Case Notes

Vicarious liability for independent contractors revisited: *Sweeney v Boylan Nominees Pty Ltd*

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The High Court has again considered the question of possible vicarious liability for the acts of independent contractors. While it has maintained the authority of a well-established exception to the usual rule of no liability, it has rejected the idea of a general principle of liability. It is suggested that if there is to be vicarious liability only for employees and not contractors, then the notion of ‘employee’ may need to be revisited.

In 1930 one Ridley, who was engaged to solicit proposals for insurance on behalf of Colonial Mutual Life Assurance Society Ltd (CML), made defamatory comments in rural South Australia concerning a rival insurance company. The High Court held that CML was vicariously liable for this defamation, although Ridley was not its employee.¹ CML was held liable despite having formally instructed Ridley not to make such comments as those he had made.²

In 2000 Maria Sweeney went into a service station in suburban Pymble in Sydney to buy some milk. There the heavy door of the refrigerator came off its hinges and fell on her. The fridge had been serviced earlier in the day by Boylan Nominees Pty Ltd (calling itself Quirk’s Refrigeration). They had asked a Mr Comninos to do the job for them, sending him with a document on their letterhead that described him as ‘our mechanic’. But Mr Comninos was not an employee of Boylan and as a result Mrs Sweeney’s action in negligence against Boylan, fought all the way to the High Court, failed.³

Was there a change in the law of negligence over the 75 years separating these decisions which meant that, while in 1931 the insurance company was held responsible for defamatory words uttered by its canvasser, in 2006 a refrigeration service company was held not responsible for the injury caused by a shoddy repair job done by its mechanic? The question whether the decision in *CML* could be applied to the facts of the later case divided the High Court. When can there be vicarious liability for the acts of an independent contractor?

The NSW Court of Appeal and all the members of the High Court agreed

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¹ Colonial Mutual Life Assurance Society Ltd v Producers & Citizens Co-operative Assurance Co of Australasia Ltd (1931) 46 CLR 41 (*CML*).
² This was so, despite the fact that (as Evatt J demonstrated in his lengthy dissent) Mr Ridley was undertaking a deliberate and malicious campaign to ‘steal’ customers from the plaintiff company, from whose employ he had previously been sacked. In other words, for the majority, vicarious liability existed even in the presence of clear malice.

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that Mr Comninos was not an employee, even on the slightly extended version of the normal tests for employment used in *Hollis v Vabu.* He was not wearing a uniform, he supplied his own tools and equipment, and he invoiced Boylan on a job-by-job basis: in short, he was conducting his own business. Was there some other basis on which Boylan could be found vicariously liable for the negligence of their contractor? The majority said that there was not. The only real argument was over how to maintain the authority of *CML,* which included a short but powerful judgment by Dixon J which had long been accepted as authoritative. According to the majority, *CML* as an exception to the usual rule against vicarious liability for independent contractors should be confined to a narrow ratio — on one view, the case of an agent with authority to solicit the bringing about of legal relations between the principal and third parties, and even there (it seems) to 'slanders uttered to persuade the third party to make an agreement with the principal'.

Kirby J in dissent argued that *CML* was not so confined and that there should be vicarious liability for the actions of a ‘representative agent’ who effectively ‘stands in place of’ the principal and ‘assumes to act in the principal’s right’. Here Boylan had allowed Comninos to be regarded (in their words) as ‘our mechanic’ and he had been given authority to take payment. By his position representing Boylan he had been given permission to enter the premises and work on the fridge.

The majority view is in general accord with past authority. