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Employer's vicarious liability

Vicarious liability is a policy mechanism by which an employer is liable for the tortious conduct of an employee. Vicarious liability extends by statute to partners who are liable for torts committed by any of them in the ordinary course of the firm's business or with the authority of the others.[1]

LIABILITY SHARED WITH, NOT SHIFTED TO, EMPLOYER

At common law the worker remains liable for damages to the plaintiff, or for indemnity[2] or contribution[3] to the vicariously liable employer.

Only in New South Wales, South Australia and Tasmania is a worker not liable to indemnify the employer (and the employer obliged to indemnify the worker), unless the worker's conduct constitutes serious and willful misconduct.[4] However, the employer's insurer is barred in Australia from seeking an indemnity, except in cases of misconduct,[5] and similar restrictions are imposed under workers compensation legislation.[6] Where a right to recover against a worker is available, it is rarely exercised:

'Employers themselves would not ordinarily dare or wish to assert such a right for fear of provoking union retaliation.'[7]

'It is not often that the servant is...joined in an action where there is...a substantial master from whom ▶

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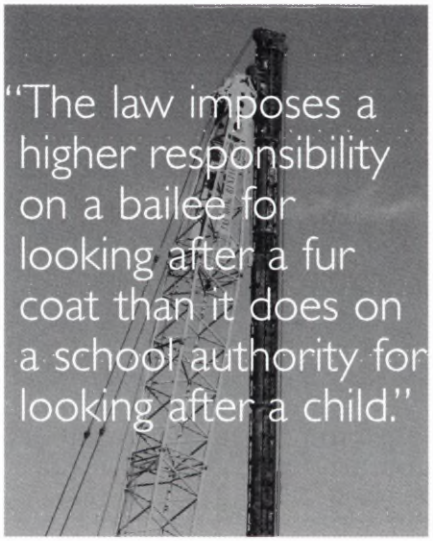
damages can be claimed... [T]he circumstances are not often such that the master would be likely to reap much benefit.'[8]

The latter quote is from a case in which the worker (a school mistress who used excessive force to discipline a naughty boy and deafened him in one ear) was ordered to pay 100% of the damages.

'*[P]rima facie*...the person actually responsible for the commission of the tort should contribute the full amount of the damages.'[9]



INDEPENDENT DISCRETION EXCEPTION

An employer is not vicariously liable for the torts of certain employees whose work involves the exercise of independent discretions, unless the authorising legislation specifically says so.[10] However, the employer may otherwise be personally liable.[11]

In the case of say a police officer the worker's authority derives directly from the law, not from employment. If a constable 'arrests a person on suspicion of felony, the suspicion must be his suspicion, and must be reasonable to him... A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority.'[12]

Similarly, a bishop personally exercises legislative, executive and judicial powers, and the Pope is not vicariously liable for defamatory comments made by the bishop.[13]

If the employer is able to control and direct the conduct in question, the worker is not operating independently:

'[T]he government exercised such a general direction and control over the director as to his function as to deprive him of any will of his own, and to make him the mere instrument of the government.'[14]

The non-delegable duty concept developed to enable private employers to be held liable for the negligence of workers who are not employees[15] or who are exercising independent discretions.[16] It has been suggested that the law of vicarious liability may yet extend to workers discharging independent duties imposed by the law where they are performed to further the employer's commercial interests.[17]

STATUTORY IMMUNITY OF THE WORKER

Crown servants acting pursuant to statute may be protected by a statutory immunity, particularly if they acted in good faith pursuant to their authority.[18] If the worker is immune from liability, there can be no vicarious liability on the Crown,[19] unless the statute allows for it. Even if the Crown owes a personal duty, the conduct of the worker is lawful and does not breach it.[20]

EMPLOYMENT RELATIONSHIP

A man, or woman, cannot serve two masters: '[T]he law does not recognise a several liability in two principals who are unconnected.'[21]

'Where the services of the servant of one employer are temporarily used by another, both employers will not be liable; *prima facie* the liability will usually remain with the general employer who may, however, "show, if he can, that he has for a particular purpose or on a particular occasion temporarily transferred the services of one of his general servants to another party so as to constitute him *pro hac vice* the servant of that other party with consequent liability for his negligent acts".'[22]

