Stevens v Brodribb Sawmilling Co Pty Ltd - [1986] HCA 1

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HIGH COURT OF AUSTRALIA

Mason, Wilson, Brennan, Deane and Dawson JJ.

STEVENS v. BRODRIBB SAWMILLING COMPANY PROPRIETARY LIMITED; GRAY v. BRODRIBB SAWMILLING COMPANY PROPRIETARY LIMITED
(1986) 160 CLR 16
13 February 1986

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Negligence

Negligence—Vicarious liability—Employee or independent contractor—Supervision—Control—Logging operations—Trucker injured by negligence of snigger—Liability of sawmiller for whom both performed work—Independent contractor—Liability of principal for injury sustained in performing work—Extra-hazardous activities—Safe system of work—Duty of principal to provide—Breach of duty.

Decisions

MASON J.: These appeals, which are brought from a decision of the Full Court of the Supreme Court of Victoria, arise out of an action for damages for personal injuries commenced in the Supreme Court by the appellant Roy Albert Stevens against the appellant Stanley Charles Gray and the respondent Brodribb Sawmilling Company Pty Ltd ("Brodribb"). They raise significant issues concerning the liability of an employer to a person engaged to perform a function forming part of the employer's business operations for injuries caused through the carelessness of another.

2. Brodribb is the owner of a large hardwood sawmill at Orbost in eastern Victoria for which it conducts extensive logging operations on the nearby Errinundra Plateau under licences from the Forests Commission of Victoria ("the Commission"). The licences, which are issued in accordance with the provisions of the Forests Act 1958 (Vic.), grant exclusive rights to remove timber from designated areas of forest, subject to conditions which include compliance with certain directions given by officers of the Commission. It has not been suggested, however, that officers of the Commission are in any way responsible for ensuring the safety of persons engaged in logging operations.

3. In order to facilitate its logging operations, Brodribb's practice over the years has been to engage persons whose functions fall within three categories, namely, felling, snigging and truck driving, and to allocate them to specified parts of its logging areas known as "compartments". It is the function of a feller to fell trees and of a snigger to push or pull logs to a loading ramp constructed by him by means of a tractor or bulldozer and to load them onto trucks for delivery to the sawmill by the truck driver. The logging operations are overseen by a "bush boss" who is an employee of Brodribb.

4. It was in the course of such logging operations that Stevens' injuries were sustained. In November 1977, while engaged by Brodribb as a truck driver, he was struck by a log. For the purpose of loading Stevens' truck Gray was making use of a loading ramp which had been constructed by him one week before. The selection of the site at which the ramp was constructed was the joint decision of Gray, the bush boss and an officer of the Commission. However, the construction of the ramp, in accordance with Brodribb's standard practice, had been entirely a matter for Gray. It was a simple earthen structure retained by one large log at the front, next to which Stevens drove his truck. Along the slope of the ramp were laid two sets of two small parallel logs, known as skids, which were usually slippery and which were set sufficiently far apart to enable a bulldozer to move backwards and forwards between them. The loading procedure was for Gray to manoeuvre logs on to the skids and to use the blade of his bulldozer to push them along the skids and onto the truck.

5. On the occasion in question, Gray had successfully loaded three logs onto Stevens' truck but was experiencing difficulty in loading a fourth log. This was because the log was substantially shorter than the others and would not straddle both pairs of skids. Gray attempted to balance the log on one set of skids and to use the blade of his bulldozer to push it onto the truck. Twice he pushed the log

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up the ramp and twice it became jammed between the edge of the ramp and the side of the truck. Each time he was able to extricate the log by using the bulldozer's blade. He tried a third time and again the log jammed. This time, in response to Stevens' protest about possible damage to his truck, Gray decided to pull it out using a chain. To that end Stevens, who had until that time been standing by observing the loading operation, obtained a chain from his truck and attached it to the log. As he did so, Gray moved the bulldozer back down the ramp so that its blade was ten to twelve feet from the log. Stevens then attached the other end of the chain to the blade of the bulldozer and proceeded to walk to its rear. Before Stevens was able to move away from the bulldozer, Gray swung it around, releasing the log which rolled down the ramp, pinning Stevens between it and the bulldozer. It is now not disputed that in so doing Gray acted negligently.

6. In addition to the admitted negligence of Gray, Stevens sought to impute liability to Brodribb in two ways. First, it was said that Brodribb is vicariously liable for the negligence of Gray because the relationship between them was that of employer and employee. Alternatively, it was submitted that even if Gray was an independent contractor and not an employee, Brodribb is nevertheless vicariously liable because this case falls within two exceptions to the general rule that a principal is not liable for the negligent conduct of his independent contractors; namely that the snigging operations were an extra-hazardous activity and that Brodribb was in breach of a non-delegable duty. Secondly, it was argued that Brodribb is personally liable for the breach, by its own acts, of a duty of care owed to Stevens, either because Stevens was an employee of Brodribb and was thus owed the complex of duties arising in relationships of employment, or because, notwithstanding the absence of such a relationship, a duty of care was owed pursuant to the general principles of the law of negligence.

7. At trial, Beach J. held that both Stevens and Gray were employees of Brodribb. In addition to the negligence of Gray in moving his bulldozer before Stevens was clear, the judge found that Brodribb was negligent in that it failed properly to supervise loading operations, to ensure that safe procedures were followed and to provide adequate loading equipment such as a forklift truck. In the result, he entered judgment for Stevens in the sum of $180,000 and apportioned liability two-thirds against Brodribb and one-third against Gray.

8. By majority, the Full Court of the Supreme Court dismissed an appeal by Gray but allowed an appeal by Brodribb and set aside judgment against it. The majority (Brooking and Kaye JJ.) held that both Stevens and Gray were independent contractors and that, in the circumstances, Brodribb was not liable for the negligence of Gray. They further held that, on the assumption that Brodribb owed Stevens a duty of care, Brodribb was not negligent in failing to provide loading equipment or in failing to supervise loading or to give instructions to sniggers and loggers that no log was to be moved while a man was on a ramp. Starke J., who dissented, agreed with the primary judge that Stevens and Gray were servants of Brodribb.

9. The first question to determine is whether the relationship between Brodribb and Gray was one of employer and employee or one of principal and independent contractor. It will also be convenient at this point to consider whether Stevens was an employee of Brodribb or an independent contractor, for, although not directly relevant to the matter presently under consideration, both issues arise from a common factual foundation. 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. It has been held, however, that the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it (Zuijs v. Wirth Brothers Pty Ltd (1955) 93 CLR 561, at p 571 ; Federal

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Commissioner of Taxation v. Barrett (1973) 129 CLR 395, at p 402 ; Humberstone v. Northern Timber Mills (1949) 79 CLR 389). In the last-mentioned case Dixon J. said (at p 404):

> "The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions."

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 (Queensland Stations Pty Ltd v. Federal Commissioner of Taxation (1945) 70 CLR 539, at p 552 ; Zuijs' Case; Federal Commissioner of Taxation v. Barrett, at p 401; Marshall v. Whittaker's Building Supply Co. (1963) 109 CLR 210, at p 218). Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee.

10. Much of the evidence at the trial was directed to determining the precise nature of the relationship between Stevens and Brodribb and Gray and Brodribb. The logging season on the Errinundra Plateau is of some six months duration and in 1977 it began towards the end of September. Stevens and Gray were engaged at the beginning of the season - Stevens as a truck driver and Gray as a truck driver and snigger. Both men had extensive experience in the timber industry and had been engaged by Brodribb to carry out similar functions during previous logging seasons. Along with others engaged to perform those functions, they provided and maintained their own equipment, set their own hours of work and received fortnightly payment from Brodribb determined by the volume of timber they had been involved in delivering to its sawmill. Brodribb did not deduct income tax instalments from these payments. Stevens' profit and loss accounts for the years ended 30 June 1977 and 1978 showed the ratio of his expenses to his gross income to be approximately 71 per cent. Gray's financial records were not in evidence.

11. Although they were available each working day, fellers, sniggers and truck drivers were not guaranteed work and were free to seek other work if bad weather or other circumstances prevented them from working for Brodribb. When there was work, truck drivers were expected under normal circumstances to cart at least two loads of logs per day from the forest to the sawmill at Orbost. There is evidence that some truck drivers carried on business in partnership with their wives but this was not the case with either Stevens or Gray. Gray, however, employed his son to drive his truck and it appears that at least one other carter engaged by Brodribb also employed a driver. Brodribb's bush boss was responsible for the overall co-ordination of activities within the logging areas and had the task of ensuring a steady flow of timber to the sawmill. Fellers, sniggers and truck drivers were subject to his direction. He liaised with officers of the Commission, allocated individuals to particular compartments, settled disputes, issued directions as to the type of logs to be snigged, and monitored the volume and quality of production. He also decided whether work should take place in inclement weather. His allocation of individuals to compartments, at least in relation to truck drivers, could vary on a daily basis and it seems that in directing Gray's truck to various compartments he normally dealt not with Gray but with its driver, Gray's son. However, he had little to do with the manner in which fellers, sniggers and truck drivers carried out their functions. Gray's evidence indicates that, except in relation to the placement of ramps and various roads and the

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choosing of logs, he was left entirely to exercise his own skill and judgment.

12. I agree with the majority in the Full Court of the Supreme Court that neither Stevens nor Gray was an employee of Brodribb. The facts, as I have related them, do not support an inference that Brodribb retained lawful authority to command either Stevens or Gray in the performance of the work which they undertook to do. As I have said, they provided and maintained their own equipment, set their own hours of work and received payments, not in the form of fixed salary or wages, but in amounts determined by reference to the volume of timber which they had been involved in delivering, through the use of their equipment, to the sawmill. The authority of Brodribb's bush boss seems to have been confined to the organization of activities in the forest, determining the location of roads and ramps, selecting the logs to be snigged, monitoring the volume and quality of production and deciding whether work would take place in bad weather. There is, in my opinion, no basis for inferring an intention that the bush boss should have authority to direct Stevens and Gray in the management and control of their equipment which they were using for the purpose of delivering timber to the mill. In Humberstone, Dixon J. said, at pp.404-405:

> "The essence of a contract of service is the supply of the work and skill of a man. But the emphasis in the case of the present contract is upon mechanical traction. This was to be done by his own property in his own possession and control. There is no ground for imputing to the parties a common intention that in all the management and control of his own vehicle, in all the ways in which he used it for the purpose of carrying their goods, he should be subject to the commands of the respondents."

See also Wright v. Attorney-General for the State of Tasmania (1954) 94 CLR 409, at pp 414, 418.

13. What is more, Brodribb and the men, including Stevens and Gray, regarded their relationship as one of independent contract, not one of employment, an attitude evidenced in the case of Gray by his employment of his son as a driver. The power to delegate is an important factor in deciding whether a worker is a servant or an independent contractor (Australian Mutual Provident Society v. Chaplin (1978) 18 ALR 385, at p 391).

14. It was in relation to the question whether Gray was an employee or an independent contractor that it was submitted on behalf of Stevens that regard should be had to the so-called "organization test". The test seems to have had its genesis in a passage of Lord Wright in Montreal v. Montreal Locomotive Works (1947) 1 DLR 161, in which his Lordship said (at p 169):

> " ... it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior."

A similar approach was adopted by Denning L.J. in Stevenson Jordan and Harrison, Ltd v. MacDonald and Evans (1952) 1 TLR 101, at p 111, and Bank Voor Handel en Scheepvaart N.V. v. Slatford (1953) 1 QB 248, at p 295. Since then the organization test has been mentioned in a number of cases, but there has been no agreement as to the role it should play. Indeed, there are competing views of the purpose which it serves.

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15. In the present case it was argued that Gray was part and parcel of Brodribb's organization in that his snigging activities were integral to the supply of timber necessary for Brodribb's sawmilling operations at Orbost. The relevance of this submission was said to be that it added weight to the inference that Gray was subject to the control of Brodribb and therefore that the relationship between them was one of employment. In short, the contention was that the organization test is relevant to the issue of control. But this is not to use the concept as a criterion for determining a legal issue or legal liability. It is merely to use the fact that A is part of B's business organization as additional material from which to infer that B has legal authority to control what A does. No doubt in some circumstances, depending on the nature of the organization and the part that A plays in its activities, it is legitimate to have regard to that fact in drawing an inference as to B's control of A in the performance of a relevant activity. However, here there are other facts which bear more cogently on the issue of control and negate the inference which is sought to be drawn.

16. The organization test was put to a different use by Starke J. in the present case, when he said:

> "The learned Judge appeared to be of the opinion that the 'control' test and the 'organisation' test were alternatives. In my judgment that is not so. Both are relevant considerations in my opinion in determining whether the contract is one of service or for services."

This is to treat the element of organization simply as a further factor to be weighed, along with control, in deciding whether the relationship is one of employment or of independent contact. This seems to be what Lord Wright had in mind in Montreal v. Montreal Locomotive Works, at p 169. For my part I am unable to accept that the organization test could result in an affirmative finding that the contract is one of service when the control test either on its own or with other indicia yields the conclusion that it is a contract for services. Of the two concepts, legal authority to control is the more relevant and the more cogent in determining the nature of the relationship. This comment applies with equal, if not greater, force to the competing view, expressed by Denning L.J. in Bank Voor Handel, at p.295, that the test is an independent method of determining who is an employee and who is an independent contractor, and in this way seeks to replace the traditional approach of balancing all the incidents of the relationship between the parties.

17. It has been suggested, though it was not argued in this case, that the organization test is not aimed at a determination of whether the relationship between the defendant and the tortfeasor is one of employment or independent contract, but is addressed rather to the question of who can be held vicariously liable for the wrongs of another. Thus it is said that once a person is found to be part of an organization, that organization is vicariously liable for all the wrongs of that person committed within the scope of his responsibilities, irrespective of whether he would, according to traditional doctrine, have been an employee or independent contractor.

18. The advantage of the organization test, on this view of it, is that it avoids the complications associated with the employee/independent contractor test. But at what price? 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 - a view which seems to have been shared by Stephen J. in Federal Commissioner of Taxation v. Barrett, at p 402, and MacKenna J. in Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance (1968) 2 QB 497, at p 524. Moreover, on this

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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. Whether the Court should impose vicarious liability on a proprietor in these circumstances is a very large question on which we have not had the benefit of argument.

19. The traditional formulation, though attended with some complications in its application to a diverse range of factual circumstances (Federal Commissioner of Taxation v. Barrett, at p 400), nevertheless has had a long history of judicial acceptance. True it is that criticisms have been made of it. It is said that a test which places emphasis on control is more suited to the social conditions of earlier times in which a person engaging another to perform work could and did exercise closer and more direct supervision than is possible today. And it is said that in modern post-industrial society, technological developments have meant that a person so engaged often exercises a degree of skill and expertise inconsistent with the retention of effective control by the person who engages him. All this may be readily acknowledged, but the common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, "so far as there is scope for it", even if it be "only in incidental or collateral matters" (Zuijs v. Wirth Brothers Pty Ltd, at p 571).

20. Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered.

21. The finding that both Gray and Stevens were independent contractors disposes not only of the argument that Brodribb is vicariously liable for Gray's negligence by virtue of a relationship of employment, but also of the argument that Brodribb is personally liable to Stevens for breach of the duty of care owed by an employer to an employee.

22. The next question to consider is whether, notwithstanding the fact that the relationship between Brodribb and Gray is one of independent contract, Brodribb is liable to Stevens on the footing that his injury arose out of dangerous operations or extra-hazardous acts. Although the doctrine of extra-hazardous acts is sometimes treated as an exception to the general rule that a principal is not liable for the negligence of his independent contractor, it is in truth an instance of strict liability for breach of a duty of care which the principal personally owes to the plaintiff. The principal's liability is therefore primary, rather than vicarious (Salsbury v. Woodland (1970) 1 QB 324, at pp 336-337, 347 ; Staveley Iron &Chemical Co. Ltd v. Jones (1956) AC 627, at pp 639, 646-647 ; Stoneman v. Lyons (1975) 133 CLR 550, at p 574).

23. The doctrine has been applied in the United States and Canada. Although it has been affirmed in a number of English decisions (Honeywill &Stein Ltd v. Larkin Brothers Ltd (1934) 1 KB 191 ; Matania v. The National Provincial Bank Ltd (1936) 2 All ER 633, at pp 645-646 ; Salsbury v. Woodland, at pp 338, 345, 348), it has not achieved complete acceptance (Hughes v. Percival (1883) 8 AC 443, at pp 446-447 ; Rainham Chemical Works Ltd v. Belvedere Fish Guano Co. Ltd (1921) 2 AC 465, at pp 476-477, 490-491). And doubt has been cast on its authenticity by the rejection in Read v. J. Lyons &Co. Ltd (1947) AC 156 of the proposition that dangerous operations give rise to strict liability.

24. The doctrine has not found favour in Australia. In Torette House Pty Ltd v. Berkman (1939) 39 SR(NSW) 156 the Supreme Court of New South Wales emphatically rejected the notion that a principal could be made liable for the negligence of an independent contractor on the basis that the activities he was engaged to perform were extra-hazardous. More recently, in Stoneman v. Lyons,

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this Court discussed the shortcomings of the doctrine, emphasizing (at pp 563-565, 574-575) the elusive nature of the distinction between acts that are extra-hazardous and those that are not. Furthermore, the traditional common law response to the creation of a special danger is not to impose strict liability but to insist on a higher standard of care in the performance of an existing duty (Adelaide Chemical and Fertilizer Co. Ltd v. Carlyle (1940) 64 CLR 514, at pp 522-523, 534 ; Swinton v. The China Mutual Steam Navigation Co. Ltd (1951) 83 CLR 553, at pp 566-567 ; Thompson v. Bankstown Corporation (1953) 87 CLR 619, at p 645 ; Imperial Furniture Pty Ltd v. Automatic Fire Sprinklers Pty Ltd (1967) 1 NSWR 29, at pp 31, 44 ; Todman v. Victa Ltd (1982) VR 849, at pp 851-852). For these reasons, the doctrine, in my opinion, has no place in Australian law.

25. The final questions are whether Brodribb was under a general common law duty of care and, if so, whether it was a personal (non-delegable) duty. In this case the first question is to be determined by reference to the elements of reasonable foreseeability and proximity discussed in the judgment of Deane J. in Jaensch v. Coffey (1984) 58 ALJR 426, at p 442; 54 ALR 417, at p 445. It is plain that Brodribb could reasonably foresee that there was a real risk that a worker carrying out Stevens' duties would sustain an injury of the kind that occurred. It is equally plain that a relationship of proximity existed between Brodribb and the individual worker sufficient to ground a common law duty of care. Subject to the ultimate control of the Commission, Brodribb had an exclusive licence to cut and take away logs from the logging areas. It allocated fellers, sniggers and truck drivers to specified parts in those logging areas; it required them to work together in teams in an intricate process of extracting timber from the forest and delivering it to the sawmill; and it monitored and co-ordinated the operations through its bush boss. While individual fellers, sniggers and truck drivers may have been responsible for their own safety with regard to carrying out their own functions, they had little choice but to rely on the care and skill of Brodribb in the arrangements which it made for the disposition of the work, and on the care and skill of the persons engaged by Brodribb in the execution of the work.

26. The interdependence of the activities carried out in the forest, the need for co-ordination by Brodribb of those activities and the distinct risk of personal injury to those engaged in the operations, called for the prescription and provision of a safe system by Brodribb. Omission to prescribe and provide such a system would expose the workers to an obvious risk of injury. Although the obligation to provide a safe system of work has been regarded as one attaching to an employer, there is no reason why it should be so confined. If an entrepreneur engages independent contractors to do work which might as readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work and where there is a need for him to give directions as to when and where the work is to be done and to co-ordinate the various activities, he has an obligation to prescribe a safe system of work. The fact that they are not employees, or that he does not retain a right to control them in the manner in which they carry out their work, should not affect the existence of an obligation to prescribe a safe system. Brodribb's ability to prescribe such a system was not affected by its inability to direct the contractors as to how they should operate their machines.

27. Accepting that Brodribb owed such a duty, the next question is whether it has been breached. It was suggested that the system of work devised by Brodribb was defective in various respects. First, it was said that the ramp was unsafe for loading shorter logs. However, it was found by the primary judge that Gray had constructed the ramp according to established practice and had used his best endeavours in that regard. It was not possible to reduce the distance between the two sets of skids to enable the short log to be rolled along them because the bulldozer would then be unable to move

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backwards and forwards between them. The small log here was only fractionally longer than the blade of the bulldozer (14 feet).

28. Secondly, it was submitted that there was negligence in failing to provide a forklift such as the one which was available at the sawmill for unloading logs. This was relied upon by the primary judge. But, as Brooking J. pointed out in the Full Court, there was no evidence as to the feasibility of their use in the forest or even the feasibility of transporting them to the site. Forklifts were described in evidence as "enormous pieces of machinery". In the context of logging operations in mountainous terrain, the suggestion appears to be unrealistic.

29. Thirdly, it was suggested that there was negligence in failing to supervise the loading operation or to ensure that safe procedures were followed. Although the primary judge found that Brodribb was negligent in these respects, there was no evidence of any previous accident occurring during loading operations and Gray and Stevens both had considerable experience. The loading operation was dangerous but "anything in the bush is dangerous" and if the work was to be performed at all, Gray and Stevens were ideally suited to perform it. The safety precaution put forward by the appellants is no more than a suggestion that had a supervisor been present he would have warned Gray not to operate the bulldozer until Stevens had reached a position of safety. I do not think that a reasonable man in the position of Brodribb would have regarded it as reasonably necessary to guard against this type of accident or to have employed a supervisor to guard against it. For similar reasons the submission that Brodribb should have provided an extra man or men to help load the log must be rejected.

30. Accordingly, none of the matters suggested by the appellants amounted to a breach by Brodribb of its duty to provide a safe system of work.

31. Finally, it remains to consider whether the duty which Brodribb owed to Stevens was non-delegable. In Kondis v. State Transport Authority (1984) 154 CLR 672 I considered that the law sometimes imposes on people a duty higher than the usual common law duty to take reasonable care. This higher duty is a duty to ensure that reasonable care is taken and it is said to be non-delegable because a principal who engages another to perform work will be liable for the negligence of the person so engaged, notwithstanding that he exercised reasonable care in the selection of the contractor. I also stated (at p. 687) that a non-delegable duty will arise where a person:

> " ... 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."

If Brodribb's duty in the present case is non-delegable, it necessarily follows that it is liable for the admitted negligence of Gray. However, the facts in the present case are essentially different from those in Kondis in that there is not the requisite relationship between the parties such as would be required to impute liability to Brodribb for the casual negligence of Gray in freeing the log without satisfying himself that Stevens was in a safe position. In Kondis the crane driver assumed the control or supervision of the labourer who was injured, control or supervision which was ordinarily exercised by the employer (see at pp.677-678). Here, Gray had not in any sense assumed control or supervision of Stevens during the loading operation. And, as I have found, Brodribb did not exercise control of, or retain a right to control or supervise, the loading operation. In these circumstances it

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can scarcely be suggested that Stevens could reasonably expect that Brodribb would see to it that due care was exercised in the loading operation by Gray. Indeed he probably would have been surprised at the suggestion that Brodribb should have done so.

32. I would dismiss the appeals.

WILSON, DAWSON JJ.: The respondent in both of these appeals is Brodribb Sawmilling Company Pty Ltd ("Brodribb"), a company which operates a large sawmill at Brodribb River near Orbost in the State of Victoria. At the relevant time it obtained timber for its sawmill under licence from the Forests Commission of Victoria pursuant to the Forests Act 1958 (Vict.). The licence designated a forest area from which Brodribb had the exclusive right to get timber and, together with certain regulations, it laid down the conditions which Brodribb was required to observe. In particular, Brodribb was required to ensure that all operations were conducted in the locations specified from time to time by a forest officer, to fell only trees branded for the purpose and to obey the directions of the forest officer with regard to the removal of the forest produce of any tree or timber.

2. For its own purposes, Brodribb divided its licence area into compartments. In relation to each compartment it engaged a tree feller, a snigger and trucks to remove the timber from the logging area to the mill. The feller felled the trees and the snigger snigged the logs, either by pushing or pulling them with a tractor fitted with a blade, to a landing from which he loaded them on to a truck. The snigger also constructed the landing which consisted of a sloping ramp upon which were two pairs of logs laid longitudinally to act as skids for logs being pushed up the ramp by the tractor. The feller, the snigger and the truck driver were all paid according to the cubic measurements of the timber delivered to the mill, but at different rates.

3. Brodribb engaged Stevens, the appellant in the first appeal and the plaintiff in the action, to cart logs to the mill from a logging area on the Errinundra Plateau over which its licence extended. For this purpose Stevens was to use his own truck. Brodribb also engaged Gray, the appellant in the second appeal and a co-defendant with Brodribb in the action, to snig and load logs in the same area. For this purpose Gray was to use his own tractor. It so happened that Gray also owned a truck which was driven by his son and at the same time Gray was engaged by Brodribb to cart logs using the truck. Both Stevens and Gray had extensive experience in the timber industry and had worked for Brodribb during previous logging seasons.

4. Logging operations on the plateau were carried out under the supervision of a bush boss employed by Brodribb. It was his task to co-ordinate the work of the fellers, sniggers and truck drivers in order to ensure that there was a steady flow of timber from the plateau to the mill. It was also his task to determine the location of roads and ramps and to see that the men engaged in the logging operations complied with the requirements of the Forests Commission.

5. In addition, there was a mill manager, who was stationed at the mill but who from time to time visited the bush operations. His evidence was that he exercised ultimate authority and had the right to terminate the engagement of any person engaged to fell, snig or cart logs who was not carrying out his duties satisfactorily.

