

## 11. Non-Delegable Duties and Vicarious Liability

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### *Term of Reference*

**1** *Inquire into the application, effectiveness and operation of common law principles applied in negligence to limit liability arising from personal injury or death including:*

**(a)** *the formulation of duties ... of care.*

### What are non-delegable duties?

11.1 The concept of a non-delegable duty is used to justify the imposition of liability on one person for the negligence of another to whom the former has entrusted (or 'delegated') the performance of some task on their behalf.

11.2 This concept is related to that of vicarious liability. Vicarious liability has two essential characteristics. First, it is liability for the negligence (or other wrong) of another. Secondly, it is strict liability — that is, liability without proof of fault. A person can be vicariously liable for the negligence of another no matter how careful the person was in all relevant matters, such as choosing and supervising the other.

11.3 The basic rule of vicarious liability is that an employer is vicariously liable for the negligence of an employee provided the employee was acting 'in the course of employment'. The law about the meaning of the concepts of 'employee' and 'course of employment' is complex, but it is not necessary to review it here.

11.4 It is important to note that the vicarious liability of the employer is additional to the 'primary' liability of the employee for negligence. Both are liable — 'jointly and severally', as it is put. The common law implies into the contract of employment a term to the effect that the employee will perform the contract with reasonable care. On the basis of this term, the employer is entitled to recover from the employee a contribution to any damages which the employer is liable to pay to the person injured or killed. If the employer was not negligent at all, it will be entitled to be fully indemnified by the employee. In some Australian jurisdictions, there is legislation that provides (in certain

types of case) that only the employer is liable, not the employee.<sup>1</sup> In some jurisdictions there are also statutory provisions that remove the right of the employer (in certain types of case) to recover contribution or an indemnity from the employee.<sup>2</sup>

11.5 In terms of personal responsibility, the most widely accepted justification for vicarious liability is that, because the employer takes the benefit of the business being conducted, the employer should also be required to bear risks attendant on the business. However, this justification is hard to reconcile with the employer's right to contribution or an indemnity. For this reason, many view vicarious liability simply as a form of liability insurance, intended primarily for the protection of plaintiffs, and not based on principles of personal responsibility.

11.6 Apart from the relationship of employer and employee, vicarious liability can also arise out of the relationship between 'principal' and 'agent'. The concept of 'agency' is a vague one, but it rests on the idea that a person who does something at the request, and for the benefit, of another does it as agent for that person.

11.7 A corollary of the general rule that employers are vicariously liable for the negligence of employees is that an employer is not vicariously liable for the negligence of independent contractors. The way the law distinguishes between employees and independent contractors is very complex, and need not be reviewed here.

11.8 Various exceptions have been developed to the rule that an employer is not vicariously liable for the negligence of independent contractors. The concept of a non-delegable duty is, in effect, a technique for creating such exceptions. So, for instance, it is now well-established that a hospital is vicariously liable for the negligence of those who provide health-care services in its name, regardless of whether the provider is an employee or an independent contractor of the hospital.<sup>3</sup>

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1 For example, *Police Act 1952 (SA)*, s 51A; *Police Regulation Act 1898 (Tas)*, s 52.

2 F. Trindade and P. Cane, *The Law of Torts in Australia*, 3<sup>rd</sup> edn (1999), 744.

3 *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553.

## The problem with non-delegable duties

11.9 In order to understand the problem posed by non-delegable duties, it is necessary to attempt to understand their nature and characteristics.

11.10 The first point to make is this. Although the precise nature of a non-delegable duty is a matter of controversy and uncertainty, one thing is clear: a non-delegable duty is not a duty to take reasonable care.<sup>4</sup> For this reason, liability for breach of a non-delegable duty will not fall within the terms of the provision contained in our overarching Recommendation 2.

11.11 A second thing that is clear about non-delegable duties is that although they are a technique for imposing vicarious liability — that is, strict liability for the negligence of another — they are typically not thought of as a form of strict liability. It is often said, for instance, that although a non-delegable duty is not a duty of care, it is a duty ‘to see that care is taken’. The implication of this statement is that there are steps (typically not specified) that can be taken to discharge a non-delegable duty. By contrast, there is nothing that an employer can do to prevent being subject to vicarious liability for the negligence of its employees. This is because it is a form of liability that attaches automatically to the relationship of employer and employee, and not to anything done by the employer in the course of that relationship. The only way of avoiding vicarious liability is not to be an employer.

11.12 The problem that this situation creates is that courts often give the impression, when they impose a non-delegable duty, that they are not imposing a form of strict liability but rather a form of liability for breach of a duty committed by the employer in the course of being an employer. In other words, although it is clear that a non-delegable duty is not a duty of care, courts often seem to think that a non-delegable duty can only be breached by conduct on the part of the employer that is *in some sense faulty*. As a result, courts do not think that they need to justify the imposition of a non-delegable duty in terms of the justifications for the imposition of strict vicarious liability. Rather, they appear to think that justification is to be found in arguments for imposing liability for ‘fault’ (in some sense).

11.13 Thirdly, it is important to understand that a non-delegable duty is a duty imposed on the employer alone. The worker is not, and cannot be, under the duty. The worker’s duty is an ordinary duty to take reasonable care. And even though liability for breach of a non-delegable duty is functionally

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<sup>4</sup> *Kondis v State Transport Authority* (1984) 154 CLR 672, 687 per Mason J.

equivalent to vicarious liability, it is (unlike vicarious liability) liability for breach of a duty resting on the employer. In other words, whereas vicarious liability is secondary or derivative liability (in the sense that it is based on the liability of the negligent worker), liability for breach of a non-delegable duty is, in theory at least, a primary, non-derivative liability of the employer.

11.14 The fundamental problem that this discussion exposes can be put most clearly by referring back to Recommendation 2 and assuming that the Proposed Act has been enacted. Suppose that a worker fails to take reasonable care to avoid causing injury or death to another (the plaintiff). The primary liability of the worker to the plaintiff will be determined in accordance with the rules (intended to limit liability and damages for negligence) contained in the Proposed Act. If the plaintiff makes a claim against the employer based on vicarious liability, that liability will be limited in the same way, and to the same extent, as the employee's primary liability because the employer's vicarious liability is derivative of the employee's primary liability. However, if the employer is not vicariously liable for the negligence of the worker (because, most importantly, the worker was an independent contractor rather than an employee) and the plaintiff claims against the employer on the basis of a breach of a non-delegable duty, the limitations of liability and damages contained in the Proposed Act will not apply to that liability.

11.15 This outcome is undesirable because the employer's liability for breach of a non-delegable duty is functionally equivalent to vicarious liability for the negligence of the worker. In the Panel's view, it would be unsatisfactory if plaintiffs could evade the application of the provisions of the Proposed Act by inviting a court to impose a non-delegable duty on a defendant employer that would not be subject to the provisions of the Proposed Act when, if they claimed against the negligent worker, the claim would be subject to the provisions of the Proposed Act.

11.16 In the opinion of the Panel, this problem could be addressed by the enactment of a provision to the effect that for the purposes of the Proposed Act, liability for breach of a non-delegable duty shall be treated as equivalent to vicarious liability for the negligence of the person to whom the doing of the relevant work was entrusted by the person held liable for breach of the non-delegable duty.

### Recommendation 43

The Proposed Act should embody the following principle:

**Liability for breach of a non-delegable duty shall be treated as equivalent in all respects to vicarious liability for the negligence of the person to whom the doing of the relevant work was entrusted by the person held liable for breach of the non-delegable duty.**

11.17 One reason why this recommendation is important is that Australian courts, including the High Court, have in recent years been searching for general principles underlying the concept of non-delegable duty. Instead of treating non-delegable duties as a means of extending the scope of vicarious liability, concepts such as ‘control’ over the work or the place where the work was being done (referring to the employer) and ‘vulnerability’ (referring to the plaintiff) have been suggested as general grounds for recognising new non-delegable duties. For instance, in *Burnie Port Authority v General Jones Pty Ltd*<sup>5</sup> the High Court assimilated the rule in *Rylands v Fletcher*<sup>6</sup> into the general law of negligence, but at the same time held that a person in occupation or control of land owes a non-delegable duty, in respect of negligent conduct by another of dangerous operations on the land, regardless of whether the occupier is vicariously liable for the person conducting the operations.

11.18 The development of such general principles may provide encouragement to people looking for ways to evade the provisions of the Proposed Act. Recommendation 43 is not intended to limit the recognition of new non-delegable duties. Its only purpose is to prevent non-delegable duties (both those that currently exist and any new duties that may be recognised in the future) being used as a way of evading the provisions of the Proposed Act.

11.19 It was suggested to us that we should make proposals intended to rationalise the current law and to limit or stop the future recognition of new non-delegable duties by specifying a list of situations in which a non-delegable duty will arise. Our view is that this would be undesirable. The incidence of non-delegable duties and the scope of vicarious liability is a matter best left for development by the courts.

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5 (1994) 179 CLR 520.

6 (1866) LR 1 Ex 265.

## Volunteers

11.20 Two issues arise here: (a) should volunteers (understood as people who do community work on a voluntary basis) be exempted from liability for negligence in certain circumstances? and (b) should community organisations be liable for the negligence of volunteers working for them?

### Should volunteers be exempted from liability?

11.21 The Panel is not aware of any significant volume of negligence claims against volunteers in relation to voluntary work, or that people are being discouraged from doing voluntary work by the fear of incurring negligence liability. The Panel has decided to make no recommendation to provide volunteers as such with protection against negligence liability.

### Should community organisations be liable?

11.22 Section 4 of the *Volunteers Protection Act 2001* (SA) protects volunteers from personal liability in certain circumstances. S 5 provides that the liability that would, but for s 4, rest on the volunteer, attaches instead to the community organisation for which the volunteer works. The effect of section 5 is to create an exception to the basic rule that vicarious liability attaches to the relationship of employer and employee. Volunteers are not employees of the organisations for which they work because there is no contract of service between them. In some situations, the common law imposes vicarious liability for the negligence of independent contractors. Likewise, voluntary workers are not independent contractors of the community organisations for which they work because there is no contract for services between them. The common law sometimes imposes vicarious liability on the basis that the negligent person was an 'agent' of the person held vicariously liable. Typically, voluntary workers would not be agents (in the relevant sense) of community organisations for which they work.

11.23 It follows that a recommendation by the Panel that community organisations should be vicariously liable for the negligence of volunteers who work for them would be in conflict with the objectives of the Terms of Reference because it would expand rather than limit liability for negligence (in this case, the negligence of others). In particular, such a recommendation would adversely affect the interests of not-for-profit community organisations,

contrary to the clear intent of Term of Reference 3(f) (dealt with in Chapter 4). We therefore make no recommendation on this issue.<sup>7</sup>

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<sup>7</sup> For a similar reason, we do not recommend the abolition of the doctrine of ‘independent discretion’ and the reversal of the rule in *Enever v R* (1906) 3 CLR 969. See F. Trindade and P. Cane, *The Law of Torts in Australia*, 3<sup>rd</sup> edn (1999), 720-1; ALRC Report 92, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (2001), paras 25.7-25.20.