An employment relationship was once largely determined by the 'control test'; the employer's ability to control and direct the worker. But the changing nature of employment has seen the ascendency of a more general test which looks at whether the worker was conducting his or her own business, or that of the employer.[23]

VICARIOUS LIABILITY FOR WORKER'S CONDUCT

The employer may be liable for the worker's tortious conduct if that conduct breaches a duty owed to the plaintiff by the employer (the 'master tort' theory[24]). Even if the worker would not be personally liable, the employer is liable for the worker's breach of the employer's duty.[25] Conversely, if the employer does not owe a duty, for example where the conduct breached a statutory duty imposed upon the worker but not upon the employer,[26] the employer is not liable.

Vicarious liability under the master tort theory is similar to that under an employer's non-delegable duty.[27] The employer's duty is breached by the worker under the former and by a non-employee under the latter.

Relationships giving rise to a non-delegable duty include:

'Master and servant ... hospital and patient ... education authority and pupil... [T]here must first be a duty of care on the part of the person against whom liability is asserted. And, obviously, there must also have been a breach of that duty and resulting injury... If...reasonable care has not been taken [then the employer is liable], no matter whose act or omission was the immediate cause of the...injury or whose immediate task it was to do that which would have eliminated the risk of injury or to refrain from doing that which created that risk.'[28]

VICARIOUS LIABILITY FOR WORKER'S TORT

Vicarious liability may alternatively be established where the worker was acting in the course of his or her

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employment and was personally liable[29] (the 'servant tort' theory, or true vicarious liability[30]).

COURSE OF EMPLOYMENT

'In [*Deatons Pty Ltd v*] *Flew*, Latham CJ...defined the scope of employment or authority as being an act which the servant was employed to perform or an act incidental to his employment. Dixon J...referred to acts done under express or implied authority or as incident to or in consequence of anything the employee was employed to do. Webb J...pointed out that vicarious liability exists for an act done within express or implied authority even though it is an improper mode of exercising authority. The inclusion within the scope of employment of unauthorised modes of performing what is authorised and the exclusion from it of wholly unauthorised acts raises difficult problems of classification.'[31]

A tanker driver who was transferring petrol from the lorry to a tank and watching over the operation, as he was required to do, lit a cigarette and threw away the lighted match, causing an explosion. His employer was vicariously liable for his carelessness in discharging his employment duties.[32]

ACTS REASONABLY INCIDENTAL

Horseplay intended to promote management/staff relations may be incidental to employment. When a manager held a naked flame near a worker covered in paint thinners, the partnership was liable.

'[T]here are things which specifically an employee is directed to do as part of his employment; there are results which he is expected to achieve but which he is permitted to achieve by doing such things as he thinks appropriate; and there are things which, though not directed to be done or authorised to be done in these senses, the employer knows are apt to occur in his workplace and tolerates as part of the environment of it... Some forms of horseplay at least are, I think, of this latter character.'[33]

UNAUTHORISED METHOD

An employer who expressly forbade a driver from carrying passengers was vicariously liable for injury to such a passenger.[34] An employer, required to provide meals, was vicariously liable when the worker disobeyed his instructions as to where to cook the chops and what frying pan to use and burnt down the plaintiff's property.[35]

When a professional footballer deliberately 'stiff-armed' an opponent with the intention of hurting him, the club was vicariously liable because he had been employed to use force to tackle opponents:

'[Bugden] did what he did in the course of playing for Canterbury Bankstown, and it can only be seen as intended to assist, and in fact assisting, Canterbury Bankstown to defeat Cronulla and as doing so by achieving a result (stopping the progress of Rogers) which could have been achieved by the proper mode of a legitimate tackle. Further, I do not think that in those circumstances the violence employed by Bugden was so excessive as to "take [his] act out of the class of acts which [he] is authorised or employed to do"... Had Bugden shot Rogers, as the garage attendant shot a complaining customer in *Wellman v Pacer Oil Co*,[36] it might have been different.'[37]

It was not proved that pre-match motivation, or 'revving up' of the players, and instructions to 'stop' Rogers, were intended to convey any instruction to adopt illegal tactics. But if the motivation 'creates a real risk that the employee will act illegitimately, that may assist the finding that the employer is liable'.[38]

Lepore comprised three actions in which the plaintiffs had been sexually assaulted by their school teachers. The assault of the plaintiff, Lepore, occurred under the guise of punishment for misbehaviour. He was told to undress, and was then touched by the teacher who was fined $300. The assaults of the plaintiffs, Samin and Rich, were more serious and the teacher was imprisoned.