6. On 9 November 1977, Gray was loading logs on to Stevens' truck. Having loaded three logs, he was having difficulty in manoeuvring a fourth log into position. It was a somewhat shorter log than usual and fell between the two pairs of skids. It came up the ramp at an angle so that when it reached the top, one end of it dropped down between the front of the ramp and the side of the load on

BarNet publication information - Date: Sunday, 28.09.2025 - Publication number: 00055 - User: jayspudvilas@gmail.com

Stevens' truck. This happened twice and Gray retrieved the log by the use of the blade on his tractor. It happened again and Stevens stopped Gray from using the tractor blade because he thought that damage might be done to equipment on the truck. Stevens obtained a chain from his truck, placed one end around the log and the other around the arms of the tractor blade for the purpose of moving the log. He started to walk to the rear of the tractor but Gray moved the tractor and dislodged the log which rolled down the ramp and pinned Stevens against the tractor. As a result, Stevens suffered the severe injuries for which he claimed damages against both Gray and Brodribb.

7. The learned trial judge (Beach J.) found that both Stevens and Gray were engaged by Brodribb as its servants and were performing their duties in that capacity on the day in question. He found that Gray acted negligently in moving the tractor in the manner in which he did without giving Stevens any warning or any opportunity to get clear and that this negligence was the cause of the accident and Stevens' injuries. The trial judge also found Brodribb negligent in failing to supervise the loading operations properly, in failing to ensure that safe procedures were adopted and in failing to provide adequate equipment. He found no contributory negligence on the part of Stevens and awarded damages in the sum of $165,000 plus interest in the sum of $15,000, apportioning the total amount between Brodribb and Gray in the proportions of two-thirds and one-third respectively.

8. Both Brodribb and Gray appealed to the Full Court of the Supreme Court of Victoria which held (Kaye and Brooking JJ., Starke J. dissenting) that Brodribb's appeal should be allowed. Gray's appeal was dismissed. It is against the judgment of the Full Court in favour of Brodribb that these appeals are now brought.

9. Gray's negligence was not contested before us and the first question which arises is whether Gray was acting as the servant of Brodribb at the time of the accident so as to render Brodribb liable for his negligent behaviour. That question falls to be determined upon the facts found by the learned trial judge. The classic test for determining whether the relationship of master and servant exists has been one of control, the answer depending upon whether the engagement subjects the person engaged to the command of the person engaging him, not only as to what he shall do in the course of his employment but as to how he shall do it: Performing Right Society, Ld. v. Mitchell and Booker (Palais de Danse), Ld. (1924) 1 KB 762 . The modern approach is, however, to have regard to a variety of criteria. This approach is not without its difficulties because not all of the accepted criteria provide a relevant test in all circumstances and none is conclusive. Moreover, the relationship itself remains largely undefined as a legal concept except in terms of the various criteria, the relevance of which may vary according to the circumstances. Thus when Windeyer J. in Marshall v. Whittaker's Building Supply Co. (1963) 109 CLR 210, at p 217, said that the distinction between a servant and an independent contractor "is rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own", he was really posing the ultimate question in a different way rather than offering a definition which could be applied for the purpose of providing an answer. So too when Denning L.J. in Bank voor Handel en Scheepvaart N.V. v. Slatford (1953) 1 QB 248, at p 295, observed that the test of being a servant does not rest nowadays on submission to orders but "depends on whether the person is part and parcel of the organization". As a restatement of the problem, this observation may place a different emphasis upon the tests to be applied but of itself offers no new test for the solution of the problem, although a submission to the contrary was made on behalf of Stevens in this case. See also Stevenson Jordan and Harrison, Ltd. v. Macdonald and Evans (1952) 1 TLR 101, at p 111 per Denning L.J.; Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance (1968) 2 QB 497, at p 524 per MacKenna J. We would be doing no more ourselves if we were to suggest that the question is whether the degree of independence overall is sufficient to

BarNet publication information - Date: Sunday, 28.09.2025 - Publication number: 00055 - User: jayspudvilas@gmail.com

establish that a person is working on his own behalf rather than acting as the servant of another, but putting it that way does at least indicate that the question is one of degree for which there is no exclusive measure.

10. 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: Montreal v. Montreal Locomotive Works (1947) 1 DLR 161, at p 169. This has led to the observation that it is the right to control rather than its actual exercise which is the important thing (Zuijs v. Wirth Brothers Pty. Ltd. (1955) 93 CLR 561, at p 571) 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. That was made clear in Queensland Stations Pty. Ltd. v. Federal Commissioner of Taxation (1945) 70 CLR 539, a case involving a droving contract in which Dixon J. observed, at p 552, that 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.

11. The other indicia of the nature of the relationship have been variously stated and have been added to from time to time. Those 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. None of these leads to any necessary inference, however, and the actual terms and terminology of the contract will always be of considerable importance.

12. Having said that, we should point out that 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. That is best illustrated by turning to the circumstances of this case and in particular to those circumstances which were suggested as indicating that Gray was the servant of Brodribb.

13. In the first place reliance was placed upon the control exercised by Brodribb, primarily through the bush boss and ultimately by the supervision of the mill manager. The evidence establishes clearly enough that the bush boss determined, together with the Forests Commission officer, where ramps were to be built although the job of constructing the ramps was left to Gray and the other sniggers. The bush boss located the access roads, but again the construction of the roads was a matter for the sniggers. Gray himself accepted that he was obliged to obey the directions of the bush boss but the occasions upon which any directions were given appear to have been limited. Upon the evidence, they were restricted to the location of the ramps and roads which we have already mentioned and to the exercise of quality control by requiring certain types of logs to be pulled out. In addition, if the weather was bad the bush boss would decide whether to suspend work. The supervision of the mill manager was even more remote and seems to have been theoretical rather

BarNet publication information - Date: Sunday, 28.09.2025 - Publication number: 00055 - User: jayspudvilas@gmail.com

than actual, being restricted to the final resolution of any dispute about the performance of duties, if necessary by ending the engagement of a feller, snigger or carter. All of this falls short, in our view, of the type of supervision or right to control which indicates the relationship of master and servant. Rather, it is consistent with the reservation of a right to direct or superintend the performance of the task which does not impair the essential independence of the person performing that task, of which Dixon J. spoke in Queensland Stations Pty. Ltd. v. Federal Commissioner of Taxation. Even the most independent of independent contractors is subject to some direction in the performance of his work and some circumstances will justify the termination of the engagement. This leads to a consideration of the other factors which are relevant to determine the nature of the relationship.

14. The preponderance of those other factors points clearly to the independence of Gray and to the absence of a master-servant relationship. How he did his work, including the building of ramps and roads and the loading of logs, was a matter for his decision. He used his own tractor and paid his own expenses. Since the performance of the work by Gray was as much dependent upon the provision of mechanized power as it was upon the provision of his own labour, the case resembles that of Humberstone v. Northern Timber Mills (1949) 79 CLR 389 where the most important part of the work to be performed consisted in the operation of a motor truck supplied by the person engaged to do the work. That was held to establish an independent contract. Gray was paid by reference to the volume of timber which he snigged and loaded and it does not appear that any deductions were made for income tax. He was engaged to snig and load a fixed quantity of timber for the relevant season, but his hours were his own.

15. In addition to the tractor which he used for snigging and loading, Gray's truck, driven by his son, was used by Brodribb to cart logs. Payment for the logs hauled was made to Gray and the inference is that he paid his son. The truck was not necessarily employed to haul logs snigged and loaded by Gray, but could be deployed by Brodribb to other landings. Payment for logs snigged and loaded and for logs carted, the rate for each operation being different, was made by single cheque to Gray. Whether or not Gray had one contract with Brodribb or two separate contracts, one for snigging and loading and one for carting, is a question which does not seem to have arisen and it is enough, we think, to say that there does not appear to have been any sharp contrast between the position of Gray as a carter and his position as a snigger and loader. There is some significance in this because there does not seem to be much doubt that in his carting operation Gray was acting as an independent contractor. Apart from anything else, Gray was able to employ his son in the actual performance of his cartage operations. An unlimited power of delegation of this kind was viewed as being almost conclusive against the contract being a contract of service in A.M.P Society v. Chaplin (1978) 18 ALR 385, at p 391. It is, we think, unnecessary to decide whether the same power of delegation existed so far as snigging and loading were concerned, but the evidence does disclose that on Saturdays the appellant Stevens used to operate Gray's tractor for him whilst he, Gray, was having a day off. On these days Stevens loaded his own truck, Gray's truck and that of another carter. It is sufficient to point to the fact, as we have already done, that no one seems to have thought that there was any significant difference in the relationship between Gray and Brodribb according to whether Gray was engaged in carting or in snigging or loading.

16. The whole of the circumstances in our view point to the fact that, as a snigger and loader, Gray was acting as an independent contractor.

17. It is convenient at this point to deal also with the relationship between Brodribb and Stevens. Little needs to be added because the operation of carting the logs appears to have been carried out upon similar terms. The evidence in relation to control presents no different picture. Carters might

BarNet publication information - Date: Sunday, 28.09.2025 - Publication number: 00055 - User: jayspudvilas@gmail.com

be directed to a particular landing and sometimes they might be told which type of log should be brought to the mill first. Otherwise a carter could select the logs he was to carry and he would determine for himself the size of the load to be carried. There was no guarantee of work carting logs. If work was not available, carters could work for another mill. Disputes would be settled by the bush boss with ultimate authority being exercised by the mill manager if necessary. Carters were paid by the volume of timber hauled and no deductions for income tax were made. They provided their own trucks and paid their own expenses. In Stevens' case, the deductions which he made each year for expenses in his profit and loss accounts amounted to some seventy per cent of his gross income (cf. A.M.P Society v. Chaplin, at p 394). Not all the carters drove their own trucks and some of them operated through husband and wife partnerships. Although the contractual arrangements do not appear to have been formalized, the carters were generally referred to as log cartage contractors and the plaintiff, Stevens, referred to himself in that way. He was, we think, clearly an independent contractor.

18. The conclusion that both Gray and Stevens were employed by Brodribb as independent contractors and not as servants disposes of the question of Brodribb's vicarious liability for Gray's negligence. It also disposes of any question of a breach of a duty of care on the part of Brodribb to provide its servants with proper plant and a safe place and system of work. However, Brodribb was also said to be liable for the injuries received by Stevens because they were sustained as the result of the extra-hazardous operations in which Stevens and Gray were engaged at the time of the accident. In these circumstances, it was said, Brodribb was under a duty to take special precautions to safeguard Stevens against injury and it was a duty which could not be delegated by the employment of independent contractors.

19. We should say immediately that whatever activities might be regarded as extra-hazardous, we doubt whether logging operations can be so categorized. It is, of course, one of the difficulties with the notion that there is some sort of strict liability for extra-hazardous acts that it is practically impossible to define them in any satisfactory way. Clearly enough they cannot be activities which inevitably result in harm; it must be possible to avoid harm by taking proper precautions because it would otherwise be wrong to undertake them at all. See Matania v. National Provincial Bank (1936) 2 All ER 633 per Slesser L.J. at p 646. But that, of course, involves the proposition that the activities are not hazardous if the proper precautions are taken. However, it is convenient to regard logging operations as being extra-hazardous for the purposes of argument.

20. The proposition that the employer of an independent contractor will be liable for damage caused by extra-hazardous acts on the part of the latter during the course of carrying out the work which he is engaged to do has its recent origin in the case of Honeywill and Stein, Ld. v. Larkin Brothers, Ld. (1934) 1 KB 191 . In that case the plaintiff was held to have been liable for the act of an independent contractor engaged by it to take photographs of the interior of a cinema owned by someone else. The act consisted of using flashlight created by the ignition of magnesium powder in a metal tray. This ignited the stage curtain and the consequent fire damaged the cinema. At pp.199-200 the principle was expressed to be that:

> " ... if a man does work on or near another's property which involves danger to that property unless proper care is taken, he is liable to the owners of the property for damage resulting to it from the failure to take proper care, and is equally liable if, instead of doing the work himself, he procures another, whether agent, servant or otherwise, to do it for him."

BarNet publication information - Date: Sunday, 28.09.2025 - Publication number: 00055 - User: jayspudvilas@gmail.com

The principle was said to arise from cases such as Bower v. Peate (1876) 1 QBD 321 , Black v. Christchurch Finance Co. (1894) AC 48 , Hughes v. Percival (1883) 8 App.Cas. 443 and Hardaker v. Idle District Council (1896) 1 QB 335 . But as was pointed out by Jordan C.J. in Torette House Pty. Ltd. v. Berkman (1939) 39 SR (NSW) 156, at pp 166-167, none of those cases supports a proposition of such width or, indeed, is inconsistent with the ordinary principles regarding vicarious liability and liability for the acts of independent contractors. Those principles were expounded by Jordan C.J. at p.170 where, in delivering a judgment with which the rest of the Court agreed, he said:

> "A person who procures the doing of an act is liable for its actual consequences and for anything necessarily involved in its being done whomsoever he may have procured to do it. He is liable for the acts of any agent of his acting within the scope of his employment. For the actual breach of any duty owed by himself he is responsible whatever steps he may have taken or agency he may have employed to endeavour to prevent a breach. In certain special circumstances, if he causes an act to be done he incurs a liability to see that care is used to prevent injury from being caused by methods incidentally used to produce the result, whomsoever he may employ to produce it."

Jordan C.J. went on to express the view:

> "But there is no general rule that if a person employs an independent contractor to do an inherently lawful act, he incurs liability for injury to others occasioned by the methods incidentally employed by the contractor in the course of its performance (these not being methods necessarily involved in the doing of the act and necessarily injurious), by reason only of the fact that the act is 'dangerous,' 'hazardous,' or 'extra hazardous'."

21. The principle laid down in Honeywill and Stein, Ld. v. Larkin Brothers, Ld. has, however, obtained some foothold in England: Matania v. National Provincial Bank; Brooke v. Bool (1928) 2 KB 578 ; The Pass of Ballater (1942) P 112 ; Salsbury v. Woodland (1970) 1 QB 324, at pp 336-337, 338 and 347-348 . It seems to be established in the United States where the Restatement replaces the word "ultrahazardous", which was initially used, with the term "abnormally dangerous": Restatement, Second, Torts, vol.3 (1977), s.519. It is also accepted in Scotland and in Canada: Stewart v. Adams (1920) SC 129 ; City of St. John v. Donald (1926) 2 DLR 185 ; Peters et al. v. North Star Oil Ltd. (1965) 54 DLR (2d) 364 .

22. On the other hand, support for the view taken by Jordan C.J. is to be found in Rainham Chemical Works, Ld. v. Belvedere Fish Guano Co. (1921) 2 AC 465, where Lord Buckmaster, at pp 476-477 and Lord Parmoor, at pp 490-491, rejected the notion advanced by Atkin L.J. in the Court of Appeal that a person employing an independent contractor to do works of a kind likely to cause danger to others is under a duty to take all reasonable precautions against such danger and that he does not escape from liability for the discharge of that duty by employing the contractor if the latter does not take precautions. Moreover, some time previously in Hughes v. Percival, at pp 446-447, Lord Blackburn restricted liability for the acts of an independent contractor to circumstances where a duty exists on the part of the person employing the contractor which cannot be discharged by the employment of someone else. Clearly he did not regard the dangerous nature of the work to be done as of itself giving rise to such a duty. Then there is the decision in Daniel v. Directors, &. of

BarNet publication information - Date: Sunday, 28.09.2025 - Publication number: 00055 - User: jayspudvilas@gmail.com

Metropolitan Railway Co. (1871) LR 5 HL 45 where the House of Lords accepted that the respondents were not liable for the negligence of their independent contractor in the performance of what, on any view, was an inherently dangerous operation of slinging iron girders over a railway line. Lord Westbury, at p. 61, in pointing out that the duty to take care fell upon the contractor and not his employer, who had a right to rely upon the contractor for the performance of that duty, said:

> " ... the ordinary business of life could not go on if we had not a right to rely upon things being properly done when we have committed and entrusted them to persons whose duty it is to do things of that nature, and who are selected for the purpose with prudence and care, as being experienced in the matter, and are held responsible for the execution of the work."

23. And in Read v. J. Lyons &Co., Ld. (1947) AC 156, the House of Lords decisively rejected any general doctrine of strict liability for hazardous activities. As Lord Simonds said, at pp. 181-182 :

> " ... I would reject the idea that, if a man carries on a so-called ultra-hazardous activity on his premises, the line must be drawn so as to bring him within the limit of strict liability for its consequences to all men everywhere. On the contrary I would say that his obligation to those lawfully upon his premises is to be ultra-cautious in carrying on his ultra-hazardous activity, but that it will still be the task of the injured person to show that the defendant owed to him a duty of care and did not fulfil it."

The direction taken in this Court has also been away from strict liability for tortious behaviour. There is a preference for a view which is more in harmony with the ordinary principles governing liability for negligence, namely, that the extent of a duty of care will depend upon the magnitude of the risk involved and its degree of probability: Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle (1940) 64 CLR 514, at pp 522-523 ; Swinton v. The China Mutual Steam Navigation Co. Ltd. (1951) 83 CLR 553, at pp 566-567 ; Thompson v. Bankstown Corporation (1953) 87 CLR 619, at p 645. Th us the standard of response required is that of a reasonable man placed in the relevant circumstances. See Wyong Shire Council v. Shirt (1980) 146 CLR 40, at pp 47-48 . If that means, in the words of Lord Simonds, an ultra-cautious response to an ultra-hazardous operation, it nevertheless falls short of the imposition of strict liability. In our view it would be inconsistent with this approach to follow the decision in Honeywill and Stein, Ld. v. Larkin Brothers, Ld. and the view of Jordan C.J. in Torette House Pty. Ltd. v. Berkman is to be preferred.

24. It is possible then to start with the general proposition laid down in 1840 in Quarman v. Burnett (1840) 6 M &W 499 (151 ER 509) that a person will not be liable for the acts or omissions of another unless that other is his servant acting in the course of his employment. He will not, therefore, be liable for the acts or omissions of a competent independent contractor employed by him. To that general proposition there are certain exceptions or qualifications.

25. Where an independent contractor is employed to do the very thing which, if done by the employer himself, would constitute a breach of duty on his part, then the employer will nevertheless be liable for any consequent loss or damage. Moreover, where precautions can be taken against loss or damage and the failure of an employer to ensure that his independent contractor takes those precautions amounts to an authorization of the act or omission causing the harm, then the employer

BarNet publication information - Date: Sunday, 28.09.2025 - Publication number: 00055 - User: jayspudvilas@gmail.com

will also be liable. That is the explanation of cases such as Bower v. Peate and Dalton v. Angus (1881) 6 App Cas 740 . With them may be contrasted a case such as Stoneman v. Lyons (1975) 133 CLR 550. In that case an owner of land employed a builder to carry out work which required the wall of an adjoining building to be underpinned. The builder, without consulting the owner or his architect, dug a trench along the whole of the wall and excavated pockets under the wall so that when rain fell the wall collapsed. The owner was held to be not liable for the damage but the result would have been different if the owner had required the builder to do what he did or had countenanced it by failing to require underpinning. As it was, the builder was guilty of what Lord Blackburn in Dalton v. Angus, at p 829, called "collateral negligence", for which the owner was not liable.

26. Then again, a duty may be of such a kind that it is not possible to discharge it or transfer it by the employment of a competent contractor. The origin of this qualification to the general principle that an employer is not liable for the acts or omissions of his independent contractor is to be seen in cases such as Pickard v. Smith (1861) 10 CB (NS) 470 (142 ER 535), although it is said (per Williams J. delivering the judgment of the Court at p 480 of CB (N.S.); p.539 of E.R.) to be derived "by a parity of reasoning" from those cases "in which the act which occasions the injury is one which the contractor was employed to do". This explanation may not be wholly satisfactory, but it is clear that the qualification does exist. The most obvious example is where a duty is imposed by statute which cannot be met by the employment of someone else. In that case there is an analogy with a duty imposed by contract which cannot be discharged by entry into a subcontract. But the qualification goes beyond duties statutorily imposed and extends to some duties at common law. The difficulty is in identifying those cases in which such a non-delegable duty arises. An effort was made to do so by Mason J. in Kondis v. State Transport Authority (1984) 154 CLR 672, at p 687, where he said that such a duty arose from "some element in the relationship between the parties that makes it appropriate to impose on the defendant a duty to ensure that reasonable care and skill is taken for the safety of the persons to whom the duty is owed". The most important example is probably the duty of care of an employer at common law to provide adequate plant and equipment, a safe place of work and a safe system of work for his employees. That is a duty which cannot be delegated to an independent contractor and the duty to take care becomes a duty to ensure that reasonable care is taken. Other examples are the duty of care owed by a hospital to its patients or by a school authority to its pupils. In such cases at least it would seem that liability for the acts or omissions of a contractor is personal rather than vicarious, but that aspect of the matter is not beyond debate. See Atiyah, Vicarious Liability in the Law of Torts, (1967), pp.338-339.

27. Apart from a submission based upon the hazardous nature of the logging operations, a submission was also made on behalf of Stevens that there was a non-delegable duty of care owed by Brodribb to Stevens arising from the general supervisory functions exercised by Brodribb in its licence area. There were, of course, other teams of fellers, sniggers and loaders and carters operating within the area and the co-ordination of all their functions was said to be the responsibility of Brodribb and to involve a duty on its part to take reasonable steps to see that the whole operation was safely carried out. The obligation said to be imposed upon Brodribb, which in the case of servants would be part of its duty to provide a proper place of work, proper plant and equipment and a safe system of work, was said to arise upon the ordinary principle that in the absence of such provision it was foreseeable that harm would be done to persons, such as the plaintiff Stevens, working in the area where the logging operations were being carried on. Reliance was placed upon the decision in McArdle v. Andmac Roofing Co. (1967) 1 WLR 356; (1967) 1 All ER 583 which held that the employment of a contractor to do certain roofing work did not displace the overriding responsibility of the employer to take precautions for the safety of subcontractors working together in close proximity in circumstances of obvious danger. It is true that the decision in that case

BarNet publication information - Date: Sunday, 28.09.2025 - Publication number: 00055 - User: jayspudvilas@gmail.com

resulted from the application of the familiar concepts of proximity and foreseeability in the law of negligence and may be said to support the appellants' submissions in these cases. There is no reason why those same concepts should not provide a basis upon which it might be found that Brodribb was under a duty of care towards Stevens and we are prepared to assume that it was under such a duty of care, although it seems to us that the extent of the duty would have to take account of the independent functions of the contractors and be something less than that owed by an employer to his employees. To equate the duty with that owed by an employer to his employees would be to give no weight to the very circumstance which differentiates the contractors from employees. For reasons which will appear, it is unnecessary to pursue that aspect of the matter to finality.

28. Such as the alleged duty was, it is said, apparently in reliance upon the analogy with the duty of care owed by an employer to his employees, that it was non-delegable. We think that such a duty in this case was non-delegable, although for reasons which can be expressed more simply and in a different way. Any such duty was, in effect, a duty to exercise care in the co-ordination of the activities of the various contractors. No question arises of the delegation of that function to any separate contractor and it can hardly have been delegated to them all merely by reason of their having been engaged as independent contractors. In that event the duty would have been negated and have ceased to exist. Put another way, the duty of co-ordinating the activities of the contractors can hardly have been performed by returning that responsibility to them. In our view, it is for this reason, rather than any special element in the relationship between Brodribb and its contractors, that no question arises of the delegation of any duty which it might have owed to them.

29. Assuming the existence of a duty of care on the part of Brodribb towards Stevens, we nevertheless do not think that want of due care on the part of Brodbribb can be made out on the evidence. The breach of duty which is alleged is three-fold: the use of an unsafe ramp and the failure to require the use of a forklift carrier or a tractor equipped with a grab to load logs, failure to give instructions that no log was to be moved on the ramp whilst anyone was on it, and failure to supervise the loading operation.

30. The ramp was, however, constructed according to established practice and, although the distance between the skids made it difficult to load shorter logs, the space was necessary to enable the tractor to move between the skids. The evidence concerning the use of a forklift or a tractor with mechanical grabs was scanty and it would, in our view, provide an insufficient basis upon which to conclude that such equipment constituted a reasonable alternative for the loading of logs in the bush. It is plain enough that such equipment was not in use and had never been in use in Brodribb's logging operations in the bush, nor, for that matter, does the evidence show that it had ever been used in similar operations by others. However effective it might have been in loading logs (and the evidence merely suggests that it would have been more effective to prevent the skidding or rolling of logs), there is no evidence of its feasibility in other respects. In the case of the forklift, the very size of the machine required would suggest its impracticability. Assuming a duty of care on the part of Brodribb, we are unable to conclude that there was any breach of that duty by reason of its failure to use machinery of the type suggested.

31. Nor does the evidence suggest to us that due care required Brodribb to give instructions that no log was to be moved during loading operations whilst a man was on the ramp. Gray was, as the other sniggers and loaders also appear to have been, an experienced operator of his equipment, skilled in the task which he was performing. Stevens was, upon the evidence, no less skilled. There was no evidence of any previous accident of the kind which happened to Stevens. The danger to which he was exposed was an obvious danger and it is unlikely that any instruction of the kind

BarNet publication information - Date: Sunday, 28.09.2025 - Publication number: 00055 - User: jayspudvilas@gmail.com

suggested would have avoided the accident.

32. Similarly, supervision of the loading operations would, in the absence of previous accidents suggesting a particular danger, have been unlikely to have avoided the accident which occurred. Such supervision would have required a man on each loading ramp, of which there were nine, and the evidence does not reveal that it would have achieved anything more than the employment of skilled operators ought to have done. Apart from the particular incident, the evidence does not suggest that the system of loading which was in use and which had apparently been in use for years, was defective.

33. Accordingly, in our view, no want of care on the part of Brodribb was established on the evidence.

34. For all of these reasons, the appeals should be dismissed.

BRENNAN J.: I am in general agreement with the reasons prepared by Mason J. for dismissing these appeals, but I should state my own reasons for agreeing that Brodribb did not breach any personal duty of care owed to Stevens.

2. Brodribb organized the felling, snigging, loading and trucking operations which brought the forest logs to the mill. All of those operations involve some risk of injury to those engaged in them. We are concerned with the loading operation. The movement of bulldozers as they manoeuvre heavy logs on loading ramps involves some risk of injury to those engaged in the loading operations. An entrepreneur who organizes an activity involving a risk of injury to those engaged in it is under a duty to use reasonable care in organizing the activity to avoid or minimize that risk, and that duty is imposed whether or not the entrepreneur is under a further duty of care to servants employed by him to carry out that activity. The entrepreneur's duty arises simply because he is creating the risk (Sutherland Shire Council v. Heyman (1985) 59 ALJR 564, at p 587; 60 ALR 1, at p 42) and his duty is more limited than the duty owed by an employer to an employee. The duty to use reasonable care in organizing an activity does not import a duty to avoid any risk of injury; it imports a duty to use reasonable care to avoid unnecessary risks of injury and to minimize other risks of injury. It does not import a duty to retain control of working systems if it is reasonable to engage the services of independent contractors who are competent themselves to control their system of work without supervision by the entrepreneur. The circumstances may make it necessary for the entrepreneur to retain and exercise a supervisory power or to prescribe the respective areas of responsibility of independent contractors if confusion about those areas involves a risk of injury. But once the activity has been organized and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur. If there is no failure to take reasonable care in the employment of independent contractors competent to control their own systems of work, or in not retaining a supervisory power or in leaving undefined the contractors' respective areas of responsibility, the entrepreneur is not liable for damage caused merely by a negligent failure of an independent contractor to adopt or follow a safe system of work either within his area of responsibility or in an area of shared responsibility.

3. In the present case, Brodribb prescribed the location of loading ramps. Brodribb also retained (though it did not actively exercise) a right to prescribe the manner of their construction and, if it be a matter of additional prescription, the means by which logs were to be loaded. Logs were to be loaded by pushing them by bulldozer blade up and over the edge of the ramp on to a waiting trailer.

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The bulldozer would move up and down between the skids of the ramp. Perhaps forklifts could have been used, but any improvement in safety would have been speculative, and did not warrant the cost and inconvenience involved. Brodribb did not employ servants to snig, load or carry logs; it employed independent contractors who were experienced in those activities. That seems to be the extent of the organization by Brodribb of the activity of loading logs. Was it negligent in prescribing that organization? Further supervision by a Brodribb employee of the independent contractors while they were working could have been prescribed but it might have been an irritating distraction to those engaged in loading. At all events, it would have been unreasonable to prescribe supervisors of experienced contractors. Brodribb did not prohibit truck drivers from helping in the loading of logs, nor did Brodribb prohibit those engaged to load logs from helping truck drivers. Was it bound to do so? In my opinion, no such prohibition was called for; to prohibit one from helping the other might increase the risk of injury in some situations. It would have prevented the injury suffered by Stevens if truck drivers had been absolutely prohibited from getting up on the loading ramp, but that would have been an unnecessary and unreasonable prohibition to prescribe. The problem of manoeuvring logs too short to straddle the gap between the skids of a loading ramp was well known. But Brodribb was not negligent in leaving the problem of manoeuvring short logs to competent independent contractors to deal with. In my opinion, the evidence did not show that Brodribb failed to exercise reasonable care in organizing the loading of logs. Apart from its responsibility in the organizing of the loading of logs, did Brodribb have any relevant continuing responsibility in the conduct of the loading operations? I think not. If the persons working in the vicinity of the loading ramps had been employees, Brodribb would have remained under a continuing duty to prescribe and enforce a safe system for dealing with the problem of logs jammed on or near the ramp (see Kondis v. State Transport Authority (1984) 154 CLR 672), but Brodribb was not under such a duty to persons who were not employees. The way in which the independent contractors chose to deal with the problem of jammed logs was a matter for them. The cause of Stevens' injury was Gray's movement of the bulldozer while Stevens was still within the danger area. That was negligence on the part of an independent contractor within an area of his responsibility. Brodribb is not vicariously liable to Stevens for Gray's negligence in moving the bulldozer when and in the manner he did.

4. I need not address the question whether there is some special category of non-delegable duty of care other than the personal duty of care arising from particular relationships (for example, master and servant, parent and child, school authority and pupil). I agree with Mason J. that no such duty arises from the circumstances of this case.

5. The appeals should be dismissed.

DEANE J: The equal division of opinion between four members of the Victorian Supreme Court in the present case demonstrates how finely balanced is the question whether the injured truck driver (the appellant Roy Albert Stevens to whom I shall refer as "Stevens") and the negligent "snigger" (the appellant Stanley Gray to whom I shall refer as "Gray") were, in all the circumstances, employees of the respondent Brodribb Sawmilling Company Pty. Ltd. ("the Brodribb Company") or independent contractors. For my part, I have come to the conclusion that, on balance, the preferable view is that both Stevens and Gray were independent contractors and not employees. I agree with the reasons for that conclusion which are set out in the judgment of Mason J.

2. The distinction between "employee" and "independent contractor" has become an increasingly amorphous one as the single test of the presence or absence of control has been submerged in a circumfluence of competing criteria and indicia. Where that distinction is relevant, it is, nonetheless, commonly decisive of the existence of vicarious liability. It is so in the present case where the

BarNet publication information - Date: Sunday, 28.09.2025 - Publication number: 00055 - User: jayspudvilas@gmail.com

conclusion that Gray was not an employee of the Brodribb Company involves the consequence that his negligent acts were not, in law, the acts of that company. On the other hand, the general principles of the law of negligence which are applicable to determine the existence and content of a common law duty of care are concerned essentially with matters of substance. In the application of those principles, technical and marginal considerations which may be decisive of characterization as an "independent contractor" or as an "employee" in a borderline case are, of themselves, unlikely to be of critical importance. Thus, the conclusion that the relationship between the Brodribb Company and Stevens should be characterized as being that between independent contractors rather than that of employer and employee is, in the present case, not of decisive significance for the purpose of the question whether that company owed a relevant common law duty of care to Stevens. What is decisive of that question is the substantive content, rather than the technical characterization, of that relationship. It is to that substantive content that regard must be had in determining whether the relationship possessed the degree of proximity necessary to give rise to a relevant duty of care.

3. Where a duty of care exists under the common law of negligence, it requires the taking of reasonable care to avoid a reasonably foreseeable and real risk of injury. That being so, a relevant duty of care will have existed in a particular case only if there was reasonable foreseeability of a real risk that injury of the kind sustained would be sustained by a member or members of a class which included the particular plaintiff. If the common law duty of care were an unqualified one owed to the world at large, reasonable foreseeability of injury of the kind sustained by a plaintiff would be the sole determinant of the existence of a relevant duty of care: it would be both a sufficient and the exclusive criterion of whether a particular defendant owed a relevant duty of care to a particular plaintiff. It is, however, plain that that is not, and has never been, the common law. Some effective additional limit or "control mechanism" must be recognized as applying to at least some categories of case (see Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad" (1976) 136 CLR 529, at p 574 ; Jaensch v. Coffey (1984) 58 ALJR 426, at pp 428 and 441 ; Candlewood Navigation Corporation Ltd. v. Mitsui Osk Lines Ltd. (1985) 59 ALJR 763, at p 769).

4. The test of reasonable foreseeability of injury which was explained by Lord Atkin in Donoghue v. Stevenson (1932) AC 562, at pp 580-582 was expressly derived from the celebrated passage in the judgment of Lord Esher (then Brett M.R.) in Heaven v. Pender (1883) 11 QBD 503, at p 509 :

> "The proposition which these recognised cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger" (emphasis added).

The reference to "every one ... would" and "at once" made Lord Esher's formulation at least as demanding as Lord Atkin's test of reasonable foreseeability: it is scarcely feasible that Lord Atkin, whose dislike of Humpty Dumpty's approach to words is well documented, used the words "can reasonably foresee would be likely to injure" (Donoghue v. Stevenson, at p 580) in a sense which would not include a case where "every one of ordinary sense who did think would at once recognise" the danger of injury. Yet Lord Atkin was at pains to emphasize that even Lord Esher's formulation would be "expressed in too general terms" unless it was limited by the "necessary qualification" of proximity of relationship (see Donoghue v. Stevenson, at p 582). That being so, his

BarNet publication information - Date: Sunday, 28.09.2025 - Publication number: 00055 - User: jayspudvilas@gmail.com

Lordship recognized (Donoghue v. Stevenson, at pp 580-582) that the duty to "take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely" to cause injury must necessarily be restricted by some overriding control. The overriding control which he recognized was that the duty was owed only to a "neighbour" in the sense of a person who was, for relevant purposes, in a relationship of proximity.

5. The requirement of a relationship of proximity as a general overriding control of the test of reasonable foreseeability has been expressly or impliedly recognized in a series of recent judgments in this Court including, it would seem, the judgments of four of the five members of the Court in Sutherland Shire Council v. Heyman (1985) 59 ALJR 564, at pp 570 (Gibbs C.J.), 579 (Mason J.), 583 (Wilson J.) and 594-595 (Deane J.). The notion of such a general and distinct requirement has been subjected to criticism by some eminent authorities (see Candlewood, at p 769; Leigh and Sillivan Ltd. v. Aliakmon Ltd. (1985) 2 WLR 289, at pp 326-327 ; Sir Robert Goff, "The Search for Principle", Proceedings of the British Academy, vol.69 (1983), 169, at pp.178-179). It must be acknowledged that such criticism would have undoubted force if the requirement of proximity of relationship had been propounded as some rigid formula which could be automatically applied as part of the syllogism of formal logic to determine whether a duty of care arises under the common law of negligence in a particular category of case. The "general conception" of proximity of relationship was, however, neither propounded by Lord Atkin nor accepted in judgments in this Court in that sense. Its acceptance involved neither question-begging nor the introduction of undesirable uncertainty into the common law. To the contrary, it flowed from the perception of a consistent jurisprudence of common law negligence in which the notion of proximity can be discerned as a unifying theme explaining why a duty to take reasonable care to avoid a reasonably foreseeable risk of injury has been recognized as arising in particular categories of case and assisting in the determination, by the ordinary legal processes of analogy, induction and deduction, of the question whether the common law should adjudge that such a duty of care is owed in a new category of case. In that regard, recognition of the requirement of proximity as a general prerequisite of a duty of care neither precludes nor dispenses with the need, in the interests of certainty, for particular rules or tests for determining whether the requirement is satisfied in the circumstances of a particular category of case (see, for example, the judgment of Gibbs C.J., in Jaensch v. Coffey, at pp 428-429 and the judgment of Mason J. in Heyman, at pp 579ff.). Indeed, once one accepts - as I think one must - that, under the law of this country, reasonable foreseeability of injury is not of itself a sufficient determinant of the existence of a duty of care in all categories of case, there would seem to be but two alternatives to acceptance of Lord Atkin's overriding requirement of neighbourhood or proximity. The first alternative is to distort the notion of reasonable foreseeability so as to exclude, in some categories of case, injury to another which is obviously foreseeable by "every one of ordinary sense". The second is to reduce the common law of negligence to a miscellany of disparate and largely unrelated rules under which a duty to take reasonable care to avoid a reasonably foreseeable risk of injury may or may not arise (cf. Candlewood, at p.769). I find both equally unacceptable.

6. I have, in Jaensch v. Coffey (at pp 441-442) and Heyman (at p 595), endeavoured to explain what I see as the essential content of the requirement of neighbourhood or proximity which Lord Atkin formulated as an overriding control of the test of reasonable foreseeability. So understood, the requirement can, as Lord Atkin pointed out (Donoghue v. Stevenson, at p 581), be traced to the judgments of Lord Esher M.R. and A.L. Smith L.J. in Le Lievre v. Gould (1893) 1 QB 491, at pp 497 and 504. In my view, that requirement remains the general conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognizes the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another. In Lord

BarNet publication information - Date: Sunday, 28.09.2025 - Publication number: 00055 - User: jayspudvilas@gmail.com

Atkin's own words, it is the "general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances" (Donoghue v. Stevenson, at p 580; and see per Fullagar J. Commissioner for Railways (N.S.W.) v. Cardy (1960) 104 CLR 274, at p 294). As such, that requirement of proximity of relationship sustains the underlying unity of principle and lack of chaos in the common law of negligence of this country.

7. I agree with Mason J. that, for the reasons which he gives, there existed in the relationship between the Brodribb Company and Stevens the requisite element of proximity to give rise to a relevant duty of care. With due respect to those who see the matter differently however, it appears to me that the Brodribb Company failed to discharge that duty. At its heart, there lay the obligation to take reasonable care to provide a safe system of work at least in those fields of operation in which the Brodribb Company required interaction between the activities of the various "fellers", "sniggers" and truck drivers whom it retained and assigned and whose activities it organized for the felling, loading and carrying of timber from its licensed areas of forest for cutting and treatment in its Orbost sawmill. One such field of operation was that involving the loading of logs on the trucks. There, the truck driver's functions and the snigger's functions necessarily overlapped to an extent that obviously required co-ordination and co-operation between the two. This was particularly so in the cases where the length of timber being loaded was shorter than the distance between the two pairs of skids on the ramp and where the ordinarily obvious method of pushing the logs up the two pairs of skids was plainly inappropriate. It may well be that the approach which was finally adopted by Gray in the present case - manipulation by bulldozer combined with the use of a supporting chain - was capable of providing the basis of an acceptable solution to one of the problems involved in loading the shorter logs in that way. To be acceptable however, the method would have to have been adopted as part of some rational system under which the respective roles and responsibilities of truck driver and snigger were identified and integrated. In fact, the evidence leads to the conclusion that the Brodribb Company provided no system at all to deal with the problem of loading the shorter logs. It simply left the problem which they posed to be dealt with on an ad hoc basis. The consequence was that a truck driver was unnecessarily exposed to any danger involved in the unplanned and unexpected. It was this absence of any settled system for the loading of the shorter logs which led to the lack of co-ordination between Gray and Stevens in the present case. In failing to provide such a system, the Brodribb Company was in breach of the duty to take reasonable care which it owed to Stevens. The injuries which Stevens sustained were of a kind which was reasonably foreseeable and were caused by that breach of duty.

8. I would allow both appeals and restore the judgment of the learned trial judge.

Orders

Appeals dismissed with costs.

Cited by:

Ekera Dental Pty Ltd v Creative Smiles Pty Ltd [2025] VSCA 149 -
Ekera Dental Pty Ltd v Creative Smiles Pty Ltd [2025] VSCA 149 -
Ekera Dental Pty Ltd v Creative Smiles Pty Ltd [2025] VSCA 149 -
Cagney v D&J Building Contractors Pty Ltd [2025] QCA 116 -
Ekera Dental Pty Ltd v Creative Smiles Pty Ltd [2025] VSCA 149 -
Ekera Dental Pty Ltd v Creative Smiles Pty Ltd [2025] VSCA 149 -

BarNet publication information - Date: Sunday, 28.09.2025 - Publication number: 00055 - User: jayspudvilas@gmail.com

Alananzeh v Zgool Form Pty Ltd [2025] ACTCA 19 (25 June 2025) (McCallum CJ; Mossop and Loukas-Karlsson JJ)

> 30 The primary judge identified that the head contractor, Core Building Group (ACT) Pty Ltd (Core), was the principal on the project. Xmplar was a subcontractor to Core and Zgool a subcontractor to Xmplar. Her Honour referred to the decisions of the High Court in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 47-48 and *Leighton Contractors Pty Ltd v Fox* [2009] HCA 35; 240 CLR 1 at [20] . Her Honour identified from *Stevens* the distinction between the duty owed by an employer as distinct from a subcontractor organising an activity. She also identified that the duty does not extend to retaining control over a system of work if it is reasonable to engage the services of independent contractors who are themselves competent to control the system of work. The primary judge at [45] quoted from *Sydney Water Corporation v Abramovic* [2007] NSWCA 248; Aust Torts Reports ¶81913 at [98]-[99], where Basten JA (with whom Mason P agreed, Santow JA in dissent) noted that a principal may owe a duty to a worker who is an employee of an independent contractor, observing that the cases suggested that satisfaction of one of the following criteria may give rise to such a duty:

Alananzeh v Zgool Form Pty Ltd [2025] ACTCA 19 -
Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA [2025] NSWCA 72 -
Sawyer v Steeplechase Pty Ltd [2025] QCA 2 -
Sawyer v Steeplechase Pty Ltd [2025] QCA 2 -
Sawyer v Steeplechase Pty Ltd [2025] QCA 2 -
Agrigrain Pty Ltd v Rindfleish [2024] NSWCA 295 -
Bird v DP (a pseudonym) [2024] HCA 41 -
Bird v DP (a pseudonym) [2024] HCA 41 -
Bird v DP (a pseudonym) [2024] HCA 41 -
Value Constructions Pty Ltd v Badra [2024] NSWCA 181 (31 July 2024) (Leeming and Kirk JJA, Griffiths AJA)

> *Papatonakis v Australian Telecommunications Commission* [1985] HCA 3; (1985) 156 CLR 7; *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 ; *Archer v Hall* [1967] 1 NSWR 107; *Felk Industries Pty Limited v Mallet* [2005] NSWCA 111; *A V Jennings Ltd v Thomas* [2004] NSWCA 309; *Sydney Water Corporation v Abramovic* [2007] NSWCA 248; *Pacific Steel Constructions Pty Ltd v Barahona* [2009] NSWCA 406; *Christmas v General Cleaning Contractors Ltd* [1952] 1 KB 141, considered.

Value Constructions Pty Ltd v Badra [2024] NSWCA 181 (31 July 2024) (Leeming and Kirk JJA, Griffiths AJA)

> 51. The word “merely” in this sentence is significant. It illustrates that his Honour was addressing situations where the cause of the injury was something done or not done by the independent contractor, responding to an argument that, even so, the occupier bore some liability for ensuring that the contractor adopted and followed a safe system of work. Brennan J was not addressing where the risk of injury arose from a state of affairs which pre-existed the involvement of the contractor or the contractor carrying out its activity. That was not the context, nor the type of duty, being considered in *Stevens* .

Value Constructions Pty Ltd v Badra [2024] NSWCA 181 (31 July 2024) (Leeming and Kirk JJA, Griffiths AJA)

> 50. The injury in *Stevens* occurred during the loading of logs by one contractor retained by the company onto the truck of another contractor retained by the company. The company had organised the activities of felling and moving the logs, including loading them onto the trucks. The High Court accepted that the company owed some general duty of care in relation to the organisation of the activities (see eg Mason J at 31). That acceptance was the

context of the discussion by Brennan J, as manifested in the first sentence quoted above. His Honour went on to state (at 48):

> If there is no failure to take reasonable care in the employment of independent contractors competent to control their own systems of work, or in not retaining a supervisory power or in leaving undefined the contractors' respective areas of responsibility, the entrepreneur is not liable for damage caused merely by a negligent failure of an independent contractor to adopt or follow a safe system of work either within his area of responsibility or in an area of shared responsibility.

Value Constructions Pty Ltd v Badra [2024] NSWCA 181 -
Value Constructions Pty Ltd v Badra [2024] NSWCA 181 -
Value Constructions Pty Ltd v Badra [2024] NSWCA 181 -
EFEX Group Pty Ltd v Bennett [2024] FCAFC 35 -
CCIG Investments Pty Ltd v Schokman [2023] HCA 21 -
Coalroc Contractors Pty Ltd v Matinca (No 2) [2023] NSWCA 127 -
JMC Pty Ltd v Commissioner of Taxation [2023] FCAFC 76 -
JMC Pty Ltd v Commissioner of Taxation [2023] FCAFC 76 -
JMC Pty Ltd v Commissioner of Taxation [2023] FCAFC 76 -
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JMC Pty Ltd v Commissioner of Taxation [2023] FCAFC 76 -
JMC Pty Ltd v Commissioner of Taxation [2023] FCAFC 76 -
Bird v DP [2023] VSCA 66 (03 April 2023) (Beach, Niall and Kaye JJA)

106. In *Stevens* ,[84] the High Court was concerned with the question whether the respondent sawmilling company was vicariously liable for the negligence of Gray who it had engaged to snig and load logs at the mill. The Court held that the snigger was not an employee of the respondent so that the respondent was not vicariously liable for his negligence. On that issue, the members of the court took into account a number of factors, including the degree of control or right of control by the respondent of the snigger, and also matters pertaining to the engagement, such as the mode of remuneration, the provision of equipment, the hours of work, holidays, deduction of income tax and the like. Relevantly, for the purposes of this case, the court also took into account that the snigger was able to, and did, employ his own son in the actual performance of the cartage operations. In that regard, Mason J (with whom Brennan J and Deane J agreed) noted that the power to delegate is an 'important factor' in deciding whether a worker is an employee or independent contractor. [85] In similar terms, Wilson J and Dawson J noted:

> Apart from anything else, Gray was able to employ his son in the actual performance of his cartage operations. An unlimited power of delegation of this kind was viewed as being almost conclusive against the contract being a contract of service in *AMP Society v Chaplin*. [86]

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[85] Ibid 26.

29. The relevant contractual principles include these stated in *Personnel Contracting* by Kiefel CJ, Keane and Edelman JJ:

> (1) a contract (not just an employment contract) "may be partly oral and partly in writing, or there may be cases where subsequent agreement or conduct effects a variation to the terms of the original contract or gives rise to an estoppel or waiver": [42];
>
> (2) "[t]here is nothing artificial about limiting the consideration of legal relationships to legal concepts such as rights and duties. By contrast, there is nothing of concern to the law that would require treating the relationship between the parties as affected by circumstances, facts, or occurrences that otherwise have no bearing upon legal rights": [44];
>
> (3) the meaning and effect of a contract must be ascertained at the time it was entered into, unless subsequent conduct casts light on a variation to that contract, citing *Connelly v Wells* (1994) 55 IR 73 at 74 : [46];
>
> (4) the meaning and effect of the contract, particularly the extent to which the contract itself gives the putative employer the right to control the doing of the work by the putative employee, determines the legal character of the contract as one of employment or not: [53];
>
> (5) "[u]ncertainty in relation to whether a relationship is one of employment may sometimes be unavoidable. It is the task of the courts to promote certainty with respect to a relationship of such fundamental importance. Especially is this so where the parties have taken legitimate steps to avoid uncertainty in their relationship. The parties' legitimate freedom to agree upon the rights and duties which constitute their relationship should not be misunderstood. It does not extend to attaching a "label" to describe their relationship which is inconsistent with the rights and duties otherwise set forth. To do so would be to elevate their freedom to a power to alter the operation of statute law to suit themselves or, as is more likely, to suit the interests of the party with the greater bargaining power": [58];
>
> (6) where a written contract exists and its validity is not challenged, the ultimate characterisation of a relationship must be concerned with the rights and duties established by that contract, however this does not mean that it is not appropriate in the "characterisation of a relationship as one of employment or of principal and independent contractor", to consider "the totality of the relationship between the parties" by reference to the various indicia of employment that have been identified in the authorities (*Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 at 29 ; *Hollis v Vabu Pty Ltd* [2001] HCA 44; (2001) 207 CLR 21 at [24]): [61]; and
>
> (7) the distinction between an employee and an independent contractor remains "rooted fundamentally in the difference between a person who serves

his employer in his, the employer's, business, and a person who carries on a trade or business of his own" citing *Marshall v Whittaker's Building Supply Co* [1963] HCA 26; (1963) 109 CLR 210 at 217 : [37].

Acciarito v Anthony Parcel Services Pty Ltd [2022] VSCA 13 (11 February 2022) (Beach and Niall JJA; Gorton AJA)

NEGLIGENCE – Personal injury – Transport accident – Whether duty of care owed by principal to delivery driver working for independent contractor – Delivery driver injured in course of work when delivery van rolled from position in which he parked it – Whether principal owed duty of care to instruct/train experienced driver in the operation of delivery van – Causation – Whether instruction or training would have resulted in driver securing vehicle so it would not roll – *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 – *Occupational Health and Safety Regulations 2007* , regs 3.5.1 and 3.5.23 – Application for leave to appeal refused.

Acciarito v Anthony Parcel Services Pty Ltd [2022] VSCA 13 (11 February 2022) (Beach and Niall JJA; Gorton AJA)

7. The plaintiff now seeks leave to appeal. His proposed grounds of appeal are as follows:

1 The judge failed to correctly apply *Stevens v Brodribb Sawmilling Company Pty Ltd* [6] to the facts in the case.

2 On the proper application of *Stevens* the judge ought to have found that [the defendant] owed to [the plaintiff] a duty of care which on the facts in the case was breached and that such breach was a cause of injury, loss and damage to [the plaintiff].

3 The judge failed to correctly apply reg 3.5.23 of [the OH&S Regulations] to the facts of the case.

4 On the proper application of reg 3.5.23 of [the OH&S Regulations] the judge ought to have found that [the defendant] was in breach of a statutory duty owed to [the plaintiff] which breach was a cause of injury, loss and damage to [the plaintiff].

Acciarito v Anthony Parcel Services Pty Ltd [2022] VSCA 13 (11 February 2022) (Beach and Niall JJA; Gorton AJA)

42. Nothing said by Mason J or Brennan J in *Stevens* (and in particular nothing said in the passages relied upon by the plaintiff) [37] required the judge to come to a different conclusion than the one he came to on the issue of duty. What the High Court (and in particular Justice Mason and Justice Brennan) said in *Stevens* about the obligations and duties of an entrepreneur who engages independent contractors to do work which might readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work led to the Court concluding in that case that the defendant (the sawmilling company) owed a general common law duty of care to an independent trucker on the facts as found in that case.

