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Vicarious Liability – The transfer of liability to a host employer

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Introduction

In the April 2016 Insurance Newsletter '*When is a Contractor not a Contractor*', Carter Newell commented on the recent casualisation of workforces and the blurring of lines between '*employees*' and '*contractors*'.

Another feature of the changing employment landscape has been the increasing outsourcing of labour and the emergence of labour hire companies. One of the principal benefits of outsourcing is that it provides flexibility in fluctuating markets. Another benefit is that organisations that adopt such a practice tend to be less exposed to liability through casual acts of negligence by its workers. However, as demonstrated by a recent decision of the Western Australian Court of Appeal,[1] this is not always the case.

It is well recognised that an employer will be vicariously liable for the negligent acts or omissions of its employees. However, if there has been a sufficient transfer of control from the employer (the labour hire company) to the host employer, then it is the host employer rather the labour hire company that may be vicariously liable for the worker's negligence.

This article examines, in the context of the decision in *Kelly*, the circumstances in which there may be a sufficient transfer of control to the host employer for the purposes of the imposition of vicariously liability.

The facts

The plaintiff/appellant (**appellant**) was employed by Ngarda Mining and Civil Pty Ltd (**Ngarda**), which was the operator of the BHP Billiton-owned Yarrie Mine, in the Pilbara region of Western Australia.

During the course of his employment, the appellant drove a dump truck to a section of the Yarrie Mine site. He reversed the dump truck he was operating to an area directly underneath a fully loaded excavator

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bucket, which was operated by Mr Scanlan. Mr Scanlan subsequently dropped the fully loaded bucket onto the tray of the appellant's dump truck, which caused the dump truck to shake violently. As a result of the shaking, the appellant sustained neck and back injuries.

There was some uncertainty as to whether Mr Scanlan was employed by the first or second defendant/ respondent, although it seemed to be accepted that he was employed by the second respondent (**the employer**) which carried on a labour hire business. Ngarda was the host employer of Mr Scanlan.

Insofar as this newsletter is concerned, the focus is on who, as between Mr Scanlan's employer and host employer, should be vicariously liable for his negligence (if any).

The key facts found by the trial judge were as follows:

1. Ngarda trained all workers who came to the Yarrie Mine site.
2. Induction and training was carried out by Ngarda employees.
3. Ngarda superintendent and mine supervisors controlled the systems and methods of communication between workers when carrying out their duties on site.
4. No labour hire employees had a supervisory role.
5. Ngarda controlled questions of coordination of workers on site.
6. Ngarda conducted safety investigations on site.
7. The employer did not have any safety regime that applied at Yarrie Mine.
8. There was no differentiation between labour hire workers and Ngarda workers on site.
9. The selection process in relation to Mr Scanlan involved the employer submitting his resume to Ngarda for its consideration.
10. Employees sent by the employer to Yarrie Mine commenced as temporary Ngarda employees on site and after three months were usually made permanent.

Decision at first instance

The appellant claimed at trial that the respondents were liable to him for their own negligence (direct liability) and for the negligence of Mr Scanlan (vicarious liability). The trial judge dismissed both claims.

> "The burden of proof for shifting liabilty for an employee's actions to a third party is a heavy one and can only be discharged in exceptional circumstances"

In relation to vicarious liability, the trial judge found in effect that the employer had no actual control and no authority to control anything done by Mr Scanlan for Ngarda (the host employer) at the Yarrie Mine site. The employer's role was essentially confined to paying Mr Scanlan's wages.

A number of documents were produced at trial, one or more of which was said to form a part of the agreement between Ngarda and the employer. The trial judge found that there was insufficient evidence to support this, and, in any event, none of the standard terms and conditions produced precluded the transfer of control for the purposes of the imposition of vicarious liability.

The trial judge further found that Mr Scanlan's services were transferred to Ngarda, and not merely the use and benefit of his work, Ngarda having full control over the actions of Mr Scanlan. On that basis, the trial judge held that the employer was not vicariously liable for any negligence of Mr Scanlan.

In relation to primary liability, the trial judge also found that there was no breach of duty on the part of Mr Scanlan. Therefore, even if the employer was vicariously liable for Mr Scanlan's acts or omissions, the claim would still have failed.

On appeal

On appeal, two of the three judges (McLure P and Murphy JA) upheld the trial judge's decision in respect of vicariously liability.