The High Court, with McHugh J dissenting, held that where an employment relationship existed between an intentional tortfeasor and the school authority, there was no scope for arguing non-delegable duty, at least where the conduct could not reasonably have been avoided by the employer.[39] McHugh J felt it was enough that intentional conduct could reasonably be avoided by the tortfeasor, citing High Court authority for the proposition that an intentional tort could alternatively be pleaded as negligence[40] (whereas Gummow and Hayne JJ, citing New Zealand authority, said that the intentional infliction of harm could not be pleaded as negligence[41]).

McHugh J found it unnecessary to consider vicarious liability, leaving the other six members of the court roughly ▶

divided. Gleeson CJ[42] and Gaudron[43] and Kirby[44] JJ took a broader view of vicarious liability, based on a sufficiently close connection between the wrongful conduct and the worker's employment, and felt that vicarious liability was arguable in each case.

The other members of the court felt that the school authority could not be vicariously liable for the serious sexual assaults on Samin and Rich,[45] but that a less serious assault in the context of discipline could give rise to vicarious liability.[46] Callinan J considered an excessive discipline argument was available only where unintended by the worker and was thus not available to Lepore on the facts.[47]

Gummow and Hayne JJ said that in the case of an intentional tort, vicarious liability should not extend beyond the cases identified by Dixon J in *Deatons*. Conduct done 'in the intended pursuit of the employer's interests or in the intended performance of the contract of employment or [conduct] done in the ostensible pursuit of the employer's business or the apparent execution of the authority which the employer held out the employee as having'.[48]

WHOLLY UNAUTHORISED CONDUCT

The best-known example of wholly unauthorised conduct is the case of the barmaid who threw a glass into a patron's face after he had offended her. Stressing that it was not part of her job to maintain order, the High Court held that the employer was not liable.

'It is not a case of a negligent or improper act, due to error or ill judgment, but done in supposed furtherance of the master's interests. Nor is it one of those wrongful acts done for the servant's own benefit for which the master is liable when they are acts to which the ostensible performance of the master's work gives occasion or which are committed under cover of the authority the servant is held out as possessing or of the position in which he is placed as a representative of his master... The truth is that it was an act of passion and resentment done neither in furtherance of the master's interests nor under his express or implied authority nor as an incident to or in consequence of anything the barmaid was employed to do. It was a spontaneous act of retributive justice. The occasion for administering it and the form it took may have arisen from the fact that she was a barmaid, but retribution was not within the course of her employment as a barmaid.'[49]

THEFT CASES

The reference to acts to which the ostensible performance of the work gives occasion describes the case in which a solicitor's clerk defrauded a client,[50] and the case in which a dry cleaner's servant stole a coat.[51] The employers were vicariously liable, in the first because the clerk's job was '[to receive] certain title deeds from the client [and call] in a mortgage debt owed to her',[52] and in the second because it was the employee's job to handle the fur coat (if it had been stolen by another employee the result would have been different[53]).

'The theft was so connected with the custodial responsibilities of the employee as to be regarded as in the course of employment; not because it was in furtherance of the employee's responsibilities, but because the nature of his responsibilities extended to custody of the fur as well as cleaning it.'[54]

When *Lepore* was before the New South Wales Court of Appeal, Mason P commented:

'If *Morris* is good law in Australia and if the State of New South Wales is not liable in the present case, it must follow that the law imposes a higher responsibility on a bailee for looking after a fur coat than it does on a school authority for looking after a child.'[55] PL