Acciarito v Anthony Parcel Services Pty Ltd [2022] VSCA 13 -
Acciarito v Anthony Parcel Services Pty Ltd [2022] VSCA 13 -
Acciarito v Anthony Parcel Services Pty Ltd [2022] VSCA 13 -
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Acciarito v Anthony Parcel Services Pty Ltd [2022] VSCA 13 -

BarNet publication information - Date: Sunday, 28.09.2025 - Publication number: 00055 - User: jayspudvilas@gmail.com

Acciarito v Anthony Parcel Services Pty Ltd [2022] VSCA 13 -
Acciarito v Anthony Parcel Services Pty Ltd [2022] VSCA 13 -
Acciarito v Anthony Parcel Services Pty Ltd [2022] VSCA 13 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 (09 February 2022) (Kiefel CJ; Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ)

74. Construct submitted that control was a necessary, though not sufficient, condition of a contract of service, citing *Zuijs v Wirth Brothers Pty Ltd* [127] . It was submitted that Hanssen alone supervised and directed every aspect of Mr McCourt's work, and it was emphasised that Construct was not entitled, under either the LHA or the ASA, to enter Hanssen's site and issue directions to Mr McCourt regarding the performance of his work. So much may be accepted. But this Court in *Stevens* [128] , and indeed in *Zuijs* [129] itself, emphasised that it is the right of a person to control the work of the other, rather than the detail of the actual exercise of control, which serves to indicate that a relationship is one of employer and employee.

via

[128] (1986) 160 CLR 16 at 24 , 36.

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 (09 February 2022) (Kiefel CJ; Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ)

38. In *Stevens* [62] , Wilson and Dawson JJ observed that Windeyer J in *Marshall* "was really posing the ultimate question in a different way". Similarly, in *Hollis* [63] , the plurality referred to the statement of Windeyer J as reflecting the "representation and ... identification with the alleged employer" that characterises a relationship as one of employment. In their Honours' view, it was another way of putting the proposition that an independent contractor "carries out his work, not as a representative but as a principal" [64] . It may also be noted that the Federal Court has previously recognised that viewing the totality of the relationship between the parties through the prism of this dichotomy can give useful shape and meaning to the assessment of the relative significance of the parties' rights and duties [65] .

via

[62] (1986) 160 CLR 16 at 35.

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 (09 February 2022) (Kiefel CJ; Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ)

121. The reality is that, for so long as employment at common law is to be understood as a category of relationship that exists in fact, "it is the totality of the relationship between the parties which must be considered" [201] . "The ultimate question will always be whether a person is acting as the [employee] of another or on [his or her] 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." [202]

via

[202] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 37.

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 (09 February 2022) (Kiefel CJ; Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ)

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113. Where a continual relationship under which work is done by an individual in exchange for remuneration in fact exists, the characterisation of that relationship as one of employment or service, on the one hand, or as one of hirer and independent contractor, on the other hand, has long been understood to turn on one or other or both of two main overlapping considerations. The first is the extent of the control that the putative employer can be seen to have over how, where and when the putative employee does the work [179] . The second is the extent to which the putative employee can be seen to work in his or her own business as distinct from the business of the putative employer [180] . Factors relevant to that second consideration have been said to include, but not to be limited to, "the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee" [181] . A third consideration sometimes identified is perhaps little more than a variation of the second consideration: it is the extent to which the work done by the putative employee can be seen to be integrated into the business of the putative employer [182] .

via

[182] *Stevenson Jordan and Harrison Ltd v Macdonald and Evans* [1952] 1 TLR 101 at 111 ; *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248 at 295 ; *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395 at 402 ; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 26-27 , 35-36 .

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 (09 February 2022) (Kiefel CJ; Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ)

55. To the extent that it has been supposed that a departure from the longstanding approach predating, but exemplified in, *Chaplin* and *Narich* was required by this Court's decisions in *Stevens* and *Hollis* , that understanding is also not correct. In neither *Stevens* nor *Hollis* did this Court suggest that, where one person has done work for another pursuant to a comprehensive written contract, the court must perform a multifactorial balancing exercise whereby the history of all the dealings between the parties is to be exhaustively reviewed even though no party disputes the validity of the contract.

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 (09 February 2022) (Kiefel CJ; Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ)

38. In *Stevens* [62] , Wilson and Dawson JJ observed that Windeyer J in *Marshall* "was really posing the ultimate question in a different way". Similarly, in *Hollis* [63] , the plurality referred to the statement of Windeyer J as reflecting the "representation and ... identification with the alleged employer" that characterises a relationship as one of employment. In their Honours' view, it was another way of putting the proposition that an independent contractor "carries out his work, not as a representative but as a principal" [64] . It may also be noted that the Federal Court has previously recognised that viewing the totality of the relationship between the parties through the prism of this dichotomy can give useful shape and meaning to the assessment of the relative significance of the parties' rights and duties [65] .

ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 -

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 -

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 -
Meechan v Savco Earthmoving Pty Ltd [2021] QCA 264 -
Meechan v Savco Earthmoving Pty Ltd [2021] QCA 264 -
Meechan v Savco Earthmoving Pty Ltd [2021] QCA 264 -
Jack Bishop Pty Ltd v Trespa Holdings Pty Ltd [2021] VSCA 275 -
McLeod v Mainfreight Distribution Pty Ltd [2021] VSCA 255 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Kuzminski v Accent Blinds Australia Pty Ltd [2020] NSWCA 150 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122 (17 July 2020) (Allsop CJ, Jagot and Lee JJ)

9. We are concerned, however, with a binary question: was Mr McCourt an employee or an independent contractor, at common law. The distinction between the two is "too deeply rooted to be pulled out": *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19; 226 CLR 161 at 173 [33] . The principles applicable are to be found in decisions of binding authority for this Court: in particular *Hollis v Vabu Pty Ltd* [2001] HCA 44; 207 CLR 21; and *Stevens v Brodribb Sawmilling Co Proprietary Limited* [1986] HCA 1; 160 CLR 16 ; and in decisions of intermediate courts of appeal of persuasive authority.

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122 -
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122 -

Jamsek v ZG Operations Australia Pty Ltd [2020] FCAFC 119 (16 July 2020) (Perram, Wigney and Anderson JJ)

> 6. The question then is what inference this Court should draw about the issue. The Court is required to consider the totality of the relationship between the parties: *Stevens* at 29 per Mason J ; applied in *Hollis* at 24 at [44] per Gleeson CJ, Gaurdron, Gummow, Kirby and Hayne JJ. As Mummery J observed in *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939 at 944 the object of this exercise is to paint a picture from the accumulation of detail and thereby to obtain an informed consideration of the qualitative nature of the whole. Having done so, it is often said that the difference between an employee and an independent contractor is 'rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own': *Marshall v Whittaker's Building Supply Co* [1963] HCA 26; 109 CLR 210 ('*Marshall*') at 217 per Windeyer J. This might be thought to suggest that there is a natural dichotomy between, on the one hand, being employed and, on the other, conducting one's own business. On this view, an affirmative answer to the latter inquiry would imply a negative answer to the former. The logic of this would suggest that one could substitute the question of whether a person was an employee with the question of whether the person was conducting their own business.

Dental Corporation v Moffet [2020] FCAFC 118 (16 July 2020) (Perram, Wigney and Anderson JJ)

> 34. Dr Moffet's submissions are supported by the observations of Mason J in *Stevens* at 28-29 . In a modern post-industrial society:
>
> > ...a person so engaged often exercises a degree of skill and expertise inconsistent with the retention of effective control by the person who engages him. All this may be readily acknowledged, but the common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, "so far as there is scope for it", even if it be "only in incidental or collateral matters".

Jamsek v ZG Operations Australia Pty Ltd [2020] FCAFC 119 (16 July 2020) (Perram, Wigney and Anderson JJ)

> 234. The ability for a person to generate goodwill or saleable assets by undertaking work is indicative of that person operating an independent business: *Stevens* at 37 per Wilson and Dawson JJ ; *Re Porter* at 186 per Gray J; see also *Dental Corporation* at [64]–[71] per Perram and Anderson JJ. Although that is so, there are various forms of work in which it is naturally difficult or impossible for goodwill to be generated: *AMP* at ALJR 411; ALR 393–394; *Vabu* at [48] ; *Roy Morgan* at [46] ; *On Call* at [274]–[275] .

Jamsek v ZG Operations Australia Pty Ltd [2020] FCAFC 119 -
Dental Corporation v Moffet [2020] FCAFC 118 -
Jamsek v ZG Operations Australia Pty Ltd [2020] FCAFC 119 -
Jamsek v ZG Operations Australia Pty Ltd [2020] FCAFC 119 -
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Jamsek v ZG Operations Australia Pty Ltd [2020] FCAFC 119 -
Dental Corporation v Moffet [2020] FCAFC 118 -
Jamsek v ZG Operations Australia Pty Ltd [2020] FCAFC 119 -
Eastern Van Services Pty Ltd v Victorian WorkCover Authority [2020] VSCA 154 -
Eastern Van Services Pty Ltd v Victorian WorkCover Authority [2020] VSCA 154 -
Eastern Van Services Pty Ltd v Victorian WorkCover Authority [2020] VSCA 154 -
Eastern Van Services Pty Ltd v Victorian WorkCover Authority [2020] VSCA 154 -
J-Corp Pty Ltd v Thompson [2019] WASCA 173 -
J-Corp Pty Ltd v Thompson [2019] WASCA 173 -
J-Corp Pty Ltd v Thompson [2019] WASCA 173 -

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D'Arcy v Caltex Australia Petroleum Pty Ltd [2019] ACTCA 27 (23 October 2019) (Murrell CJ, Mossop and Charlesworth JJ)

> 72. The circumstances of the present case are distinct from those in *Stevens* or *Leighton*. In the present case, Caltex was not part of a contractual chain linking Caltex to the injured employee. In *Stevens* there was a contractual relationship between the sawmill and both the negligent contractor and the injured contractor. In *Leighton* there was a chain of subcontracting which linked both the head contractor (Leighton) and the concreting contractor (Downview) to the injured contractor and the person responsible for his injury. In contrast, Caltex was a lessee of Evangelista. It was Evangelista who contracted with Fuel-Sys, who in turn employed the appellant. Thus there is no direct contractual hierarchy through which control might be exercised by Caltex.

D'Arcy v Caltex Australia Petroleum Pty Ltd [2019] ACTCA 27 -
D'Arcy v Caltex Australia Petroleum Pty Ltd [2019] ACTCA 27 -
D'Arcy v Caltex Australia Petroleum Pty Ltd [2019] ACTCA 27 -
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D'Arcy v Caltex Australia Petroleum Pty Ltd [2019] ACTCA 27 -
D'Arcy v Caltex Australia Petroleum Pty Ltd [2019] ACTCA 27 -
CGU Insurance Ltd v Coote (by his next friend Stephen Desmond Coote) [2018] WASCA 117 -
CGU Insurance Ltd v Coote (by his next friend Stephen Desmond Coote) [2018] WASCA 117 -
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Coles Supermarkets Australia Pty Ltd v Ready Workforce (A Division of Chandler Macleod) Pty Ltd [2018] NSWCA 140 -
Stringer & or v Westfield Shopping Centre Management Co (SA) Pty Ltd [2017] SASCFC 138 -
Stringer & or v Westfield Shopping Centre Management Co (SA) Pty Ltd [2017] SASCFC 138 -
Stringer & or v Westfield Shopping Centre Management Co (SA) Pty Ltd [2017] SASCFC 138 -
Stringer & or v Westfield Shopping Centre Management Co (SA) Pty Ltd [2017] SASCFC 138 -
Stringer & or v Westfield Shopping Centre Management Co (SA) Pty Ltd [2017] SASCFC 138 -
Gulic v Boral Transport Ltd [2016] NSWCA 269 -
Danthanarayana v Commonwealth of Australia [2016] FCAFC 114 -
Danthanarayana v Commonwealth of Australia [2016] FCAFC 114 -
Lee v Wickham Freight Lines Pty Ltd [2016] NSWCA 209 (15 August 2016) (Basten and Simpson JJA, Sackville AJA)

> 2. Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16 at 47-48; Leighton Contractors Pty Ltd v Fox (2009) 240 CLR 1; [2009] HCA 35 at [20].

Lee v Wickham Freight Lines Pty Ltd [2016] NSWCA 209 -
Penrith City Council v Healey; GIO General Ltd v Healey [2016] NSWCA 161 (07 July 2016) (Basten and Simpson JJA, Emmett AJA)

> 76. That, in turn, raises the question as to the nature and scope of the Council's duty to the plaintiff, not limited to the duty to repair damaged bins. This is far from the first case in which this Court has had to give consideration to the scope of the duty of care owed by a principal who contracts with an employer to an employee of the contractor: see, for example: *Sydney Water Corporation v Abramovic* [2007] NSWCA 248; Aust Torts Reports 81-913; *Wooby v*

Australian Postal Corporation [2013] NSWCA 183; 233 IR 471; *Central Darling Shire Council v Greeney* [2015] NSWCA 51. The issue has also been the subject of discussion in the High Court: see *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; 160 CLR 16 ; *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19; 226 CLR 161.

Penrith City Council v Healey; GIO General Ltd v Healey [2016] NSWCA 161 -
Penrith City Council v Healey; GIO General Ltd v Healey [2016] NSWCA 161 -
Penrith City Council v Healey; GIO General Ltd v Healey [2016] NSWCA 161 -
Federal Commissioner of Taxation v Jayasinghe [2016] FCAFC 79 -
Kelly v Bluestone Global Ltd (in liq) [2016] WASCA 90 -
Kelly v Bluestone Global Ltd (in liq) [2016] WASCA 90 -
Kelly v Bluestone Global Ltd (in liq) [2016] WASCA 90 -
Fajloun v Khoury [2016] NSWCA 101 -
Fajloun v Khoury [2016] NSWCA 101 -
Fajloun v Khoury [2016] NSWCA 101 -
Victorian WorkCover Authority v Divadeus Pty Ltd (in Liquidation) [2016] VSCA 81 -
R v Moore [2015] NSWCCA 316 (15 December 2015) (Bathurst CJ, Simpson JA and Bellew J)

Allina Pty Ltd v Commissioner of Taxation (1991) 28 FCR 203 Andar Transport Pty Ltd v Brambles Ltd (2004) 217 CLR 424 ; [2004] HCA 28 Anns v Merton London Borough Council (1978) AC 728 Anonity, The [1961] 2 Lloyd's Rep 117 Australian Iron and Steel Ltd v Ryan (1957) 97 CLR 89 ; [1957] HCA 25 Barton v The Queen (1980) 147 CLR 75 ; [1980] HCA 48 Berger v Willowdale AMC (1983) 145 DLR (3d) 247 Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (2014) 254 CLR 185 ; [2014] HCA 36 Burns v The Queen (2012) 246 CLR 334 ; [2012] HCA 35 Callaghan v The Queen (1952) 87 CLR 115 ; [1952] HCA 55 Caltex Refineries (Qld) Pty Ltd v Stavar (2009) 75 NSWLR 649 ; [2009] NSWCA 258 Council of the Shire of Sutherland v Heyman (1985) 157 CLR 424 ; [1985] HCA 41 Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1 ; [1999] HCA 59 CSR Ltd v Wren (1997) 44 NSWLR 463 Deputy Federal Commissioner of Taxes (South Australia) v Elder's Trustee and Executor Company Ltd (1936) 57 CLR 610 ; [1936] HCA 64 Donoghue v Stevenson [1932] AC 562 Dupas v The Queen (2010) 241 CLR 237 ; [2010] HCA 20 English v Rogers [2005] Aust Torts Reports 81800 ; [2005] NSWCA 327 General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125 ; [1964] HCA 69 Grain Elevators Board (Victoria) v President, Councillors and Ratepayers of the Shire of Dunmunkle (1946) 73 CLR 70 ; [1946] HCA 13 Hamilton v Whitehead (1988) 166 CLR 121 ; [1988] HCA 65 Heaton v Western Australia (2013) 234 A Crim R 409 ; [2013] WASCA 207 Hunter Resources Ltd v Melville (1988) 164 CLR 234 ; [1988] HCA 5 Island Maritime Ltd v Filipowski (2006) 226 CLR 328 ; [2006] HCA 30 Jago v District Court of New South Wales (1989) 168 CLR 23 ; [1989] HCA 46 Jones v United States of America 308 F 2d 307 (1962) Kalwy v Secretary, Department of Social Security (1992) 38 FCR 295 King v The Queen (2012) 245 CLR 588 ; [2012] HCA 24 Kondis v State Transport Authority (1984) 154 CLR 672 ; [1984] HCA 61 Leighton Contractors Pty Ltd v Fox (2009) 240 CLR 1 ; [2009] HCA 35 Likiardopoulos v The Queen (2012) 247 CLR 265 ; [2012] HCA 37 Macaree v State of Western Australia [2011] WASCA 207 Maxwell v The Queen (1996) 184 CLR 501 ; [1996] HCA 46 Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210 Mitchell v Glasgow City Council [2009] 1 AC 874 ; [2009] UKHL 11 Nationwide News Pty Ltd v Naidu (2007) 71 NSWLR 471 ; [2007] NSWCA 377 Nelson v Director of Public Prosecutions (Cth) (2014) 294 FLR 347 ; [2014] VSCA 217 Nicol v Allyacht Spars Pty Ltd (1987) 163 CLR 611 ; [1987] HCA 68 Nydam v R [1977] VR 430 O'Brien v Dawson (1942) 66 CLR 18 ; [1942] HCA 8 Perre v Apand Pty Ltd (1999) 198 CLR 180 ; [1999] HCA 36 R v Cameron (Court of Criminal Appeal (NSW), 27 September 1994, unrep) R v Evans (Gemma) [2009] 1 WLR 1999 ; [2009] EWCA Crim 650 R v Glennon (1992) 173 CLR 592 ; [1992] HCA 16 R v Lavender (2005) 222 CLR 67 ; [2005] HCA 37 R v McGee (2008) 102 SASR 318 ; [2008] SASC 328 R v Miller [1983] 2 AC 161 R v Moore (District Court (NSW), Whitford DCJ, 8 August 2014, unrep) R v Peters (1995) 83 A Crim R 142 R v Petroulias (No 1) (2006) 177 A Crim R 153 ; [2006] NSWSC 788 R v Rimmington [2006] 1 AC 459 ; [2005] UKHL 63 R v Sieders (2008) 72 NSWLR 417 ; [2008] NSWCCA 187 R v Smith [1995] 1 VR 10 R v Taktak (1988) 14 NSWLR 226 RJP v The Queen [2014] VSCA 290 Roads and Traffic Authority of New South Wales v Dederer (2007) 234 CLR 330 ; [2007] HCA 42 Smith v The Queen (1994) 181 CLR 338 ; [1994] HCA 60 Stevens v Brodribb Sawmilling Company Pty Ltd (1986) 160 CLR 16 ; [1986] HCA 1 Sullivan v Moody (2001) 207 CLR 562 ; [2001] HCA 59 Sydney Water Corporation v Turano (2009) 239 CLR 51 ; [2009] HCA 42 Tame v New South Wales (2002) 211 CLR 317 ; [2002]

HCA 35 TNT Australia Pty Ltd v Christie (2003) 65 NSWLR 1 ; [2003] NSWCA 47 Vairy v Wyong Shire Council (2005) 223 CLR 422 ; [2005] HCA 62 Walton v Gardiner (1993) 177 CLR 378 ; [1993] HCA 77 Wilson v The Queen (1992) 174 CLR 313 ; [1992] HCA 31 Yuille v B&B Fisheries (Leigh) Ltd [1958] 2 Lloyd's Rep 596

R v Moore [2015] NSWCCA 316 -
R v Moore [2015] NSWCCA 316 -
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R v Moore [2015] NSWCCA 316 -
R v Moore [2015] NSWCCA 316 -
R v Moore [2015] NSWCCA 316 -
R v Moore [2015] NSWCCA 316 -
Classic Constructions (Aust) Pty Ltd v Fischetti [2015] ACTCA 51 -
Classic Constructions (Aust) Pty Ltd v Fischetti [2015] ACTCA 51 -
Classic Constructions (Aust) Pty Ltd v Fischetti [2015] ACTCA 51 -
Tattsbet Ltd v Morrow [2015] FCAFC 62 -
Tattsbet Ltd v Morrow [2015] FCAFC 62 -
Tattsbet Ltd v Morrow [2015] FCAFC 62 -
Tattsbet Ltd v Morrow [2015] FCAFC 62 -
Tattsbet Ltd v Morrow [2015] FCAFC 62 -
Ballandis v Swebbs [2015] QCA 76 -
Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] FCAFC 37 -
Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] FCAFC 37 -
Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] FCAFC 37 -
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Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] FCAFC 37 -
Central Darling Shire Council v Greeney [2015] NSWCA 51 -
Central Darling Shire Council v Greeney [2015] NSWCA 51 -
BlueScope Steel Ltd v Cartwright [2015] NSWCA 25 (23 February 2015) (Beazley P, Ward and Emmett JJA)

Leighton Contractors Pty Ltd v Fox [2009] HCA 25; 240 CLR 1; *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; 160 CLR 16 ; *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 9; 221 CLR 234, considered

BlueScope Steel Ltd v Cartwright [2015] NSWCA 25 -
Lorrimar v Serco Sodexo Defence Services Pty Ltd [2014] NSWCA 371 -
Lorrimar v Serco Sodexo Defence Services Pty Ltd [2014] NSWCA 371 -
AF Concrete Pumping Pty Ltd v Ryan [2014] NSWCA 346 -
Briers v Skilled Group Limited [2014] TASFC 8 -
Waco Kwikform Ltd v Perigo and Workers Compensation Nominal Insurer [2014] NSWCA 140 -
Waco Kwikform Ltd v Perigo and Workers Compensation Nominal Insurer [2014] NSWCA 140 -
Waco Kwikform Ltd v Perigo and Workers Compensation Nominal Insurer [2014] NSWCA 140 -
Waco Kwikform Ltd v Perigo and Workers Compensation Nominal Insurer [2014] NSWCA 140 -
Waco Kwikform Ltd v Perigo and Workers Compensation Nominal Insurer [2014] NSWCA 140 -
Waco Kwikform Ltd v Perigo and Workers Compensation Nominal Insurer [2014] NSWCA 140 -
Parkview Constructions Pty Ltd v Abrahim [2013] NSWCA 460 -
Ewart v Caruso [2013] WASCA 266 (25 November 2013) (McLure P, Newnes JA, Murphy JA)

31. The primary judge directed himself as to the law (correctly in my respectful view) by reference to a passage from the judgment of Wilson and Dawson JJ in ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (1986) 160 CLR 16, 36 , in which their Honours pointed out that whilst in many, if not most, cases it is still appropriate to apply the control test (in the sense of the

right to control) in the first instance other indicia (examples of which their Honours referred to) may also be relevant. I should add that in that case the reasons of Mason J (with whom Brennan and Deane JJ agreed) were to similar effect. Mason J said:

> 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. ... Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee (24).

Ewart v Caruso [2013] WASCA 266 -
Ewart v Caruso [2013] WASCA 266 -
Ewart v Caruso [2013] WASCA 266 -
Duffy v Salvation Army (Victoria) Property Trust [2013] null 0 (20 September 2013) (Hansen and Tate JJA and Beach AJA)

14. The Salvation Army accepted that it owed a duty of care to Duffy as he was an employee at common law. [10] It denied any negligence on its part and denied any breach of duty as an occupier. It also submitted that if negligence was found, then Duffy's actions had constituted contributory negligence, in that he failed to have sufficient regard to his own safety when he reached to catch a large falling mirror in circumstances where he knew or ought to have known that doing so presented a risk of injury to himself, and failed to remove himself from a position of danger. It alleged that Duffy was solely responsible for any injuries he suffered by reason of his contributory negligence. [11]

via

[10] The Salvation Army accepted that Duffy was deemed to be an employee at common law in circumstances where it had control and power over what he did at work: *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 .

Dragojlovic v The Queen [2013] VSCA 151 -
Dragojlovic v The Queen [2013] VSCA 151 -
Dragojlovic v The Queen [2013] VSCA 151 -
Dragojlovic v The Queen [2013] VSCA 151 -
Wooby v Australian Postal Corporation [2013] NSWCA 183 -
Wooby v Australian Postal Corporation [2013] NSWCA 183 -
Wooby v Australian Postal Corporation [2013] NSWCA 183 -
Wooby v Australian Postal Corporation [2013] NSWCA 183 -
Wooby v Australian Postal Corporation [2013] NSWCA 183 -
P & M Quality Smallgoods Pty Ltd v Leap Seng [2013] NSWCA 167 -
Morvatjou v Moradkhani [2013] NSWCA 157 (05 June 2013) (McColl and Hoeben JJA, Tobias AJA)

96. In order to determine whether the appellant was an employee or an independent contractor, his Honour was required to consider the totality of the relationship between the parties: *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 (at 29) per Mason J; *Hollis v Vabu Pty Ltd* [2001] HCA 44; (2001) 207 CLR 21 (at [24], [58]) per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ. The distinction between an employee and an independent contractor is "rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own": *Marshall v Whittaker's Building Supply Co* [1963] HCA 26; (1963) 109 CLR 210 (at 217) per Windeyer J; referred to with approval by the majority in *Hollis v Vabu Pty Ltd* (at [39] - [40]).

ACE Insurance Ltd v Trifunovski [2013] FCAFC 3 (25 January 2013) (Lander, Buchanan and Robertson JJ)

89. In *Connelly v Wells* (1994) 55 IR 73 Gleeson CJ (of the Supreme Court of New South Wales) referred to *Stevens v Brodribb* and to the way in which the "control test has given way to the application of competing criteria and indicia". His Honour said:

> When one person agrees to perform work for another, it may become necessary, for any one of a number of purposes, to determine whether the relationship between them is that of employer and employee. Such a determination might affect their respective obligations to the revenue authorities, or the extent to which one is legally responsible for the acts or omissions of the other, or their insurance arrangements. In the present case the respondent suffered an injury whilst at work, and the question arose, in the course of proceedings under the *Workers Compensation Act* 1987 , whether the respondent had entered into or was working under a contract of service with the appellant as his employer.
>
> When such an issue arises it is often the case that the competing possibility advanced for consideration is that the relationship between the two persons involved is that of principal and independent contractor. Consequently, many of the decided cases state the relevant principles in a manner which directs attention to the differences between these two kinds of legal relationship. The most recent authoritative statements on the subject in this country are to be found in the judgments of the High Court in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, (Mason J at 23-29, Wilson and Dawson JJ at 36-39 and Deane J at 49). As Deane J observed, the distinction between an employee and an independent contractor has become increasingly amorphous as what used to be called the control test has given way to the application of competing criteria and indicia. The degree of control to which the person performing the work is subject is still described as a prominent factor, but is not now regarded as determinative. Other relevant matters are said to include the way in which the work is remunerated, the provision and maintenance of equipment, the arrangements that are made about hours of work and provision for holidays, the obligation to work, the arrangements that are made about taxation, and the capacity to delegate the work.