McLure P agreed with the trial judge that the appellant had not established that any of the documents produced at trial formed a part of the agreement between Ngarda and the employer. Instead, he considered that the terms of the agreement could be implied from the conduct of the parties.[2]

After also taking into account the terms of the employment contract with Mr Scanlan, McLure P concluded that Ngarda had both the authority to control and actual control over Mr Scanlan in the work place, and that, conversely, the employer had no authority to control Mr Scanlan in the scope and manner of performance of his duties for Ngarda at Yarrie.[3]

McLure P referred to the decision *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd,*[4] in which Lord MacMillan identified the relevant question as being whether an employer had temporarily transferred the services of one of his servants to another party so as to constitute him *pro hoc vice* (for the time being) the servant of that other party with consequential liability for his negligent acts. The burden of proof was said to rest with the employer and could only be discharged in '*exceptional circumstances*'.[5]

In applying the '*test*' in *Mersey Docks* to the facts of this case, McLure P commented that the facts of the case were unusual and that it was misleading to characterise the employer's business as that of labour hire. Instead, it was more akin to the provision of a HR function.[6] On that basis, he considered that the only reasonable conclusion open was that vicarious liability for Mr Scanlan's negligent acts were transferred from the employer to Ngarda.

Murphy JA, in reaching a similar conclusion, referred to the decision in *McDonald v The Commonwealth*,[7] which preceded *Mersey Docks*, in which it was said:

> *'If by the agreement the employer vests in the third party complete, or substantially complete, control of the employee, so that he is entitled not only to direct the employee what he is to do but how he is to do it, and the employee was performing services stipulated for, or authorised by, the third party at the time, the third party is liable.'*

On that basis, Murphy JA concluded that it was open to the trial judge, on the evidence to find, for the purposes of determining the question of vicarious liability, that the authority to control the discretion exercised by Mr Scanlan had passed to Ngarda, and that no material authority to subsisted in the employer.[8]

Mitchell J, like McLure P, referred to the decision *Mersey Docks*, finding that the burden of proof on an employer who sought to avoid vicarious liability was a heavy one, which could '*only be discharged in quite exceptional circumstances*'. To highlight this point, he noted that '*counsel were not able to refer the court to any 20th or 21st century case in which the principle had been applied to exclude an employer's vicarious liability*'.[9]

Mitchell J ultimately found that the uncertainty as to the relevant terms of the contracts between the employer, Mr Scanlan and Ngarda meant that the employer had not discharged its heavy onus of proving that it had divested itself of the entitlement to control how Mr Scanlan did his work. In his view the evidence as to the actual exercise of control was not inconsistent with the employer retaining an *unexercised authority* to direct Mr Scanlan as to how he should safely perform his work.

Dual Vicarious Liability

While the focus of this newsletter is on the transfer of control for the purpose of vicarious liability, a related issue under consideration was whether or not there should be dual vicarious liability. In other words, whether both the employer and the host employer could be vicariously liable for the negligence of Mr Scanlan.

McLure P commented that the New South Wales Court of Appeal in *Day v Ocean Beach Hotel Shellharbour Pty Ltd*[10] concluded that dual vicarious liability was inconsistent with the reasoning of the majority in the High Court decision in *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd*.[11] However, as the claim failed at the first hurdle on the factual issue of breach, he was not prepared to express a view on the matter. Neither Murphy JA or Mitchell J expressed an opinion on this issue either.

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Conclusion

Notwithstanding the outcome in *Kelly*, it remains the case that the burden of proof for shifting liability for an employee's actions to a third party is a heavy one and can only be discharged in '*exceptional*' circumstances.

A more detailed analysis of the law in this area can be found in the decision of the Victorian Supreme Court in *Deutz Australia Pty Ltd v Skilled Engineering Ltd and Anor*.[12] Interestingly, it was also observed in that case that no cases in the 20th century could be found in which '*the burden of showing transfer for purposes of imposition of vicarious liability was discharged*'.[13]

It is clear that the majority in *Kelly* considered that the facts of that case were unusual. Nevertheless, the outcome is somewhat surprising given the apparent uncertainty in the contractual arrangements.

The main point to note, however, is that in any claim involving negligence of a labour hire employee, it should not be automatically assumed that liability will rest with the employer. The contractual relationship will need to be scrutinised to determine whether or not there has been a sufficient degree of transfer of control over the employee for liability to pass to the host employer.

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[1] *Kelly v Bluestone Global Ltd (In Liq)* [2016] WASCA 90.
[2] Ibid [51].
[3] Ibid [53].
[4] [1946] UKHL 1; [1947] AC 1; [1947] 2 All ER 345.
[5] *Kelly v Bluestone Global Ltd (In Liq)* [2016] WASCA 90 [58].
[6] Ibid [59].
[7] (1945) 46 SR (NSW) 129.
[8] *Kelly v Bluestone Global Ltd (In Liq)* [2016] WASCA 90 [75].
[9] Ibid, [90].
[10] [2013] NSWCA 250.
[11] (1986) 160 CLR 626.
[12] [2001] VSC 194.
[13] Ibid [114].

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