Endnotes: **1** R Balkin and J Davis (1996) *Law of Torts* (2nd ed), 835. **2** See *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555 at 579. **3** supra 1 at 845. **4** ss 3(1), 5 *Employer Liability Act* 1991 (NSW); s 27C *Wrongs Act* 1936 (SA); s 22A *Law Reform (Miscellaneous Provisions) Act* 1956 (NT). **5** s 66 *Insurance Contracts Act* 1983 (Cth). **6** T Paine (2000) 'workers compensation' in J Golden et al (eds), *The Laws of Australia: Labour Law* (vol 26.5) LBC, 205. **7** J Fleming (1987) *The Law of Torts* (7th ed) LBC, 240. **8** *Ryan v Fildes* [1938] 3 All ER 517 at 526. **9** ibid at 525. **10** See for example s 64B *Australian Federal Police Act* 1979 (Cth). **11** *Skuse v Commonwealth of Australia* (1985) 62 ALR 108 at 121. **12** *Enever v The King* (1906) 3 CLR 969 at 977; *Baume v The Commonwealth* (1906) 4 CLR 97 at 110. **13** *Wilkins v Jennings* [1985] Aust Tort Reports 80-754 at 69,518. **14** *Haines v Bendall* [1990] Aust Tort Reports 80-005 NSWCA at 67,594; *Bennett v Minister for Community Welfare* [1988] Aust Tort Reports 80-210 WASC at 68,089. **15** See for example *The Commonwealth of Australia v Introvigne* (1982) 150 CLR 258. **16** See for example *Gold v Essex County Council* [1942] 2 KB 293. **17** *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626. **18** See for example *Board of Fire Commissioners of NSW v Ardouin* (1961) 109 CLR 105; *Trobridge v Hardy* (1955) 94 CLR 147; such immunities will be strictly construed: *Australian National Airlines Commission v Newman* (1987) 162 CLR 466. **19** *De Bruyn v The State of South Australia* (1991) 54 SASR 231; *Cowell v Corrective Services Commission of NSW* (1988) 13 NSWLR 714. **20** *De Bruyn* at 236. **21** *Laugher v Pointer* (1826) 5 B & C 547 at 558. **22** supra 17 at 641. **23** *Hollis v Vabu Pty Ltd* (2001) 181 ALR 63. **24** *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1956-1957) 97 CLR 36 at 61. **25** supra 1 at 759. **26** supra 24. **27** *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520. **28** *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* (2003) 77 ALJR 558 at 577-578 [100], [101], [105]. **29** *Commonwealth of Australia v Connell* (1986) 5 NSWLR 218 at 223. **30** supra 24 at 57. **31** supra 291 at 221. **32** *Century Insurance Co Ltd v Northern Ireland Road Transport Board* [1942] AC 509. **33** *Petrou v Hatzigeorgiou* [1991] Aust Torts Reports 81-071 at 68,563. **34** *Twine v Bean's Express* [1946] 1 All ER 202; *Conway v George Wimpey & Co Ltd* [1951] 1 All ER 363. **35** *Bugge v Brown* (1919) 26 CLR 110 at 132. **36** (1974) 504 SW 2d 55. **37** *Canterbury Bankstown Rugby League Football Club Ltd v Rogers; Bugden v Rogers* [1993] Aust Torts Reports 81-246 at 62,551. **38** ibid at 62,554. **39** *Lepore* at 620-621 [342]. **40** ibid at 589 [161], 590 [162]. **41** ibid at 608 [270]. **42** ibid at 575 [76], 576 [85]. **43** ibid at 583 [131]. **44** ibid at 583 [131]. **45** ibid at 603 [243] (Gummow and Hayne JJ); 621 [342] (Callinan J). **46** ibid at 603 [243]. **47** ibid at 621, 622 [351], [352]. **48** ibid at 602 [239]. **49** *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 at 381-382. **50** *Lloyd v Grace, Smith & Co* [1912] AC 716. **51** *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716. **52** *Lepore* at 579 [109] (Gaudron J); although the solicitor would have been directly liable for failing to supervise the clerk: Gummow and Hayne JJ at 602 [237]. **53** supra 51 at 741. **54** *Lepore* at 571 [52]. **55** *Lepore v State of New South Wales* (2001) 52 NSWLR 420 at 431 [55].