ACE Insurance Ltd v Trifunovski [2013] FCAFC 3 (25 January 2013) (Lander, Buchanan and Robertson JJ)

91. His Honour thought post-contract conduct to be irrelevant. That was also the view of the Privy Council in *Chaplin* and *Narich* . It has been, however, assumed in the present case that the nature of the relationship may be legitimately examined by reference to the actual way in which work was carried out. No dispute has been raised in the present case about that approach, which for reasons to be explained shortly appears to be correct, and I will not dwell upon the contrary view. At 81 – 82 Kirby P said:

> Originally disputes such as the present were resolved by reference to the "control test", ie whether the suggested "employer" had control over the work to be done by the asserted "worker". Traditionally the test was expressed: can the person said to be the employer direct the person claimed to be a worker not only as to what the worker does but also as to how he or she does it.
>
> In due course the unsatisfactory features of this test became obvious. This led to a line of authority in which the higher courts made it clear that the search was not for *ac tual* control but for the *ultimate* authority to control the work involved, employment lying in the latter. See *Humberstone v Northern Timber Mills Pty Limited* (1949) 79 CLR 389 at 404. Nevertheless, despite this clarification, in the understandable desire to have simple rules which could determine the threshold question of the alleged employment of a worker (upon the determination of which entitlements of the Act would either follow or be denied), there was a natural tendency to look for rules which could readily be applied. One by one, these "rules" came, on analysis, to be seen as unreliable.
>
> Burke CCJ referred to the suggested principle that one indicium of employment was the control of hours. But then it was held that the absence of such control did not

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> necessarily take the relationship outside that of employment or the worker outside the protection of the Act. Similarly, the suggested rule that only a contractor supplied his or her own tools and equipment and that a worker looked to the employer to do so except in the most minor respects, became discredited. Whilst the supply of its own equipment was often an indication of the fact that the relationship was not one of employment, it was not necessarily determinative as *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 516 illustrat es.
>
> The real incapacity of the "control" test to provide sound guidance, as to the nature of the relationship of worker and employer was demonstrated in a series of cases where the asserted "worker" performed duties in isolated places or was involved in activities so peculiar and individualistic that no effective control could either be exerted or expected in that worker's work. See eg *Zuijs v Wirth Bros Pty Limited* (1955) 93 CLR 561 at 572.
>
> It is in this way that Australian courts, after their hankering for clear and simple rules, came to the present test. It is stated in such decisions as *Stevens v Brodribb Sawmilling Company Pty Limited* (1986) 160 CLR 16 .
>
> (Emphasis in original.)

and (at 83):

> The other indicia of the nature of the relationship have been variously stated and have been added to from time to time. Those 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 a distinct calling on the part of the person engaged, the provision by him of his own place of work or 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. None of these leads to any necessary inference, however, and the actual terms and terminology of the contract will always be of considerable importance.

ACE Insurance Ltd v Trifunovski [2013] FCAFC 3 -
ACE Insurance Ltd v Trifunovski [2013] FCAFC 3 -
ACE Insurance Ltd v Trifunovski [2013] FCAFC 3 -
ACE Insurance Ltd v Trifunovski [2013] FCAFC 3 -
Twynam Agricultural Group Pty Ltd v Williams [2012] NSWCA 326 -
King v The Queen [2012] VSCA 206 -
Miljus v Watpow Constructions Pty Ltd [2012] NSWCA 96 (20 April 2012) (Bathurst CJ, McColl and Whealy JJA)

72. The general position in relation to the complex of relationships on a building or development site has recently been made clear by the High Court of Australia. The relevant principles, as I see them, may be shortly stated as follows.

a) The general duty of care owed by a builder or contractor who has possession of the building site is that of an occupier. It owes a duty to persons coming onto the site to use reasonable care to avoid physical injury to them where the risk of that injury is foreseeable: *Australian Safeway Stores Pty Ltd v Zaluzna* [1987] HCA 7; 162 CLR 479 at 488 ; *Leighton Contractors Pty Ltd v Fox* [2009] HCA 35; 240 CLR 1 at [48] .

b) This duty, in circumstances where the occupier engages an independent contractor to carry out aspects of its enterprise, does not give rise to a duty of care towards an employee of the

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independent contractor akin to the duty of an employer to his employee: *Leighton Contractors* at [48] :

> "the relationship between principal and independent contractor is not one which, of itself, gives rise to a common law duty of care, much less to the special duty resting on employers to ensure that care is taken."

c) In the circumstances outlined by Mason J in *Stevens v Brodribb* , the duty to take reasonable care may, however, extend to responsibilities involved in the system of work utilised by the independent contractor. Whether this is so or not will depend on an investigation of the facts and circumstances pertinent to the enterprise being considered. As Mason J said in *Brodribb* (at 31):

> "Although the obligation to provide a safe system of work has been regarded as one attaching to an employer, there is no reason why it should be so confined. If an entrepreneur engages independent contractors to do work which might as readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work and where there is a need for him to give directions as to when and where the work is to be done and to co-ordinate the various activities, he has an obligation to prescribe a safe system of work. The fact that they are not employees, or that he does not retain a right to control them in the manner in which they carry out their work, should not affect the existence of an obligation to prescribe a safe system."

d) Where, however, the builder/occupier has engaged the services of an independent contractor whose task it is to control its employee's systems of work without supervision by the occupier, there may, depending on the overall circumstances, be no liability imposed on the builder for a failure by the independent contractor to control its own system of work. In *Stevens v Brodribb* , Brennan J said (at 47-48):

> "The duty to use reasonable care in organizing an activity does not import a duty to avoid any risk of injury; it imports a duty to use reasonable care to avoid unnecessary risks of injury and to minimize other risks of injury. It does not import a duty to retain control of working systems if it is reasonable to engage the services of independent contractors who are competent themselves to control their system of work without supervision by the entrepreneur. The circumstances may make it necessary for the entrepreneur to retain and exercise a supervisory power or to prescribe the respective areas of responsibility of independent contractors if confusion about those areas involves a risk of injury. But once the activity has been organized and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur. If there is no failure to take reasonable care in the employment of independent contractors competent to control their own systems of work, or in not retaining a supervisory power or in leaving undefined the contractors' respective areas of responsibility, the entrepreneur is not liable for damage caused merely by a negligent failure of an independent contractor to adopt or follow a safe system of work either within his area of responsibility or in an area of shared responsibility."

Miljus v Watpow Constructions Pty Ltd [2012] NSWCA 96 -
Miljus v Watpow Constructions Pty Ltd [2012] NSWCA 96 -
Miljus v Watpow Constructions Pty Ltd [2012] NSWCA 96 -
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Miljus v Watpow Constructions Pty Ltd [2012] NSWCA 96 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -

Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
Karatjas v Deakin University [2012] VSCA 53 (28 March 2012) (Nettle and Hansen JJA and Kyrou AJA)

33. With respect, however, Mrs Karatjas's case was not that Deakin owed her a duty of care just because it provided 'some security services to the overall outside areas of the campus'. It was rather and more importantly because, as the party who retained Spotless as contractor to conduct the cafeteria for the benefit of students and university staff, Deakin owed Mrs Karatjas what counsel described in his submissions to the judge as a ' *Brodribb* type' [32] duty of care. The judge did not deal with that contention.

via

[32] *Stevens v Brodbribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16 .

Karatjas v Deakin University [2012] VSCA 53 (28 March 2012) (Nettle and Hansen JJA and Kyrou AJA)

59. Contrastingly, the duty which Deakin owed to Mrs Karatjas was a duty, to adopt Hayne J's expression in *Modbury Triangle* , to prevent her getting 'in harm's way': [53] by controlling her and the system for her entry and exit to and from her place of work. It was a duty, akin to the duty in *Brodribb* , which existed because of the relationship between Deakin and Mrs Karatjas the result of Deakin retaining exclusive control over the means of entry and exit to Mrs Karatjas's place of work as opposed to Deakin's position as the occupier of the campus or the place of work. It was a duty to provide a safe system of entry and exit to the place of work; not to control the conduct of others on the campus or otherwise.

Karatjas v Deakin University [2012] VSCA 53 (28 March 2012) (Nettle and Hansen JJA and Kyrou AJA)

47. Given that an employer's obligation to provide a proper system of work extends to securing the personal safety of the employee entering and leaving a car-park which the employee is encouraged to use, as this court held in *Sartori* ; and that, in this case, Deakin exercised control over that aspect of the system of work by determining where cafeteria employees should be encouraged to park their cars and the paths which should be made available for passage from there to the cafeteria, I consider that Deakin did owe a duty to cafeteria employees of a ' *Brodribb* type' to take reasonable care to secure the personal safety of Spotless employees moving to and from the car-park to the cafeteria; and, in particular, to secure those employees against what the judge found was a foreseeable risk of Spotless employees being attacked as they moved between the car-park and the cafeteria.

Karatjas v Deakin University [2012] VSCA 53 -
Karatjas v Deakin University [2012] VSCA 53 -
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Karatjas v Deakin University [2012] VSCA 53 -
Karatjas v Deakin University [2012] VSCA 53 -
Elazac Pty Ltd v Shirreff [2011] VSCA 405 (01 December 2011) (Redlich and Mandie JJA, Beach AJA)

BarNet publication information - Date: Sunday, 28.09.2025 - Publication number: 00055 - User: jayspudvilas@gmail.com

7. Additionally, by a notice of contention, the plaintiff contends that even if he was not an employee of the defendant, his relationship with the defendant 'was still of such a nature that the duty owed by the [defendant] at common law and pursuant to section 21 of the *Occupational Health and Safety Act* 1985 was breached by the [defendant]'. In support of his notice of contention, the plaintiff contends that the duty owed to him at common law is that set out in *Stevens v Brodribb Saw Milling Pty Ltd*. [2] Whatever be the position at common law (about which we will say more below), it is convenient to deal immediately with that part of the plaintiff's notice of contention in which reliance is placed upon s 21 of the *Occupational Health and Safety Act* 1985 .

Occupational Health and Safety Act 1985

via

[2] (1986) 160 CLR 16 .

Elazac Pty Ltd v Shirreff [2011] VSCA 405 (01 December 2011) (Redlich and Mandie JJA, Beach AJA)

45. In *Stevens v Brodribb*, Mason J said: [13]

> If an entrepreneur engages independent contractors to do work which might as readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work and where there is a need to give direction when and where the work is to be done and to coordinate the various activities, he has an obligation to prescribe a safe system of work. The fact that they are not employees, or that he does not retain a right to control them in the manner in which they carry out their work, should not affect the existence of an obligation to prescribe a safe system. [14]

via

[13] Ibid [31] .

Elazac Pty Ltd v Shirreff [2011] VSCA 405 -
Elazac Pty Ltd v Shirreff [2011] VSCA 405 -
Elazac Pty Ltd v Shirreff [2011] VSCA 405 -
Elphick v Westfield Shopping Centre Management Company Pty Ltd [2011] NSWCA 356 (25 November 2011) (Young and Whealy JJA, Sackville AJA)

61. Against this background, decided cases have shown at times an uncertainty of approach. This uncertainty has, in a number of respects, been resolved by recent decisions of the High Court of Australia. The primary judge referred to several of these in his reasons for decision. However, it may be convenient to summarise in very brief form the principles I see as being relevant to the resolution of the issues here. This is not intended to be an exhaustive summary, or, for that matter, a comprehensive analysis. The relevant principles in the present matter are, as I see them, as follows:

(a) The duty of care owed by Westfield to Mr Elphick was that of an occupier. This duty was succinctly stated in *Australian Safeways Stores Pty Limited v Zaluzna* (1987) 162 CLR 479 at 488 :-

> ... the fact that [injured person] was a lawful entrant upon the land of the [occupier] establishes a relationship between them which of itself suffices to give rise to a duty on

> the part of the [occupier] to take reasonable care to avoid a foreseeable risk of injury to the [injured party].

(b) This duty, in circumstances where the occupier engages an independent contractor to carry out aspects of its enterprise, does not give rise to a duty of care towards an employee of the independent contractor akin to the duty of an employer to his employee (see *Leighton Contractors v Fox* at [48]:-

> The relationship between principal and independent contractor is not one which, of itself, gives rise to a common law duty of care, much less to the special duty resting on employers to ensure that care is taken.)

(c) In certain circumstances, the duty to take reasonable care will, however, extend to responsibilities involved in the system of work utilised by the independent contractor. Whether this is so or not will depend on a fact-intensive investigation to determine whether there is the necessary interdependence of the activities carried out in the enterprise under consideration. As Mason J said in *Brodribb* at 31 :-

> The interdependence of the activities carried out in the forest, the need for co-ordination by Brodribb of those activities and the distinct risk of personal injury to those engaged in the operations, called for the prescription and provision of a safe system by Brodribb. Omission to prescribe and provide such a system would expose the workers to an obvious risk of injury. Although the obligation to provide a safe system of work has been regarded as one attaching to an employer, there is no reason why it should be so confined. If an entrepreneur engages independent contractors to do work which might as readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work and where there is a need for him to give directions as to when and where the work is to be done and to co-ordinate the various activities, he has an obligation to prescribe a safe system of work. The fact that they are not employees, or that he does not retain a right to control them in the manner in which they carry out their work, should not affect the existence of an obligation to prescribe a safe system. Brodribb's ability to prescribe such a system was not affected by its inability to direct the contractors as to how they should operate their machines.

(d) Where, however, the occupier has engaged the services of an independent contractor whose task it is to control its employee's systems of work without supervision by the occupier, there may, depending once again on a fact-sensitive enquiry, be no liability imposed on the occupier for a failure by the independent contractor to control its own system of work. As Brennan J said in *Brodribb* at 47 - 48 :-

> The circumstances may make it necessary for the entrepreneur to retain and exercise a supervisory power or to prescribe the respective areas of responsibility of independent contractors if confusion about those areas involves a risk of injury. But once the activity has been organized and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur. If there is no failure to take reasonable care in the employment of independent contractors competent to control their own systems of work, or in not retaining a supervisory power or in leaving undefined the contractors' respective areas of responsibility, the entrepreneur is not liable for damage caused merely by a negligent failure of an independent contractor to adopt or follow a safe system of work either within his area of responsibility or in an area of shared responsibility.

Elphick v Westfield Shopping Centre Management Company Pty Ltd [2011] NSWCA 356 (25 November 2011) (Young and Whealy JJA, Sackville AJA)

BarNet publication information - Date: Sunday, 28.09.2025 - Publication number: 00055 - User: jayspudvilas@gmail.com

61. Against this background, decided cases have shown at times an uncertainty of approach. This uncertainty has, in a number of respects, been resolved by recent decisions of the High Court of Australia. The primary judge referred to several of these in his reasons for decision. However, it may be convenient to summarise in very brief form the principles I see as being relevant to the resolution of the issues here. This is not intended to be an exhaustive summary, or, for that matter, a comprehensive analysis. The relevant principles in the present matter are, as I see them, as follows:

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(b) This duty, in circumstances where the occupier engages an independent contractor to carry out aspects of its enterprise, does not give rise to a duty of care towards an employee of the independent contractor akin to the duty of an employer to his employee (see *Leighton Contractors v Fox* at [48]:-

> The relationship between principal and independent contractor is not one which, of itself, gives rise to a common law duty of care, much less to the special duty resting on employers to ensure that care is taken.)

(c) In certain circumstances, the duty to take reasonable care will, however, extend to responsibilities involved in the system of work utilised by the independent contractor. Whether this is so or not will depend on a fact-intensive investigation to determine whether there is the necessary interdependence of the activities carried out in the enterprise under consideration. As Mason J said in *Brodribb* at 31 :-

> The interdependence of the activities carried out in the forest, the need for co-ordination by Brodribb of those activities and the distinct risk of personal injury to those engaged in the operations, called for the prescription and provision of a safe system by Brodribb. Omission to prescribe and provide such a system would expose the workers to an obvious risk of injury. Although the obligation to provide a safe system of work has been regarded as one attaching to an employer, there is no reason why it should be so confined. If an entrepreneur engages independent contractors to do work which might as readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work and where there is a need for him to give directions as to when and where the work is to be done and to co-ordinate the various activities, he has an obligation to prescribe a safe system of work. The fact that they are not employees, or that he does not retain a right to control them in the manner in which they carry out their work, should not affect the existence of an obligation to prescribe a safe system. Brodribb's ability to prescribe such a system was not affected by its inability to direct the contractors as to how they should operate their machines.

(d) Where, however, the occupier has engaged the services of an independent contractor whose task it is to control its employee's systems of work without supervision by the occupier, there may, depending once again on a fact-sensitive enquiry, be no liability imposed on the occupier for a failure by the independent contractor to control its own system of work. As Brennan J said in *Brodribb* at 47 - 48 :-

> The circumstances may make it necessary for the entrepreneur to retain and exercise a supervisory power or to prescribe the respective areas of responsibility of independent contractors if confusion about those areas involves a risk of injury. But once the

BarNet publication information - Date: Sunday, 28.09.2025 - Publication number: 00055 - User: jayspudvilas@gmail.com

> activity has been organized and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur. If there is no failure to take reasonable care in the employment of independent contractors competent to control their own systems of work, or in not retaining a supervisory power or in leaving undefined the contractors' respective areas of responsibility, the entrepreneur is not liable for damage caused merely by a negligent failure of an independent contractor to adopt or follow a safe system of work either within his area of responsibility or in an area of shared responsibility.

Elphick v Westfield Shopping Centre Management Company Pty Ltd [2011] NSWCA 356 -
Elphick v Westfield Shopping Centre Management Company Pty Ltd [2011] NSWCA 356 -
Mungis (No 2) Pty Limited v Still [2011] NSWCA 261 -
Roche Mining Pty Ltd v Jeffs [2011] NSWCA 184 -
Roche Mining Pty Ltd v Jeffs [2011] NSWCA 184 -
Miller v Miller [2011] HCA 9 -
Koljibabic v BHP Billiton Nickel West Pty Ltd [2011] WASCA 87 -
Miller v Miller [2011] HCA 9 -
Koljibabic v BHP Billiton Nickel West Pty Ltd [2011] WASCA 87 -
Miller v Miller [2011] HCA 9 -
Miller v Miller [2011] HCA 9 -
Ilvariy Pty Ltd v Sijuk [2011] NSWCA 12 -
Ilvariy Pty Ltd v Sijuk [2011] NSWCA 12 -
Galea v Bagtrans Pty Ltd [2010] NSWCA 350 -
Placer (Granny Smith) Pty Ltd v Specialised Reline Services Pty Ltd [2010] WASCA 148 -
Placer (Granny Smith) Pty Ltd v Specialised Reline Services Pty Ltd [2010] WASCA 148 -
Placer (Granny Smith) Pty Ltd v Specialised Reline Services Pty Ltd [2010] WASCA 148 -
Unilever Australia Limited v Pahi; Swire Cold Storage Pty Limited v Pahi [2010] NSWCA 149 (05 July 2010) (Allsop P, Beazley and Giles JJA)

> (v) In accordance with the principles stated in *Stevens v Brodribb* , there was no duty on Streets or Swire to control the system of work implemented by ESP: [62]. Accordingly, his Honour erred in finding that Streets and Swire each owed and breached a relevant duty of care to Ms Pahi : [75].

Unilever Australia Limited v Pahi; Swire Cold Storage Pty Limited v Pahi [2010] NSWCA 149 (05 July 2010) (Allsop P, Beazley and Giles JJA)

> 51 In *Pacific Steel v Barahona*, this Court noted, at [88]:
>
> > "The circumstances [in *Stevens v Brodribb*] to which Brennan J referred were not elaborated. Subsequent cases have explored the circumstances, but *Leighton v Fox* stands against arriving at 'a general law obligation … of a more extensive kind than that recognised in *Stevens v Brodribb Sawmilling Co Pty Ltd* ' (at [59])."

The liability of Streets and Swire

Unilever Australia Limited v Pahi; Swire Cold Storage Pty Limited v Pahi [2010] NSWCA 149 -
Unilever Australia Limited v Pahi; Swire Cold Storage Pty Limited v Pahi [2010] NSWCA 149 -
Unilever Australia Limited v Pahi; Swire Cold Storage Pty Limited v Pahi [2010] NSWCA 149 -
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Unilever Australia Limited v Pahi; Swire Cold Storage Pty Limited v Pahi [2010] NSWCA 149 -
Unilever Australia Limited v Pahi; Swire Cold Storage Pty Limited v Pahi [2010] NSWCA 149 -

Unilever Australia Limited v Pahi; Swire Cold Storage Pty Limited v Pahi [2010] NSWCA 149 -
Musija v Kresa [2010] VSCA 163 -
Roy Morgan Research Pty Ltd v Commissioner of Taxation [2010] FCAFC 52 (26 May 2010) (Keane CJ, Sundberg and Kenny JJ)

16. The Tribunal then undertook a detailed review of the leading cases on whether a person is an employee or something else. These included *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) 33 ATR 537 (*Vabu*), *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 (*Hollis*), *World Book (Australia) Pty Ltd v Federal Commissioner of Taxation* (1992) 23 ATR 412 (*World Book*), *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 (*Stevens*), *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (1997) 37 ATR 528 (*Roy Morgan Centre*), *Commissioner of State Taxation v Roy Morgan Research Centre Pty Ltd* (2004) 90 SASR 12 (*Roy Morgan SA*) and *M arshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 (*Marshall*).

Roy Morgan Research Pty Ltd v Commissioner of Taxation [2010] FCAFC 52 (26 May 2010) (Keane CJ, Sundberg and Kenny JJ)

51. In *Stevens* 160 CLR at 3637 Wilson and Dawson JJ said that the right to the exclusive services of the person engaged pointed towards a contract of service. In the passage quoted the Tribunal was simply summarising the evidence that bore on this issue. Interviewers were not precluded from working for other enterprises, including competitors of Roy Morgan. But when they were working for Roy Morgan they were not to pursue other activities, either for their own benefit or for others. Further, information they obtained while working for Roy Morgan could not be used for other purposes or advantages. We are unable to discern how the Tribunal's rendering of this evidence, in its overall assessment of the parties' relationship, constitutes an error of law in "formulating and applying the [unidentified] test set out in *Stevens v Brodribb* ".

Roy Morgan Research Pty Ltd v Commissioner of Taxation [2010] FCAFC 52 -
Roy Morgan Research Pty Ltd v Commissioner of Taxation [2010] FCAFC 52 -
Roy Morgan Research Pty Ltd v Commissioner of Taxation [2010] FCAFC 52 -
Roy Morgan Research Pty Ltd v Commissioner of Taxation [2010] FCAFC 52 -
Roy Morgan Research Pty Ltd v Commissioner of Taxation [2010] FCAFC 52 -
Pollard v Wilson [2010] NSWCA 68 -
Pollard v Wilson [2010] NSWCA 68 -
Pollard v Wilson [2010] NSWCA 68 -
Kuhl v Zurich Financial Services Australia Ltd [2010] WASCA 50 -
Kuhl v Zurich Financial Services Australia Ltd [2010] WASCA 50 -
Kuhl v Zurich Financial Services Australia Ltd [2010] WASCA 50 -
Kuhl v Zurich Financial Services Australia Ltd [2010] WASCA 50 -
Kuhl v Zurich Financial Services Australia Ltd [2010] WASCA 50 -
Pacific Steel Constructions Pty Ltd v Barahona [2009] NSWCA 406 (11 December 2009) (Allsop P, Beazley and Giles JJA)
Stevens v Brodribb Sawmilling Co Pty Ltd [1986] HCA 1 ; (1986) 160 CLR 16
Sweeney v Boylan Nominees Pty Limited

Pacific Steel Constructions Pty Ltd v Barahona [2009] NSWCA 406 -
Pacific Steel Constructions Pty Ltd v Barahona [2009] NSWCA 406 -
Pacific Steel Constructions Pty Ltd v Barahona [2009] NSWCA 406 -
Pacific Steel Constructions Pty Ltd v Barahona [2009] NSWCA 406 -
Pacific Steel Constructions Pty Ltd v Barahona [2009] NSWCA 406 -
Pacific Steel Constructions Pty Ltd v Barahona [2009] NSWCA 406 -
Miller v Miller [2009] WASCA 199 -
Vlado Adonovski v Park Tec Engineering Pty Ltd [2009] NSWCA 305 (27 October 2009) (Tobias and Young JJA, Sackville AJA)
Stevens v Brodribb Sawmilling Co Pty Ltd [1986] HCA 1 ; 160 CLR 16
Warren v Coombes

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Vlado Adonovski v Park Tec Engineering Pty Ltd [2009] NSWCA 305 -
Ireland v Ian Johnson CEO of the Department of Corrective Services [2009] WASCA 162 (03 September 2009) (Wheeler JA, Pullin JA, LE Miere J)

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

Ireland v Ian Johnson CEO of the Department of Corrective Services [2009] WASCA 162 -
Ireland v Ian Johnson CEO of the Department of Corrective Services [2009] WASCA 162 -
Ireland v Ian Johnson CEO of the Department of Corrective Services [2009] WASCA 162 -
Leighton Contractors Pty Ltd v Fox [2009] HCA 35 (02 September 2009) (French CJ,Gummow, Hayne, Heydon and Bell JJ)

> 62. In *Stevens v Brodribb Sawmilling Co Pty Ltd* [84] Mason J explained that if an entrepreneur engages independent contractors to do work that might as readily be done by employees, in circumstances in which there is a risk to them of injury arising from the nature of the work and where there is a need for direction and co-ordination of the various activities being undertaken, the entrepreneur will come under a duty to prescribe a safe system of work. Mr Fox submitted that Downview's liability should be sustained upon this basis. He pointed to the fact that this was a busy building site with many people in and about it. However, as the Court of Appeal observed, there is nothing unreasonable about subcontracting the work of concrete pumping [85] . It is an activity that requires specialised equipment and which lends itself to being carried out by independent contractors. The primary judge's findings that the line cleaning was a self-contained operation that did not require co-ordination with other activities on the site was not disturbed. Mr Fox's submission cannot be sustained.

Leighton Contractors Pty Ltd v Fox [2009] HCA 35 -
Leighton Contractors Pty Ltd v Fox [2009] HCA 35 -
Leighton Contractors Pty Ltd v Fox [2009] HCA 35 -
Leighton Contractors Pty Ltd v Fox [2009] HCA 35 -
Leighton Contractors Pty Ltd v Fox [2009] HCA 35 -
Leighton Contractors Pty Ltd v Fox [2009] HCA 35 -
Leighton Contractors Pty Ltd v Fox [2009] HCA 35 -
Leighton Contractors Pty Ltd v Fox [2009] HCA 35 -
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Leighton Contractors Pty Ltd v Fox [2009] HCA 35 -
Leighton Contractors Pty Ltd v Fox [2009] HCA 35 -
Leighton Contractors Pty Ltd v Fox [2009] HCA 35 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 (26 June 2009) (Beazley JA at 1; Ipp JA at 113; Basten JA at 128)

160 CLR 16 (considered)

Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
Commissioner of State Revenue v Mortgage Force Australia Pty Ltd [2009] WASCA 24 -
Commissioner of State Revenue v Mortgage Force Australia Pty Ltd [2009] WASCA 24 -
Commissioner of State Revenue v Mortgage Force Australia Pty Ltd [2009] WASCA 24 -
Commissioner of State Revenue v Mortgage Force Australia Pty Ltd [2009] WASCA 24 -
Tobiassen v Reilly [2009] WASCA 26 -

Tobiassen v Reilly [2009] WASCA 26 -
Tobiassen v Reilly [2009] WASCA 26 -
Tobiassen v Reilly [2009] WASCA 26 -
Transfield Services (Australia) v Hall [2008] NSWCA 294 (10 November 2008) (Beazley JA ; Campbell JA ; McClellan CJ at CL)

81 Deane J, the other judge who sat in ***Stevens v Brodribb*** , said nothing about the significance of extra-hazardous activities.

Transfield Services (Australia) v Hall [2008] NSWCA 294 -
Transfield Services (Australia) v Hall [2008] NSWCA 294 -
Transfield Services (Australia) v Hall [2008] NSWCA 294 -
Transfield Services (Australia) v Hall [2008] NSWCA 294 -
Transfield Services (Australia) v Hall [2008] NSWCA 294 -
Transfield Services (Australia) v Hall [2008] NSWCA 294 -
Transfield Services (Australia) v Hall [2008] NSWCA 294 -
Transfield Services (Australia) v Hall [2008] NSWCA 294 -
Tarabay v Leite [2008] NSWCA 259 -
Tarabay v Leite [2008] NSWCA 259 -
Tarabay v Leite [2008] NSWCA 259 -
Fitzgerald v Hill [2008] QCA 283 (16 September 2008) (McMurdo P, Holmes JA and Mackenzie AJA,)
(1986) 160 CLR 16; [1986] HCA 1 , applied

Fitzgerald v Hill [2008] QCA 283 -
Fitzgerald v Hill [2008] QCA 283 -
Fitzgerald v Hill [2008] QCA 283 -
Tolhurst v Cleary Bros (Bombo) Pty Ltd [2008] NSWCA 181 (12 August 2008) (Beazley JA ; Giles JA ; Tobias JA)

64 Thus in *Rockdale Beef Pty Ltd v Carey* [2003] NSWCA 132 Ipp JA, with whom Mason P and McColl JA agreed, said -

> "79 The judgments of Wilson and Dawson JJ and Deane J in *Stevens* are authority for the proposition that an entrepreneur may owe a duty of care to an independent contractor when, according to the general law of negligence, the circumstances are such that a duty arises. The existence of the duty is not conditional on the existence of any particular factual element. It is the substantive content of the relationship between the parties that is decisive. As it was put by Gummow and Hayne JJ in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 194 ALR 337 at 375, albeit in relation to a different context, the "totality of the relationship between the parties ... is the proper basis upon which a duty of care may be recognised.'
>
> ...
>
> 84 In my opinion, nothing said by Mason J or Brennan J in *Stevens* , or Heydon JA in *Kolodziejczyk* prevents the general law of negligence imposing on an entrepreneur a duty of care owed to an independent contractor. Such a duty may arise in circumstances where there is no need for the entrepreneur to give directions as to when and where the work is to be done and to co-ordinate the various activities, but where, for other reasons, reasonable care on the part of the entrepreneur affects the way in which the work is to be undertaken and the safety of the work site, and where other considerations (not applicable in *Stevens* and *Kolodziejczyk*) such as vulnerability, inequality of bargaining power, control, and the

> other manifold factors that the law recognises as being relevant to the existence of a duty of care, are present."

Tolhurst v Cleary Bros (Bombo) Pty Ltd [2008] NSWCA 181 -
Tolhurst v Cleary Bros (Bombo) Pty Ltd [2008] NSWCA 181 -
Tolhurst v Cleary Bros (Bombo) Pty Ltd [2008] NSWCA 181 -
Tolhurst v Cleary Bros (Bombo) Pty Ltd [2008] NSWCA 181 -
Tolhurst v Cleary Bros (Bombo) Pty Ltd [2008] NSWCA 181 -
Tolhurst v Cleary Bros (Bombo) Pty Ltd [2008] NSWCA 181 -
Wesfarmers Federation Insurance Ltd v Stephen Wells trading as Wells Plumbing [2008] NSWCA 186 -
Wesfarmers Federation Insurance Ltd v Stephen Wells trading as Wells Plumbing [2008] NSWCA 186 -
Wesfarmers Federation Insurance Ltd v Stephen Wells trading as Wells Plumbing [2008] NSWCA 186 -
Wesfarmers Federation Insurance Ltd v Stephen Wells trading as Wells Plumbing [2008] NSWCA 186 -
Wesfarmers Federation Insurance Ltd v Stephen Wells trading as Wells Plumbing [2008] NSWCA 186 -
Wesfarmers Federation Insurance Ltd v Stephen Wells trading as Wells Plumbing [2008] NSWCA 186 -
J Blackwood & Son v Skilled Engineering [2008] NSWCA 142 -
J Blackwood & Son v Skilled Engineering [2008] NSWCA 142 -
The Uniting Church v Takacs [2008] NSWCA 141 (20 June 2008) (Hodgson JA at 1; McColl JA at 61; Basten JA at 83)

> 76. Had the Trust ultimately entered a contract with the respondent for him to carry out the activity of painting of the roof, he would have been so engaged as an independent contractor. His acts would not, in law, have been the Trust's acts. An independent contractor does not become the "agent" of the principal for the purpose of reg 73 merely because the parties enter into a contract for services: *Balesfire* (at [65]). It would have been up to him to decide how to perform the task at hand consistent with him carrying on his own trade, including determining what, if any, safeguards should be deployed: *Marshall v Whittaker's Building Supply Co* [1963] HCA 26; (1963) 109 CLR 210 (at 217) per Windeyer J (expressed in dissent, but referred to with approval in *Hollis v Vabu Pty Ltd* [2001] HCA 44; (2001) 207 CLR 21 (at [40]) per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); see also *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; (2002) 209 CLR 95 (at [40]) per Gaudron, McHugh, Hayne and Callinan JJ); *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 (at 37) per Wilson and Dawson JJ. In my view the respondent did not lose his independent contractor status merely because he had not yet entered into a contract.

The Uniting Church v Takacs [2008] NSWCA 141 -
Homecare Direct Shopping Pty Ltd v Gray [2008] VSCA 111 -
Homecare Direct Shopping Pty Ltd v Gray [2008] VSCA 111 -
SNF (Australia) Pty Ltd v Jones [2008] WASCA 121 (10 June 2008) (McLure JA)

> 43 The question whether a duty of care is non-delegable only arises if a defendant owes a duty of care to the claimant and has expressly or impliedly delegated the responsibility for discharging the duty to a suitably qualified and experienced independent contractor. (A failure to take reasonable care in the selection of the contractor will constitute a breach of the usual common law duty.) A defendant will be liable for the negligence of an independent contractor if the defendant's duty of care is higher than usual and extends to ensuring the independent contractor is not negligent: ***Burnie Port Authority v General Jones Pty Ltd*** (1994) 179 CLR 520; ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (1986) 160 CLR 16 . Ordinarily, questions of non-delegability arise in cases where the existence and scope of the duty of care are well established, as in the employment relationship. In cases such as

this where there is a dispute as to whether the defendant owed a duty of care at all, the answer to that question will have regard to all relevant circumstances including the involvement of contractors.

SNF (Australia) Pty Ltd v Jones [2008] WASCA 121 -
SNF (Australia) Pty Ltd v Jones [2008] WASCA 121 -
Erect Safe Scaffolding (Australia) Pty Ltd v Sutton [2008] NSWCA 114 (06 June 2008) (Giles JA; Basten JA ; McClellan CJ at CL)

132 When an employer is engaged as a subcontractor on a large and complex construction site, its activities must conform to the requirements for the overall management of that site. Efficiency of effort requires that safety issues are managed by coordinating the efforts of all subcontractors through a body such as a Safety Committee. Because each subcontractor has responsibility for its own tasks and cannot undertake the work of other subcontractors, they are entitled to expect that the Head Contractor will put in place and effectively manage a system of safety appropriate to the needs of the whole site, (see *Stevens v Brodribb Sawmilling Co Pty Ltd* (1985-1986) 160 CLR 16 at 31). However, this does not mean that when it becomes aware of a problem posing an immediate threat to the safety of its own workers, a subcontractor may discharge its duty by leaving the matter in the hands of the Safety Committee. It has a responsibility to ensure that the Safety Committee responds effectively and rectifies the hazard, removing the danger before its employees are subjected to the identified risk. Until the danger is rectified it has an obligation to ensure its workers are not subjected to it, if necessary, by refusing to allow them to carry out tasks where they may encounter the danger.

Erect Safe Scaffolding (Australia) Pty Ltd v Sutton [2008] NSWCA 114 -
Fox v Leighton Contractors Pty Ltd [2008] NSWCA 23 -
Fox v Leighton Contractors Pty Ltd [2008] NSWCA 23 -
Fox v Leighton Contractors Pty Ltd [2008] NSWCA 23 -
Fox v Leighton Contractors Pty Ltd [2008] NSWCA 23 -
Anyco Pty Ltd v Kleeman [2008] WASCA 30 (19 February 2008) (Pullin JA)

41. Turning first to the question of the appellant's duty of care, it is well established that, in addition to any relevant statutory duty, a principal or head contractor may owe a duty of care at common law to subcontractors and their employees to establish a safe system of work. The law was stated in ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (1985) 160 CLR 16 by Mason J as follows:

> Although the obligation to provide a safe system of work has been regarded as one attaching to an employer, there is no reason why it should be so confined. If an entrepreneur engages independent contractors to do work which might as readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work and where there is a need for him to give directions as to when and where the work is to be done and to coordinate the various activities, he has an obligation to prescribe a safe system of work. The fact that they are not employees, or that he does not retain a right to control them in the manner in which they carry out their work, should not affect the existence of an obligation to prescribe a safe system (31).

Anyco Pty Ltd v Kleeman [2008] WASCA 30 -
Anyco Pty Ltd v Kleeman [2008] WASCA 30 -
Anyco Pty Ltd v Kleeman [2008] WASCA 30 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 (14 September 2007) (Mason P; Santow JA ; Basten JA)

33 *Stevens v Brodribb Sawmilling Co Pty Ltd* (supra) has been invoked in subsequent decisions which have imposed analogous duties upon an entrepreneur or principal, though there was lacking that interdependence of activities upon a complex site calling for co-ordination. For example in *Rockdale Beef Pty Ltd v Carey* [2003] NSWCA 132 Ipp JA, with whom Mason P and McColl JA concurred, extended the principle beyond cases akin to those described in *Stevens v Brodribb* . The court

concluded that one must judge the case for such extension by reference to the totality of the relationship between the parties. At [84] in *Rockdale* Ipp JA said:

> "... Such a duty may arise in circumstances where there is no need for the entrepreneur to give directions as to when and where the work is to be done and to co-ordinate the various activities, but where, for other reasons, reasonable care on the part of the entrepreneur affects the way in which the work is to be undertaken and the safety of the work site, and where other considerations ... such as vulnerability, inequality of bargaining power, control, and the other manifold factors that the law recognises as being relevant to the existence of a duty of care, are present."

Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
J Blackwood & Son Steel & Metals Pty Ltd v Nichols [2007] NSWCA 157 (04 July 2007) (Mason P; Tobias JA; Handley AJA)

52. As I have indicated, the duty of care held to be owed by TNT in *Christie* was directly based upon the principle expounded by Mason J in *Stevens* . In the present case, the first respondent expressly eschewed any such reliance submitting that no allegation was made that the appellant was some sort of de facto employer of the first respondent. This concession was properly made as, unlike TNT, the appellant had not exercised daily control over the relevant work activities of the first respondent, namely, the securing of his load; nor had it placed itself in a relationship, day in and day out, indistinguishable from that of employee and employer.

J Blackwood & Son Steel & Metals Pty Ltd v Nichols [2007] NSWCA 157 -
J Blackwood & Son Steel & Metals Pty Ltd v Nichols [2007] NSWCA 157 -
J Blackwood & Son Steel & Metals Pty Ltd v Nichols [2007] NSWCA 157 -
J Blackwood & Son Steel & Metals Pty Ltd v Nichols [2007] NSWCA 157 -
J Blackwood & Son Steel & Metals Pty Ltd v Nichols [2007] NSWCA 157 -
J Blackwood & Son Steel & Metals Pty Ltd v Nichols [2007] NSWCA 157 -
J Blackwood & Son Steel & Metals Pty Ltd v Nichols [2007] NSWCA 157 -
Victorian WorkCover Authority v Game [2007] VSCA 86 -
Fitzpatrick v Job t/as Jobs Engineering [2007] WASCA 63 -
Fitzpatrick v Job t/as Jobs Engineering [2007] WASCA 63 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Mambare Pty Ltd trading as Valley Homes v Rebecca Irene Bell in her capacity as Administratrix of the Estate of the Late Simon James Bell & Anor [2006] NSWCA 332 -
Mambare Pty Ltd trading as Valley Homes v Rebecca Irene Bell in her capacity as Administratrix of the Estate of the Late Simon James Bell & Anor [2006] NSWCA 332 -
Mambare Pty Ltd trading as Valley Homes v Rebecca Irene Bell in her capacity as Administratrix of the Estate of the Late Simon James Bell & Anor [2006] NSWCA 332 -
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Mambare Pty Ltd trading as Valley Homes v Rebecca Irene Bell in her capacity as Administratrix of the Estate of the Late Simon James Bell & Anor [2006] NSWCA 332 -

Glynn v Challenge Recruitment Australia Pty Ltd [2006] NSWCA 203 -
Glynn v Challenge Recruitment Australia Pty Ltd [2006] NSWCA 203 -
ACT Visiting Medical Officers Association v Australian Industrial Relations Commission [2006] FCAFC 109 -
ACT Visiting Medical Officers Association v Australian Industrial Relations Commission [2006] FCAFC 109 -
ACT Visiting Medical Officers Association v Australian Industrial Relations Commission [2006] FCAFC 109 -
ACT Visiting Medical Officers Association v Australian Industrial Relations Commission [2006] FCAFC 109 -
Maricic v Dalma Formwork (Australia) Pty Ltd [2006] NSWCA 174 (30 June 2006) (Beazley JA at 1; Ipp JA at 2; Basten JA at 3)

Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16
Stewart v Dillingham Constructions Pty Ltd

Maricic v Dalma Formwork (Australia) Pty Ltd [2006] NSWCA 174 (30 June 2006) (Beazley JA at 1; Ipp JA at 2; Basten JA at 3)

44 *Rockdale* was a case in which a stockman working on a feed-lot was injured when a steer, which had turned back in a race, struck the plaintiff's horse as he was seeking to prevent its escape. In relation to the opinions expressed in *Stevens* , Ipp JA said that the nature and extent of the duty of care must be established by reference to the general law of negligence: the examples given in *Stevens* were not exhaustive of the class. His Honour said (at [84]):

> "Such a duty may arise in circumstances where there is no need for the entrepreneur to give directions as to when and where the work is to be done and to co-ordinate the various activities, but where, for other reasons, reasonable care on the part of the entrepreneur affects the way in which the work is to be undertaken and the safety of the work site, and where other considerations (not applicable in *Stevens* ...) such as vulnerability, inequality of bargaining power, control, and other manifold factors that the law recognises as being relevant to the existence of a duty of care, are present."

Maricic v Dalma Formwork (Australia) Pty Ltd [2006] NSWCA 174 -
Maricic v Dalma Formwork (Australia) Pty Ltd [2006] NSWCA 174 -
Maricic v Dalma Formwork (Australia) Pty Ltd [2006] NSWCA 174 -
Maricic v Dalma Formwork (Australia) Pty Ltd [2006] NSWCA 174 -
Maricic v Dalma Formwork (Australia) Pty Ltd [2006] NSWCA 174 -
Sweeney v Boylan Nominees Pty Ltd [2006] HCA 19 (16 May 2006) (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ)

91. Secondly, Boylan argued that to apply the *CML* rule would undermine the principle in *Quarman v Burnett* [123] . That principle holds that, at common law, a person is not generally liable for the negligence of an independent contractor. This Court was repeatedly reminded by Boylan's counsel that the *Quarman* principle had stood for 160 years and had been affirmed in *Stevens* [124] and other cases [125] .

via

[124] (1986) 160 CLR 16 at 43.

Sweeney v Boylan Nominees Pty Ltd [2006] HCA 19 (16 May 2006) (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ)

61. *Matters not in issue*: A number of arguments that were considered by the Court of Appeal (or which might otherwise have been suggested by the facts of this case) are not in issue in this appeal:

(1) *The personal liability issue*: Neither as a matter of law, nor as a matter of fact, was it argued that Boylan was directly responsible for Mrs Sweeney's injury. Thus, there was no attempt to suggest that Boylan owed Mrs Sweeney a non-delegable duty of care on the basis that the defective refrigerator door constituted an "extra-hazardous" risk [85] or on some other ground. As to the facts, although it is true that there had been a defect in the refrigerator door *befor e* Mr Comninos endeavoured to fix it, the primary judge's conclusion that the actual *cause* of Mrs Sweeney's injury was not that defect but the incompetent attempt to repair it. Clearly, that conclusion was open to the primary judge. In this Court, it was not suggested for Mrs Sweeney that liability could be brought home to Boylan, except as it was responsible for the negligence of Mr Comninos.

(2) *The statutory employment issue*: A belated attempt was made in the Court of Appeal to argue that Mr Comninos was a "deemed worker" of Boylan's and that the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW) [86] applied. However, even if that provision applied in some way to resolve the common law duty of Boylan to Mrs Sweeney, such an issue had not been raised at trial. Without procedural unfairness to Boylan it could not be asserted for the first time on appeal. The effect (if any) of that statute was therefore rejected by the Court of Appeal [87]. The argument was not revived in this Court.

(3) *The organisation test issue*: Mrs Sweeney did not seek to revive Lord Denning's attempt to explain the ambit of vicarious liability for persons working for and within the organisation of the defendant's business [88]. There are some similarities between the expression of this test ("part and parcel of the organisation") and other attempts to explain vicarious liability by reference to an analysis of "enterprise risk" (for example, as considered by the Supreme Court of Canada [89]). This Court rejected the organisation test in *Stevens* [90]. Whilst there may be more to the notion than some critics have suggested, it was not revived in argument in this appeal. Any reconsideration of the organisation test must therefore await another day.

(4) *The ipso facto representative issue*: It was suggested in the Court of Appeal that McHugh J had developed a *sui generis* principle of his own which he had propounded in a series of cases. This, it was argued, was to the effect that a principal is vicariously liable for acts carried out by an authorised agent [91]. Bec ause there are some resonances of this view in the reasons of the primary judge, when he came to his ultimate conclusion that vicarious liability existed in this case[92], it is important to understand that the arguments for Mrs Sweeney did not propound any such "broader doctrine". The Court of Appeal pointed out that the joint reasons in *Hollis* did not embrace the approach taken by McHugh J [93]. The joint reasons did not need to do so because of the finding of the participating judges that the proper relationship in that case was that of employment. By well established doctrine, that relationship, if proved, attracted vicarious liability for the tortious acts of the employee.

via

[90] (1986) 160 CLR 16 at 26-29, 35-36. Cf *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395 at 402.

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Sweeney v Boylan Nominees Pty Ltd [2006] HCA 19 -
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Sweeney v Boylan Nominees Pty Ltd [2006] HCA 19 -
Balesfire Pty Ltd t/as the Gutter Shop & Ors v Jamie Adams & Ors [2006] NSWCA 112 -
Balesfire Pty Ltd t/as the Gutter Shop & Ors v Jamie Adams & Ors [2006] NSWCA 112 -
Balesfire Pty Ltd t/as the Gutter Shop & Ors v Jamie Adams & Ors [2006] NSWCA 112 -
Balesfire Pty Ltd t/as the Gutter Shop & Ors v Jamie Adams & Ors [2006] NSWCA 112 -
Dowthwaite Holdings Pty Ltd v Saliba [2006] WASCA 72 (03 May 2006) (McLure JA)

110. Bristile admitted at the trial that it owed a duty of care to Mr Barley and to Dowthwaite in certain circumstances, but the content of the duty of care is an issue on this appeal. The trial Judge found that Bristile had established a system which imposed on Bristile a duty to subcontractors to inspect premises to ensure that the premises were safe for the tiling contractors and their employees, but that this duty did not extend to inspecting the interior of premises to ensure that there were no hazards such as unguarded voids that might cause injury to subcontractors. Her Honour concluded that "whatever the extent of the duty of care was in relation to the exterior of the premises it did not extend to an inspection of the interior in the circumstances of this case". Her Honour said:

> "72 Bristile had no control over the care and management of the premises although its system involved a liaison between the builder and sub-contractors in relation to ongoing safety issues which could include safety issues inside the premises if access was required. After Bristile has been contacted by a builder and advised that the premises are ready for the installation of tiling the supervisor calls out to check whether the appropriate scaffolding has been installed. There may be a number of days between that inspection and the installation of the tiles during which there could be changes in the condition of the premises. It is difficult to see how Bristile could sustain an ongoing duty of care in relation to a broad range of safety issues in the premises when the inspection could have been some days prior to the arrival of the tilers. The responsibility for maintaining a safe environment in the premises is an ongoing responsibility of the occupier, Saliba.
>
> 73 Once Dowthwaite is advised to attend at the premises responsibility for ensuring that the tilers are not exposed to hazards in the work place is also the responsibility of Dowthwaite as employer. It is the employer that has the opportunity of ascertaining the condition of the premises prior to and during the installation of the tiles and the employer who has the opportunity to instruct the tilers as to the system of work to be employed. If safety issues arise either during or before the installation of the tiles the usual practice is to contact Bristile to speak to the builder unless the builder happened to be present at the premises to allow for direct communication. As part of the general system in place Bristile would then contact the builder to rectify any hazards that had been identified. As with the advisory role this system of liaison does not translate into a duty to inspect and warn sub-contractors in relation to safety issues inside the premises. The role played by Bristile is analogous to the role of entrepreneur described by Brennan J in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 47 – 48 :
>
> 'The duty to use reasonable care in organising an activity does not import a duty to avoid any risk of injury; it imports a duty to use reasonable care to avoid unnecessary risks of injury and to

minimise other risks of injury. It does not import a duty to retain control of working systems if it is reasonable to engage the services of independent contractors who are competent in themselves to control their systems of work without supervision by the entrepreneur ... Once the activity has been organised and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur.'

74 There is no issue in this case that the plaintiff was anything other than an employee of an independent contractor, namely Dowthwaite. ..."

BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers [2006] WASCA 49 (29 March 2006) (Wheeler J)

113 The Union submits that the correct approach to deciding the question of the existence of an employment relationship is to have regard to the "totality of the relationship" – see ***Hollis v Vabu Pty Ltd*** (2001) 207 CLR 21 at 33, [24] ; ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (1986) 160 CLR 16 at 29 ; ***Personnel Contracting Pty Ltd v CFMEU*** (*supra*) at [28] per Steytler J at [99] – [100] per Simmonds J.

BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers [2006] WASCA 49 -
BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers [2006] WASCA 49 -
Coca-Cola Amatil (NSW) Pty Ltd v Pareezer [2006] NSWCA 45 -
M a Partitioning & Ceilings Pty Ltd v Kezic [2005] NSWCA 414 (25 November 2005) (Santow and Bryson JJA, Hoeben J)

27 However, it is important to underline that in the present case the respondent eschewed reliance upon that basis of liability in *Brodribb* ; it may be referred to by the shorthand "the co-ordination basis" of liability. That derives from interdependence of activities there carried out and the need for co-ordination by the head contractor in order to avoid the distinct risk of personal injury to those engaged in the operations, so calling for the prescription and provision of a safe system of work by that contractor. Such overall site-co-ordinating role as might have been exercised by MAP was not called in aid by the respondent, no doubt having regard to the way the case was argued at trial, in circumstances where the pleadings themselves fell short of so alleging. Essentially MAP and V & B were both engaged in the gyprocking and plastering, working alongside each other on site, with MAP in the superior position as contractor to V & B as sub-contractor, under arrangements described below.

M a Partitioning & Ceilings Pty Ltd v Kezic [2005] NSWCA 414 -
M a Partitioning & Ceilings Pty Ltd v Kezic [2005] NSWCA 414 -
M a Partitioning & Ceilings Pty Ltd v Kezic [2005] NSWCA 414 -
M a Partitioning & Ceilings Pty Ltd v Kezic [2005] NSWCA 414 -
M a Partitioning & Ceilings Pty Ltd v Kezic [2005] NSWCA 414 -
Di Vincenzo v McKrill [2005] WASCA 222 -
Di Vincenzo v McKrill [2005] WASCA 222 -
Samsung Electronics Australia Pty Ltd v Macura [2005] NSWCA 386 (11 November 2005) (Mason P, Campbell AJA and Gzell J)

18 His Honour also took the view that Samsung owed a duty of care to Mr Macura of the type described by Mason J in *Stevens v Brodribb Sawmiling Co Pty Ltd* (1985-1986) 160 CLR 16 .

The legal principles

Samsung Electronics Australia Pty Ltd v Macura [2005] NSWCA 386 -
Samsung Electronics Australia Pty Ltd v Macura [2005] NSWCA 386 -
Samsung Electronics Australia Pty Ltd v Macura [2005] NSWCA 386 -
Samsung Electronics Australia Pty Ltd v Macura [2005] NSWCA 386 -
Paul Andrew Bennett and Craig Bradley Dix t/as FITNESS PAINTING and Property Maintenance v Higgins [2005] WASCA 197 (19 October 2005) (Wheeler J, Pullin J, LE Miere J)

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

Telstra Corp Ltd v Worthing

Paul Andrew Bennett and Craig Bradley Dix t/as FITNESS PAINTING and Property Maintenance v Higgins [2005] WASCA 197 -
State of New South Wales v Watzinger [2005] NSWCA 329 -
English v Rogers [2005] NSWCA 327 -
Re Australian Industrial Relations Commission and Arends; ex parte Commonwealth of Australia [2005] FCAFC 204 -
Re Australian Industrial Relations Commission and Arends; ex parte Commonwealth of Australia [2005] FCAFC 204 -
Lopez v Deputy Commissioner of Taxation [2005] FCAFC 157 (15 August 2005) (Ryan, Lander and Crennan JJ)

49. It was submitted, in the same context, that the so-called "organisation test" is one of the indicia which may be evaluated in drawing the distinction, but it cannot be determinative in characterising the contract as being one of service if the application of the control test, either on its own or with other indicia, yields the conclusion that it is a contract of services: *Stevens v Brodribb* (supra), at 27. The adaptation of the common law to changes in the nature of work including increased specialisation and the deployment in commerce and industry of members of professional bodies has been noted by the High Court in *Hollis v Vabu Pty Ltd* (supra), at 39-41 . The fact that a presumptive employer has knowledge and skill in relation to the work performed which is at least equal to that of the presumptive employees, but chooses to allow them great scope for individual initiative in how and when they perform the work does not militate against the contracts being ones of employment rather than for services: *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395 at 404.

Lopez v Deputy Commissioner of Taxation [2005] FCAFC 157 -
Creevey v Barrois [2005] NSWCA 264 -
Lopez v Deputy Commissioner of Taxation [2005] FCAFC 157 -
Lopez v Deputy Commissioner of Taxation [2005] FCAFC 157 -
Lopez v Deputy Commissioner of Taxation [2005] FCAFC 157 -
Creevey v Barrois [2005] NSWCA 264 -
Rawson Homes Pty. Ltd. v Donnelly [2005] NSWCA 211 -
Rawson Homes Pty. Ltd. v Donnelly [2005] NSWCA 211 -
Martin v Clarke [2005] WASCA 66 -
Martin v Clarke [2005] WASCA 66 -
Martin v Clarke [2005] WASCA 66 -
Australian Air Express Pty Ltd v Langford [2005] NSWCA 96 (04 April 2005) (Ipp, Tobias and McColl JJA)

13 The appellant accepted that the meaning of the word "employee" in the *Comcare Act* was to be resolved by having regard to the common law principles which have developed to determine whether a working relationship is one of employer – employee or employer – independent contractor. It was also common ground that although the Owner/Driver Agreement referred to the respondent as "the Contractor" throughout, that is not determinative. The Court is required to consider the totality of the relationship between the parties: *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 (" *Stevens* ") at 29 per Mason J ; *Hollis* at 33 [24], 45 [58] Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.

Australian Air Express Pty Ltd v Langford [2005] NSWCA 96 -

Australian Air Express Pty Ltd v Langford [2005] NSWCA 96 -
Australian Air Express Pty Ltd v Langford [2005] NSWCA 96 -
Australian Air Express Pty Ltd v Langford [2005] NSWCA 96 -
Australian Air Express Pty Ltd v Langford [2005] NSWCA 96 -
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Australian Air Express Pty Ltd v Langford [2005] NSWCA 96 -
Australian Air Express Pty Ltd v Langford [2005] NSWCA 96 -
Australian Air Express Pty Ltd v Langford [2005] NSWCA 96 -
National Transport Insurance Ltd v Chalker [2005] NSWCA 62 (15 March 2005)

> 66. To the limited extent that Andrews contended against a ***Stevens*** type duty of care I would reject such submission. In my view Andrews assumed an organising, entrepreneurial role analogous to that of the sawmiller in ***Stevens*** .

National Transport Insurance Ltd v Chalker [2005] NSWCA 62 -
National Transport Insurance Ltd v Chalker [2005] NSWCA 62 -
National Transport Insurance Ltd v Chalker [2005] NSWCA 62 -
National Transport Insurance Ltd v Chalker [2005] NSWCA 62 -
National Transport Insurance Ltd v Chalker [2005] NSWCA 62 -
National Transport Insurance Ltd v Chalker [2005] NSWCA 62 -
National Transport Insurance Ltd v Chalker [2005] NSWCA 62 -
National Transport Insurance Ltd v Chalker [2005] NSWCA 62 -
Pack-Tainers Pty Ltd v Moore [2005] NSWCA 43 (08 March 2005) (Santow and Bryson JJA, Young CJ in Eq)

> 19 Turning to Wilson and Dawson JJ in *Brodribb* , their joint judgment emphasised that while "control" was no longer the exclusive test, it was still the proper starting point of the inquiry. They described this as an inquiry which was " *one of degree for which there is no exclusive measure*" (at 36). They listed a range of indicia which would be considered in that inquiry, but emphasised that making a list was apt to mislead as the indicia were "*no more than a guide*":
>
> > "Those 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. None of these leads to any necessary inference, however, and the actual terms and terminology of the contract will always be of considerable importance." (at 36-7)

Pack-Tainers Pty Ltd v Moore [2005] NSWCA 43 -
Pack-Tainers Pty Ltd v Moore [2005] NSWCA 43 -
Pack-Tainers Pty Ltd v Moore [2005] NSWCA 43 -
Pack-Tainers Pty Ltd v Moore [2005] NSWCA 43 -
Pack-Tainers Pty Ltd v Moore [2005] NSWCA 43 -
Pack-Tainers Pty Ltd v Moore [2005] NSWCA 43 -
Pack-Tainers Pty Ltd v Moore [2005] NSWCA 43 -
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Pack-Tainers Pty Ltd v Moore [2005] NSWCA 43 -
Pack-Tainers Pty Ltd v Moore [2005] NSWCA 43 -
Pack-Tainers Pty Ltd v Moore [2005] NSWCA 43 -
Pack-Tainers Pty Ltd v Moore [2005] NSWCA 43 -
Boylan Nominees Pty Ltd t/as Quirks Refrigeration v Sweeney [2005] NSWCA 8 (18 February 2005)

82. The majority referred to ***Quarman v Burnett*** 6 M & W 499 as "[t]he foundation case for the present authorities". In recent years (and prior to ***Hollis v Vabu Pty Ltd***), ***Quarman v Burnett*** has been cited with approval by the High Court. For example, in ***Scott v Davis*** Gummow J said (at 406 [218]):

"The judgment of Parke B, delivering the judgment of the Court of Exchequer in **Quarman**, is treated in this Court as the classic authority that at common law a person generally is not liable for the negligence of an independent contractor (**Stevens v Brodribb Sawmilling Company Pty Ltd** at 43 ; **Burnie Port Authority v General Jones Pty Ltd** (1994) 179 CLR 520 at 577 ; **Northern Sandblasting Pty Ltd v Harris** at 366)".

And Hayne J (at 430[292]) quoted the following passage from the judgment of Parke B:

> "It is undoubtedly true, that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like."

As Hayne J observed (at 431 [292]), Parke B rejected (at 514) the wider proposition that "a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit."

Boylan Nominees Pty Ltd t/as Quirks Refrigeration v Sweeney [2005] NSWCA 8 -
Boylan Nominees Pty Ltd t/as Quirks Refrigeration v Sweeney [2005] NSWCA 8 -
Personnel Contracting v Construction, Forestry, Mining and Energy Union [2004] WASCA 312 (22 December 2004) (Steytler J (Presiding Judge), EM Heenan J, Simmonds J)

100 What his Honour meant by the reference to the factors, including but not limited to control, subsumed by the "totality of the relationship" is indicated by an earlier passage in his judgment in ***Stevens*** (*supra*), which is not referred to in ***Vabu*** , but which is a passage quoted in ***Odco*** as setting out the law on this point ((*supra*) at 754):

> "The approach of this court has been to regard it [control] merely as one of a number of indicia which must be considered in the determination of the question: *Queensland Stations Pty Ltd v FCT* (1945) 70 CLR 539 at 552 ; *Zuijs* ' case [*supra*]; *FCT v Barrett* (1973) 129 CLR at 401; 2 ALR 65; *Marshall* [*supra*] at 218. Other relevant factors include, but

> are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee."

Personnel Contracting v Construction, Forestry, Mining and Energy Union [2004] WASCA 312 -
Personnel Contracting v Construction, Forestry, Mining and Energy Union [2004] WASCA 312 -
Personnel Contracting v Construction, Forestry, Mining and Energy Union [2004] WASCA 312 -
Personnel Contracting v Construction, Forestry, Mining and Energy Union [2004] WASCA 312 -
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Personnel Contracting v Construction, Forestry, Mining and Energy Union [2004] WASCA 312 -
TNT Australia Pty. Ltd. v Wills [2004] NSWCA 455 (13 December 2004) (Hodgson JA, Pearlman AJA and Windeyer J)

> 26 It was submitted for TNT that the primary judge was in error in finding that TNT owed a duty of care to Mr. Wills analogous to that of an employer. GSW was an independent business, and Mr. Wills was not part of TNT's establishment and was not subject to direction or control by TNT. This case was wholly different from TNT Australia Pty. Ltd. v. Christie [2003] NSWCA 47 , where the employer was a labour hire company and the employee worked at the premises of the hirer, used only equipment of the hirer and was subject to direction and control by supervisors employed by the hirer. If TNT had a duty of care to Mr. Wills, it was a much more limited duty, to use reasonable care to avoid unnecessary risks of injury and minimise other risks of injury: Stevens v. Brodribb Sawmilling Co. Pty. Ltd. (1986) 160 CLR 16 at 47 ; Boral Roof Tiles Ltd. v. O'Brien NSWCA 15/12/94.

TNT Australia Pty. Ltd. v Wills [2004] NSWCA 455 -
Eurobodalla Shire Council v Dufty [2004] NSWCA 450 -
Eurobodalla Shire Council v Dufty [2004] NSWCA 450 -
Eurobodalla Shire Council v Dufty [2004] NSWCA 450 -
Eurobodalla Shire Council v Dufty [2004] NSWCA 450 -
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Eurobodalla Shire Council v Dufty [2004] NSWCA 450 -
Eurobodalla Shire Council v Dufty [2004] NSWCA 450 -
R v ACR Roofing Pty Ltd [2004] VSCA 215 -
Howells v Murray River North Pty Ltd [2004] WASCA 276 -
Howells v Murray River North Pty Ltd [2004] WASCA 276 -
Paddison v Ultimate Image Pty Ltd t/as Hawkesbury Plasterworks [2004] NSWCA 410 (17 November 2004) (Sheller and Santow JJA, Levine J)

> 38 Heydon JA continued under the heading "Conclusion in relation to the plaintiff's submissions":

"64 In evaluating the plaintiff's submission set out above, it is necessary, as the submission contemplates, to put aside 'the obvious likelihood that [he] in circumstances of time pressure might reach from the top of the ladder to left and to right in order to save time'. That must be done for the reasons set out above. There was no evidence or finding that time pressure was affecting the precise way the plaintiff was operating. That leaves three points in the plaintiff's submissions.
65 The first is that the defendant put the plaintiff in a position of working at such a height as to pose an obvious risk of falling. In my opinion the risk was, *for persons experienced in that type of work* , far from obvious. It does not follow from the fact that Mr Smink thought it dangerous to ascend the ladder that there was an obvious risk *for the plaintiff* in doing so.
66 The plaintiff's second point was that there is a low threshold involved in foreseeability and that the Master misunderstood this. The defendant referred to *Wyong Shire Council v Shirt* (1980) 146 CLR 40; *Nagle v Rotnest Island Authority* (1993) 177 CLR 423; *Modbury Triangle Shopping Centre v Anzil* (2000) 75 ALJR 164. It is true that Glass JA in the Court of Appeal in *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 641 famously described foreseeability as an 'undemanding' test. In many areas it may be, at least as the law stands now. But it has a different and more demanding operation where simple uncomplicated operations by an employee within the normal system of work are concerned, for the reasons explained in *Smi th's* case, *O'Connor's* case and Glass JA's book. The position cannot be different for independent contractors: *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 31. The authorities relied on by the plaintiff deal with areas distinct from the question whether a system of work in which an experienced plaintiff is operating is safe.
67 The third point made by the plaintiff is that the findings of fact referred to in Ground 2 contradict the Master's conclusion that there was no foreseeability.
68 The first of the allegedly contradictory findings of fact was, in para [34], expressed thus:

> 'there was a risk arising from the nature of the work and there was some need for co-ordination by the defendant in relation to the delivery of the decorations.'

This statement was made in answer to an attempt by the defendant to distinguish a passage in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 31, where Mason J said that an entrepreneur owed a duty to prescribe a safe system of work whether or not those he engaged were independent contractors or employees. Mason J spoke of where there was a 'risk ... of injury arising from the nature of work', and of a need for coordination. The injury here did not flow from any problem about coordination of work in erecting decorations as distinct from delivering them. The fact that there was said by the Master to be a risk of injury to persons generally does not contradict her conclusion that the injury to the plaintiff on the ladder was not reasonably foreseeable. The plaintiff's submission also overlooks the fact that immediately after the passage relied on the Master said of the case before her: 'But the activities [were] not interdependent as in *Brodribb* .'
69 The second passage on which the plaintiff relies as contradicting the finding on foreseeability is at para [51]:

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> ‘It may be accepted that a risk of injury attaches in respect of any person who had to go on to work at height in order to install Christmas decorations. It follows from the circumstances that such a person is expected to work at a height [such that] he had to use a ladder.’

The whole paragraph reads:

> ‘So far as these particulars relate to fault directly attributable to the defendant they depend upon there having been a personal duty of care reposed in it to exercise reasonable care to protect the plaintiff from foreseeable risk of injury, which called on it to ensure that they took adequate precautions for the plaintiff’s safety while he carried out his visual display work. It may be accepted that a risk of injury attaches in respect of any person who had to go on to work at height in order to install Christmas decorations. It follows from the circumstances that such a person is expected to work at a height [such that] he had to use a ladder. For the security and soundness of the ladder he had to rely upon the defendant.’

The Master’s point was simply that among the precautions which the defendant had to take was the provision of a secure and sound ladder. The plaintiff’s case does not allege that the actual ladder was insecure and unsound. Further, the Master’ s statement that there was a ‘risk’ arising for ‘any person’ is not inconsistent with her conclusion that it was not a reasonably foreseeable risk so far as the plaintiff was concerned.

70 The third allegedly contradictory passage relied upon by the plaintiff is from para [69]:

> ‘It is my view that a mobile scaffolding platform would have been a cheap and practical response to the foreseeable risk.’

As counsel for the plaintiff accepted in oral argument to this Court, this is scarcely contradictory of the Master’s finding that there was no reasonably foreseeable risk. What is said in para [69] appears after the Master said she rejected the plaintiff’s case. It is part of the Master’s provisional findings against the possibility that her reasoning leading to the decision to direct a verdict for the defendant was wrong. What is said in para [69] assumes that the findings on reasonable foreseeability in para [65] are wrong, but does not accept that they are wrong.

71 In oral argument counsel for the plaintiff put the plaintiff’s case in the following forceful way:

> ‘if a man is standing half way up a ladder then of course he has the benefit of hand holds, mainly the rest of the ladder. If he is standing at the top of a ladder which is leaning against a wall then he presumably may get some hand holds on the wall or some part of the structure but when he’s

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got a ladder that's standing out in the open like a pyramid and he's perched at the top of it and he has no point of stability beyond such as may be obtained by resting his shins against the top of the ladder we would say that it is plainly reasonably foreseeable that he's at risk of falling off and seriously damaging himself.'

72 The answer to this argument is that while it may be reasonably foreseeable that many men in that position would fall off, the plaintiff was a skilled workman experienced in this type of repetitive work. "

Paddison v Ultimate Image Pty Ltd t/as Hawkesbury Plasterworks [2004] NSWCA 410 -
Paddison v Ultimate Image Pty Ltd t/as Hawkesbury Plasterworks [2004] NSWCA 410 -
Paddison v Ultimate Image Pty Ltd t/as Hawkesbury Plasterworks [2004] NSWCA 410 -
Paddison v Ultimate Image Pty Ltd t/as Hawkesbury Plasterworks [2004] NSWCA 410 -
Paddison v Ultimate Image Pty Ltd t/as Hawkesbury Plasterworks [2004] NSWCA 410 -
Emoleum (Aust) Pty Ltd v Cecil Henry Bond [2004] NSWCA 352 (29 September 2004) (Mason P, Giles and Santow JJA)

53 Emoleum does not dispute that its entrepreneurial role at the site imposed upon it a duty of care similar to that discussed in ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (1986) 160 CLR 16 at 31. This was a duty to prescribe and provide a safe system of work similar to that falling upon an employer (see per Mason J at 31). Arguably, a similar duty derived from Emoleum's relationship with the deceased, which was akin to that of a "special employer" (cf ***TNT Australia Pty Ltd v Christie & Ors*** [2003] NSWCA 47, ***Rockdale Beef Pty Ltd v Carey*** [2003] NSWCA 132). It is unnecessary to pursue this, given the proper concession as to the former duty.

Starks v RSM Security Pty Ltd [2004] NSWCA 351 -
Starks v RSM Security Pty Ltd [2004] NSWCA 351 -
Geroheev Pty Ltd v Wheare [2004] WASCA 206 -
Multiplex Constructions (NSW) Pty Ltd v Lopez [2004] NSWCA 319 (13 September 2004) (Handley, Beazley and Santow JJA)

43 This statement derives from the principles laid down by the High Court in *Stevens v Brodribb Sawmilling Co Limited* (1985) 160 CLR 16 . In particular it is based upon the fact that Multiplex, as head contractor, was necessarily involved in the co-ordination of activities in what was undoubtedly a large scale and complex construction site involving a number of different trades.

Multiplex Constructions (NSW) Pty Ltd v Lopez [2004] NSWCA 319 -
Multiplex Constructions (NSW) Pty Ltd v Lopez [2004] NSWCA 319 -
Multiplex Constructions (NSW) Pty Ltd v Lopez [2004] NSWCA 319 -
Multiplex Constructions (NSW) Pty Ltd v Lopez [2004] NSWCA 319 -
Multiplex Constructions (NSW) Pty Ltd v Lopez [2004] NSWCA 319 -
Siljeg v Multiplex Constructions Pty Limited [2004] NSWCA 193 (27 July 2004) (Handley, Beazley and Tobias JJA)

68 The legal foundation for this submission was said to be the decision of the High Court in *Stevens v Brodribb Sawmilling Company Pty Limited* (1986) 160 CLR 16. In that case Mason J (at [31]) said:

"Although the obligation to provide a safe system of work has been regarded as one attaching to an employer, there is no reason why it should be so confined. If an entrepreneur engages independent contractors to do work which might as readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work and where there is a need for him to give directions as to when and where the work is to be done and to co-ordinate the various activities, he has an obligation to prescribe a safe system of work. The fact that they are not

employees, or that he does not retain a right to control them in the manner in which they carry out their work, should not affect the existence of an obligation to prescribe a safe system."

Siljeg v Multiplex Constructions Pty Limited [2004] NSWCA 193 -
Andar Transport Pty Ltd v Brambles Ltd [2004] HCA 28 -
Bhambra v Roet [2003] NSWCA 393 -
Bhambra v Roet [2003] NSWCA 393 -
Thompson v Woolworths (Q'land) P/L [2003] QCA 551 (12 December 2003) (de Jersey CJ, Williams JA and McMurdo J,)

11. Accordingly here, one should not ignore the respective, independent functions of the appellant and the respondent, the respondent being, in terms used by Brennan J in *Stevens v Brodribb* (p 47), "competent [herself] to control [her] system of work without supervision by the [appellant]". I consider that was one of the circumstances bearing upon the scope of any duty owed to the respondent, although I am not to be taken as suggesting it was of determinative significance.

Thompson v Woolworths (Q'land) P/L [2003] QCA 551 -
Thompson v Woolworths (Q'land) P/L [2003] QCA 551 -
Thompson v Woolworths (Q'land) P/L [2003] QCA 551 -
Signet Engineering Pty Ltd v Melvan [2003] WASCA 313 -
Signet Engineering Pty Ltd v Melvan [2003] WASCA 313 -
Kschammer v R W Piper & Sons Pty Ltd [2003] WASCA 298 (03 December 2003) (Malcolm CJ; Murray and Parker JJ)

40. In my opinion, nothing said in ***Sullivan v Moody*** (*supra*) appears to have had the effect that the law as stated in ***Stevens v Brodribb*** (*supra*) and the passage cited from ***Sutherland Shire Council v Heyman*** (*supra*) is required to be modified in any way.

Kschammer v R W Piper & Sons Pty Ltd [2003] WASCA 298 (03 December 2003) (Malcolm CJ; Murray and Parker JJ)

38. In ***Sullivan v Moody*** [2001] 8 CA 59 at [48]; [2001] 207 CLR 562 at 578, Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ said:

> "As Professor Fleming said [Fleming, *The Law of Torts*, 9th ed, (1998) at 151], 'no one has ever succeeded in capturing in any precise formula' a comprehensive test for determining whether there exists, between two parties, a relationship sufficiently proximate to give rise to a duty of care of the kind necessary for actionable negligence. The formula is not 'proximity'. Notwithstanding the centrality of that concept, for more than a century, in this area of discourse, and despite some later decisions in this Court which emphasised that centrality [eg *Ja ensch v Coffey* (1984) 155 CLR esp at 584585 per Deane J; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 52 per Deane J], it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established [*Hawkins v Clayton* (1988) 164 CLR 539 at 555-556 per Brennan J; *Hill v Van Erp* (1997) 188 CLR 159 at 210 per McHugh J; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 9697 [270]-[274] per Hayne J]. It expresses the nature of what is in issue, and in that respect gives focus to the inquiry, but as an explanation of a process of reasoning leading to a conclusion its utility is limited."

Kschammer v R W Piper & Sons Pty Ltd [2003] WASCA 298 (03 December 2003) (Malcolm CJ; Murray and Parker JJ)

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36. The learned Judge concluded at par [59] of her reasons that it had not been established that the Piper Company was the occupier of the premises. As a result, the liability of the Piper Company and Mr Piper in negligence alone fell to be considered. The appellant was not an employee of the Piper Company, but an independent contractor. The Piper Company was the appellant's principal. Consequently, any liability of the Piper Company to the appellant was to be determined in accordance with the wellknown principles expounded in ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (1986) 160 CLR 16 at 31 per Mason J ; and at 47 per Brennan J; and see ***Sutherland Shire Council v Heyman*** (1985) 157 CLR 424 at 479.

Kschammer v R W Piper & Sons Pty Ltd [2003] WASCA 298 (03 December 2003) (Malcolm CJ; Murray and Parker JJ)

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

Kschammer v R W Piper & Sons Pty Ltd [2003] WASCA 298 -
Kschammer v R W Piper & Sons Pty Ltd [2003] WASCA 298 -
Surf Coast Shire Council v Webb & Anor; Webb v Norquay Nominees Pty Ltd & Anor [2003] VSCA 162 -
Surf Coast Shire Council v Webb & Anor; Webb v Norquay Nominees Pty Ltd & Anor [2003] VSCA 162 -
Surf Coast Shire Council v Webb & Anor; Webb v Norquay Nominees Pty Ltd & Anor [2003] VSCA 162 -
Surf Coast Shire Council v Webb & Anor; Webb v Norquay Nominees Pty Ltd & Anor [2003] VSCA 162 -
Surf Coast Shire Council v Webb & Anor; Webb v Norquay Nominees Pty Ltd & Anor [2003] VSCA 162 -
Sparks v Van Den Ham [2003] WASCA 143 (27 June 2003) (Wallwork J, Murray J, Parker J)

45. In the course of his reasons, Muller DCJ directed himself in accordance with the principles enunciated in ***Stevens v Brodribb Sawmilling Company Pty Ltd*** (1986) 160 CLR 16 in particular by Mason J at 31 and Brennan J at 47. These passages are particularly relevant to the duty of care owed when organising an activity in which a number of independent contractors and others are variously engaged. As Brennan J observed in ***Brodribb*** at 47 :

> "The duty to use reasonable care in organising an activity does not import a duty to avoid any risk of injury; it imports a duty to use reasonable care to avoid unnecessary risks of injury and to minimise other risks of injury. It does not import a duty to retain control of working systems if it is reasonable to engage the services of independent contractors who are competent themselves to control their system of work without supervision ... If there is no failure to take reasonable care in the employment of independent contractors competent to control their own systems of work, or in not retaining a supervisory power or in leaving undefined the contractors' respective areas of responsibility, the entrepreneur is not liable for damage caused merely by a negligent failure of an independent contractor to adopt or follow a safe system of work either within his area of responsibility or in an area of shared responsibility."

Sparks v Van Den Ham [2003] WASCA 143 -
Sparks v Van Den Ham [2003] WASCA 143 -
Rockdale Beef Pty Ltd v Carey [2003] NSWCA 132 -
Rockdale Beef Pty Ltd v Carey [2003] NSWCA 132 -
Rockdale Beef Pty Ltd v Carey [2003] NSWCA 132 -
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Rockdale Beef Pty Ltd v Carey [2003] NSWCA 132 -

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Rockdale Beef Pty Ltd v Carey [2003] NSWCA 132 -
Rockdale Beef Pty Ltd v Carey [2003] NSWCA 132 -
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Rockdale Beef Pty Ltd v Carey [2003] NSWCA 132 -
Rockdale Beef Pty Ltd v Carey [2003] NSWCA 132 -
Rockdale Beef Pty Ltd v Carey [2003] NSWCA 132 -
Gordon v Tamworth Jockey Club [2003] NSWCA 82 (16 April 2003) (Sheller, Beazley and Giles JJA)
Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16
Wormald v Robertson (1992) Aust Tort Reps 81-180

Gordon v Tamworth Jockey Club [2003] NSWCA 82 -
Gordon v Tamworth Jockey Club [2003] NSWCA 82 -
TNT Australia Pty Ltd v Christie [2003] NSWCA 47 -
TNT Australia Pty Ltd v Christie [2003] NSWCA 47 -
United Construction Pty Ltd v Birighitti [2003] WASCA 24 -
United Construction Pty Ltd v Birighitti [2003] WASCA 24 -
New South Wales v Lepore [2003] HCA 4 -
New South Wales v Lepore [2003] HCA 4 -
New South Wales v Lepore [2003] HCA 4 -
New South Wales v Lepore [2003] HCA 4 -
Transtate Pty. Limited v Rauk [2002] NSWCA 222 (15 August 2002) (Powell and Santow JJA, Mathews AJA)

66 Under a heading "Employee or Sub-contractor" O'Keefe J, after setting out what he considered to be the relevant facts, continued (RAB 122-127):

> "14. Senior counsel for the defendant submitted that notwithstanding the changed arrangements between the plaintiff and the defendant that were effected in 1992 the plaintiff still remained an employee, a 'direct employee', of the defendant. If that were the correct situation it would have consequences in relation to the nature of the duty and standard of care owed by the defendant to the plaintiff, the quantum of damages to which the plaintiff may be entitled, the action per quod servitum (sic) amisit instituted by Restisle against the defendant the cross-action by the defendant against Restisle.
> 15. The argument on behalf of the defendant stressed the extent of control that was de facto exercised by the senior staff of the defendant in respect of the work to be and actually carried out by the plaintiff. Although it was conceded that the question of control was not the sole or necessarily determining factor, it was argued that extent of control combined with supervision, hours of work, provision of a place of work, provision of transportation and provision of equipment, including safety equipment, meant that the correct analysis of the relationship between the plaintiff and the defendant was that of employer and employee."

Then, after a reference to the Judgment of Mason J (as he then was), and the joint Judgment of Wilson and Dawson JJ, in ***Stevens v. Brodribb Sawmilling Co. Pty. Limited*** (1985-1986) 160 CLR 16 and to the Judgment of Meagher JA in ***Vabu Pty. Limited v. Commissioner of Taxation*** (1996) 81 IR 150 , his Honour continued:

> "19. In the present case the extent of control exercised de facto by the defendant combined with supervision and devising the system of work is not inconsistent with the plaintiff being the employee of Restisle. The arrangement which was made between Restisle and the defendant in 1992

was considered and deliberate. It was entered into with the intention of terminating the relationship of employer and employee between the defendant and the plaintiff.

.....

21. Where two parties have solemnly and formally terminated the relationship of employer and employee and have genuinely sought to substitute a contractual relationship, as in the present case, it would need very unusual circumstances to infer, contrary to the intention and actions of the parties, that the relationship of employer and employee nevertheless had nonetheless continued. In the present case I do not think that it did. In 1992 there was a formal termination of the employment of the plaintiff by the defendant. Thereafter his services in the form of labour were provided to the defendant by Restisle, which was paid by the defendant for those services in accordance with the contract which had been entered into between Restisle and the defendant. There were mutual benefits arising out of such situation. Some of the benefits for the defendant have already been adverted to. Benefits to the plaintiff included that the company which he controlled received for distribution in accordance with his choice a greater amount than he personally would have received had he remained an employee. The fact that the defendant ceased to be liable to him for wages, for insurance, award compliance and taxation, including payroll tax purposes confirms the maintenance of the intention of the defendant manifest by the changed arrangements entered into in 1992. Like inferences can and should be drawn in respect of the intention of both Restisle and the plaintiff.

22. In the circumstances of the instant case I am satisfied that at times material to the liability of the defendant, the plaintiff was an employee of Restisle, that Restisle contracted his services to the defendant at an agreed rate, but that the defendant retained the functions of determining, implementing and carrying out the system of work in its yard and workshop, the work on which the plaintiff was to be engaged as well as its supervision. It also retained control of and remained responsible for the place in which his work was to be performed. There is nothing unusual about that in the industrial climate prevailing in this State.

23. I am satisfied that at the time of his injury, the plaintiff was not an employee of the defendant. He was an employee of Restisle which subcontracted his services to the defendant."

Kolodziejczyk v Grandview Pty Ltd [2002] NSWCA 267 -
Kolodziejczyk v Grandview Pty Ltd [2002] NSWCA 267 -
Kolodziejczyk v Grandview Pty Ltd [2002] NSWCA 267 -
Kolodziejczyk v Grandview Pty Ltd [2002] NSWCA 267 -
Kolodziejczyk v Grandview Pty Ltd [2002] NSWCA 267 -
Kolodziejczyk v Grandview Pty Ltd [2002] NSWCA 267 -
Daykin v Neba International Couriers [2002] WASCA 213 -
Daykin v Neba International Couriers [2002] WASCA 213 -
Van der Sluice v Display Craft Pty ltd [2002] NSWCA 204 (09 July 2002) (Meagher and Heydon JJA, Foster AJA)

66 The plaintiff's second point was that there is a low threshold involved in foreseeability and that the Master misunderstood this. The defendant referred to *Wyong Shire Council v Shirt* (1980) 146 CLR 40; *Nagle v Rotnest Island Authority* (1993) 177 CLR 423; *Modbury Triangle Shopping Centre v Anzil* (2000) 75 ALJR 164. It is true that Glass JA in the Court of Appeal in *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 641 famously described foreseeability as an "undemanding" test. In many areas it may be, at least as the law stands now. But it has a different and more demanding operation where simple uncomplicated operations by an employee within the normal system of work are concerned, for the reasons explained in *Smith's* case, *O'Connor's* case and Glass JA's book. The

position cannot be different for independent contractors: *Stevens v Brodribb Saw Milling Co Pty Ltd* (1986) 160 CLR 16 at 31. The authorities relied on by the plaintiff deal with areas distinct from the question whether a system of work in which an experienced plaintiff is operating is safe.

Van der Sluice v Display Craft Pty ltd [2002] NSWCA 204 (09 July 2002) (Meagher and Heydon JJA, Foster AJA)

Stevens v Brodribb Saw Milling Co Pty Ltd (1986) 160 CLR 16
Sullivan v Moody

Van der Sluice v Display Craft Pty ltd [2002] NSWCA 204 -
Van der Sluice v Display Craft Pty ltd [2002] NSWCA 204 -
Van der Sluice v Display Craft Pty ltd [2002] NSWCA 204 -
Van der Sluice v Display Craft Pty ltd [2002] NSWCA 204 -
Van der Sluice v Display Craft Pty ltd [2002] NSWCA 204 -
Dettmer v K J McCracken Pty Ltd [2002] NSWCA 199 -
Dettmer v K J McCracken Pty Ltd [2002] NSWCA 199 -
Dettmer v K J McCracken Pty Ltd [2002] NSWCA 199 -
Hewitt v Benale Pty Ltd [2002] WASCA 163 -
Hewitt v Benale Pty Ltd [2002] WASCA 163 -
Hewitt v Benale Pty Ltd [2002] WASCA 163 -
Hewitt v Benale Pty Ltd [2002] WASCA 163 -
Mickelberg v Aerodata Holdings Ltd [2002] WASCA 80 -
Mickelberg v Aerodata Holdings Ltd [2002] WASCA 80 -
Ermogenous v Greek Orthodox Community of SA Inc [2002] HCA 8 -
New South Wales Land and Housing Corporation v Watkins [2002] NSWCA 19 -
Williams v Trimview Roof Restoration Pty Ltd [2001] WASCA 414 -
Williams v Trimview Roof Restoration Pty Ltd [2001] WASCA 414 -
Williams v Trimview Roof Restoration Pty Ltd [2001] WASCA 414 -
Boral Resources (SA) Ltd v Byrnecut Mining Pty Ltd [2001] WASCA 408 -
Maggbury Pty Ltd v Hafele Australia Pty Ltd [2001] HCA 70 -
Scott & v McMahon & 2 Ors [2001] NSWCA 481 -
Sullivan v Moody [2001] HCA 59 -
Carrier Airconditioning Pty Ltd v Duzevich [2001] WASCA 243 (17 August 2001) (Malcolm CJ; Kennedy and Roberts-Smith JJ)

13 The learned Commissioner appears to have accepted the evidence of the respondent regarding the manner in which the accident occurred. It was held that although the appellant was not the respondent's employer, the appellant nevertheless owed the respondent a duty of care according to the ordinary principles of negligence: ***Stevens v Brodribb Sawmilling Company Pty Ltd*** (1986) 160 CLR 16 . It was found that the respondent was working on the appellant's production line as part of a team constructing the appellant's airconditioning units under the supervision of the appellant's staff. The appellant, therefore, effectively had control of the respondent's work environment. In the circumstances it was held that there was no significant distinction between the content of the duty of care that the appellant owed to the respondent and that owed by an employer to an employee. This finding is not challenged on the appeal.

(Page 7)

Carrier Airconditioning Pty Ltd v Duzevich [2001] WASCA 243 -
Carrier Airconditioning Pty Ltd v Duzevich [2001] WASCA 243 -
Hollis v Vabu Pty Ltd [2001] HCA 44 (09 August 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

43. These notions also influence the meaning to be given today to "control" as a discrimen between employees and independent contractors. In *Stevens v Brodribb Sawmilling Co Pty Ltd* [59] , the Court was adjusting the notion of "control" to circumstances of contemporary life and, in doing so, continued the developments in *Zuijs v Wirth Brothers Pty Ltd* [60] and *Humbe*

rstone v Northern Timber Mills [61] . In *Humberstone* [62] , Dixon J observed that the regulation of industrial conditions and other statutes had made more difficult of application the classic test, whether the contract placed the supposed employee subject to the command of the employer. Moreover, as has been pointed out[63]:

> "The control test was the product of a predominantly agricultural society. It was first devised in an age untroubled by the complexities of a modern industrial society placing its accent on the division of functions and extreme specialisation. At the time when the courts first formulated the distinction between employees and independent contractors by reference to the test of control, an employer could be expected to know as much about the job as his employee. Moreover, the employer would usually work with the employee and the test of control and supervision was then a real one to distinguish between the employee and the independent contractor. With the invention and growth of the limited liability company and the great advances of science and technology, the conditions which gave rise to the control test largely disappeared. Moreover, with the advent into industry of professional men and other occupations performing services which by their nature could not be subject to supervision, the distinction between employees and independent contractors often seemed a vague one."

Hollis v Vabu Pty Ltd [2001] HCA 44 (09 August 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

72. Rather than attempting to force new types of work arrangements into the so-called employee /independent contractor "dichotomy" based on medieval concepts of servitude, it seems a better approach to develop the principles concerning vicarious liability in a way that gives effect to modern social conditions. As I pointed out in *Burnie Port Authority v General Jones Pty Ltd* [104] and reiterated in *Scott v Davis* [105] , the genius of the common law is that the first statement of a common law rule or principle is not its final statement. The contours of rules and principles expand and contract with experience and changes in social conditions. The law in this area has been and should continue to be "sufficiently flexible to adapt to changing social conditions" [106] .

via

[106] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 28-29 per Mason J .

Hollis v Vabu Pty Ltd [2001] HCA 44 (09 August 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

44. It was against that background that in *Brodribb* [64] Mason J said that, whilst these criticisms might readily be acknowledged:

> "the common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, 'so far as there is scope for it', even if it be 'only in incidental or collateral matters': *Zuijs v Wirth Brothers Pty Ltd* [65] . Furthermo re, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered."

via

[64] (1986) 160 CLR 16 at 29.

Hollis v Vabu Pty Ltd [2001] HCA 44 (09 August 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

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Hollis v Vabu Pty Ltd [2001] HCA 44 -
Hollis v Vabu Pty Ltd [2001] HCA 44 -
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Hollis v Vabu Pty Ltd [2001] HCA 44 -
Hollis v Vabu Pty Ltd [2001] HCA 44 -
Hollis v Vabu Pty Ltd [2001] HCA 44 -
Rich v State of Queensland & Ors [2001] QCA 295 -
Rich v State of Queensland & Ors [2001] QCA 295 -
Rich v State of Queensland & Ors [2001] QCA 295 -
Rich v State of Queensland & Ors [2001] QCA 295 -
Rich v State of Queensland & Ors [2001] QCA 295 -
Rich v State of Queensland & Ors [2001] QCA 295 -
Rich v State of Queensland & Ors [2001] QCA 295 -
Wilke v Astra Pharmaceuticals P/L & Anor [2001] NSWCA 135 -
JA & BM Bowden & Sons Pty Limited v Chief Commissioner of State Revenue [2001] NSWCA 125 (07 May 2001)

9. The general principles applicable in determining whether a contract is one of service or for services are set out in ***Stevens v Brodribb Sawmilling Company Pty Limited*** (1986) 160 CLR 16 an d, as Sheller JA remarked in ***Vabu Pty Limited v Federal Commissioner of Taxation*** (1996) 96 ATC 4898 (at 4902), consideration of the question whether a relationship of employer and employee exists, must start with that decision.

JA & BM Bowden & Sons Pty Limited v Chief Commissioner of State Revenue [2001] NSWCA 125 -
JA & BM Bowden & Sons Pty Limited v Chief Commissioner of State Revenue [2001] NSWCA 125 -
JA & BM Bowden & Sons Pty Limited v Chief Commissioner of State Revenue [2001] NSWCA 125 -
JA & BM Bowden & Sons Pty Limited v Chief Commissioner of State Revenue [2001] NSWCA 125 -
Achron Pty Ltd v Serco Water (WA) Pty Ltd [2001] WASCA 141 (04 May 2001) (Kennedy, Ipp and Murray JJ)

Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16
Stott v West Yorkshire Road Car Co Ltd

Achron Pty Ltd v Serco Water (WA) Pty Ltd [2001] WASCA 141 -
Maggiotto Building Concepts Pty Ltd v Gordon [2001] NSWCA 65 -
Maggiotto Building Concepts Pty Ltd v Gordon [2001] NSWCA 65 -
ADC v White [2001] NSWCA 9 -
ADC v White [2001] NSWCA 9 -
Wentworth v Wentworth [2000] NSWCA 350 -
Wentworth v Wentworth [2000] NSWCA 350 -
Almeida v Universal Dye Works Pty Ltd [2000] NSWCA 264 -
Parker v Transfield Pty Ltd [2000] WASCA 382 -
Scott v Davis [2000] HCA 52 -

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Scott v Davis [2000] HCA 52 -
Scott v Davis [2000] HCA 52 -
Scott v Davis [2000] HCA 52 -
Scott v Davis [2000] HCA 52 -
Scott v Davis [2000] HCA 52 -
State Rail Authority of New South Wales v Gudgeon [2000] NSWCA 165 -
State Rail Authority of New South Wales v Gudgeon [2000] NSWCA 165 -
State Rail Authority of New South Wales v Gudgeon [2000] NSWCA 165 -
Ivan Fortescue (Junior) v Neville Morrasey [2000] NSWCA 193 -
Ivan Fortescue (Junior) v Neville Morrasey [2000] NSWCA 193 -
Ivan Fortescue (Junior) v Neville Morrasey [2000] NSWCA 193 -
Ivan Fortescue (Junior) v Neville Morrasey [2000] NSWCA 193 -
Drake Personnel Ltd v Commissioner of State Revenue [2000] VSCA 122 -
Drake Personnel Ltd v Commissioner of State Revenue [2000] VSCA 122 -
State of New South Wales v Buckland; Katena Pty Ltd v Buckland [2000] NSWCA 72 -
State of New South Wales v Buckland; Katena Pty Ltd v Buckland [2000] NSWCA 72 -
Jakovich Transport and Earthmoving Pty Ltd v Spiral Tube Makers Pty Ltd [2000] WASCA 46 -
Elliott v Bickerstaff [1999] NSWCA 453 (16 December 1999) (Handley, Stein and Giles JJA)

> In *Kondis v. State Transport Authority* [(1984) 154 CLR, at 679-687; and see also *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR at 44, per Wilson and Dawson JJ], in a judgment with which Deane J and Dawson J agreed, Mason J identified some of the principal categories of case in which the duty to take reasonable care under the ordinary law of negligence is non-delegable in that sense: adjoining owners of land in relation to work threatening support or common walls; master and servant in relation to a safe system of work; hospital and patient; school authority and pupil; and (arguably), occupier and invitee. In most, though conceivably not all, of such categories of case, the common 'element in the relationship between the parties which generates [the] special responsibility or duty to see that care is taken' is that 'the person on whom [the duty] 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' [*Kondis v State Transport Authority* (1984) 154 CLR at 687 ; see also, *Stevens v Brodribb Sawmilling Co Pty Ltd* (1985) 160 CLR at 31 , 44-46]. It will be convenient to refer to that common element as 'the central element of control'. Viewed from the perspective of the person to whom the duty is owed, the relationship of proximity giving rise to the non-delegable duty of care in such cases is marked by special dependence or vulnerability on the part of that person [*The Commonwealth v Introvigne* (1982) 150 CLR 258 at 271, per Mason J.]" (footnote references added)

Elliott v Bickerstaff [1999] NSWCA 453 -
Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59 (10 November 1999) (Gleeson Cj, gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

> 113. The conclusion that a duty of care arose from the directions of the Authority makes it unnecessary to examine the plaintiff's further contention that the relationship of the Authority and the plaintiff was analogous to that of an employer and employee and that, consequently, the Authority owed him a duty of care because of that relationship. Thus, in *Stevens v Brodribb Sawmilling Co Pty Ltd* [105] , this Court held that the duty of care owed by an employer to an independent contractor extended to providing a safe system of work. However, it is unnecessary to examine this contention because, even if the plaintiff's argument is correct, the alleged analogous relationship would not have imposed a higher duty of care on the Authority.

via

[105] (1986) 160 CLR 16 at 31 per Mason J .

Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59 -
Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59 -
Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59 -
Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59 -
Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59 -
Hollis v Vabu Pty Limited (T/as Crisis Couriers) [1999] NSWCA 334 (05 November 1999) (Sheller and Giles JJA, Davies AJA)
Stevens v Brodribb Sawmilling Co Pty Limited (1986) 160 CLR 16
Swinton v The China Mutual Steam Navigation Co Limited

Hollis v Vabu Pty Limited (T/as Crisis Couriers) [1999] NSWCA 334 -
Hollis v Vabu Pty Limited (T/as Crisis Couriers) [1999] NSWCA 334 -
Cochrane v Hannaford [1999] NSWCA 371 -
Perre v Apand Pty Ltd [1999] HCA 36 -
Perre v Apand Pty Ltd [1999] HCA 36 -
Perre v Apand Pty Ltd [1999] HCA 36 -
Austin v Bonney [1998] QCA 8 -
Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 -
Anderson v Mount Isa Basketball Association Incorporated [1997] QCA 340 -
Northern Sandblasting Pty Ltd v Harris [1997] HCA 39 (14 August 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ)
[294] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520. But see *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29-30 .

Northern Sandblasting Pty Ltd v Harris [1997] HCA 39 -
Northern Sandblasting Pty Ltd v Harris [1997] HCA 39 -
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Northern Sandblasting Pty Ltd v Harris [1997] HCA 39 -
Northern Sandblasting Pty Ltd v Harris [1997] HCA 39 -
Hill v Van Erp [1997] HCA 9 (18 March 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh and Gummow JJ)
[73] (1986) 160 CLR 16 at 52.

Hill v Van Erp [1997] HCA 9 (18 March 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh and Gummow JJ)
[65] (1994) 179 CLR 520 at 543 (a quote from the judgment of Deane J in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 53).

Esanda Finance Corporation Ltd v Peat Marwick Hungerfords [1997] HCA 8 -
Hill v Van Erp [1997] HCA 9 -
Hill v Van Erp [1997] HCA 9 -
Hill v Van Erp [1997] HCA 9 -
Hill v Van Erp [1997] HCA 9 -
Hill v Van Erp [1997] HCA 9 -
Bale v Seltsam Pty Ltd [1996] QCA 288 -
Harris v Northern Sandblasting [1995] QCA 413 -
Bryan v Maloney [1995] HCA 17 (23 March 1995) (Mason CJ; Brennan, Deane, Toohey and Gaudron JJ)
11 (1994) 179 CLR 520 at 543 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; and see also Stevens v. Brodribb Sawmilling Co. Pty. Ltd. (1986) 160 CLR 16 at 53.
12 See, generally, Midland Bank v. Hett, Stubbs and Kemp

Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 (24 March 1994) (Mason CJ; Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)
28. It is true that the requirement of proximity was neither formulated by Lord Atkin nor propounded and developed in cases in this Court as a logical definition or complete criterion which could be directly applied as part of a syllogism of formal logic to the particular

circumstances of a particular case ((98) See Donoghue v. Stevenson (1932) AC at 580 ; and, generally, Stevens v. Brodribb Sawmilling Co. Pty. Ltd. (1986) 160 CLR at 51-53 .). As a general conception deduced from decided cases, its practical utility lies essentially in understanding and identifying the categories of case in which a duty of care arises under the common law of negligence rather than as a test for determining whether the circumstances of a particular case bring it within such a category, either established or developing ((99) See, generally, Jaensch v. Coffey (1984) 155 CLR at 585 ; Stevens v. Brodribb Sawmilling Co. Pty. Ltd. (1986) 160 CLR at 53 ; Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd. (1964) AC 465, at 524-525 .). That is, however, the basic function performed by general principles or conceptions in the ascertainment and development of the common law. More than half a century ago, Scott LJ ((100) Haseldine v. C.A. Daw and Son Ltd. (1941) 2 KB 343, at 362-363 .) drew attention to the "curious repetition of history" involved in the fact that "Lord Atkin's exposition of principle (had) met with the same unfair criticism, although less in degree, as that which Lord Esher's exposition (of principle in Heaven v. Pender had) evoked". Scott LJ correctly pointed out ((101) ibid.) that criticism based on "the error ... of assuming that Lord Atkin was intending to formulate a complete criterion, almost like a definition in the prolegomena to a new theory of philosophy" failed to appreciate "the real value of attempts to get at legal principle". The point can be illustrated by contrasting the specific test of "non-natural", "special" or "not ordinary" use under the rule in Rylands v. Fletcher with the general conception or principle of proximity of relationship in the law of negligence. The "non-natural" use test under the rule in Rylands v. Fletcher was not deduced from past cases. As has been said, it was an unexplained, and conceivably inadvertent, judicial transformation of Blackburn J's qualification "not naturally there". More important, notwithstanding its lack of clear objective content, it has been propounded merely as a specific test to be directly applied, as part of a complex complete

Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 -
Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 -
Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 -
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Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 -
Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 -
Walton v Gardiner [1993] HCA 77 -
Gala v Preston [1991] HCA 18 -
Gala v Preston [1991] HCA 18 -
Nicol v Allyacht Spars Pty Ltd [1988] HCA 48 -
Hawkins v Clayton [1988] HCA 15 -
Nicol v Allyacht Spars Pty Ltd [1987] HCA 68 -
Nicol v Allyacht Spars Pty Ltd [1987] HCA 68 -
Cook v Cook [1986] HCA 73 (02 December 1986) (Mason, Wilson, Brennan, Deane and Dawson JJ)

8. For our part, we accept that a relevant duty of care will arise under the common law of negligence only in a case where the requirement of a relationship of proximity between the plaintiff and the defendant is satisfied (see, generally, Jaensch v. Coffey (1984) 58 ALJR 426, at pp 428 -429, 441-442; 54 ALR 417, at pp 419-421, 443-445 ; Sutherland Shire Council v. Heyman (1985) 59 ALJR 564, at pp 570, 579, 583, 594-595; 60 ALR 1, at pp 13-14, 29, 36, 53-56 ; Stevens v. Brodribb (1986) 60 ALJR 194 , at pp 199 , 208-209 ; 63 ALR 513, at pp 521-522 , 536-538). As an overriding control of the test of reasonable foreseeability, that requirement of proximity of relationship can be traced to the judgments of Lord Esher M.R. and A.L. Smith L.J. in Le Lievre v. Gould (1893) 1 QB 491 (see Donoghue v. Stevenson (1932) AC 562, at p 581). It constitutes the general determinant of the categories of case in which the common law of negligence recognizes the existence of a duty to take reasonable care to avoid a reasonably foreseeable and real risk of injury to another.

San Sebastian Pty Ltd v The Minister [1986] HCA 68 -
Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd [1986] HCA 34 -
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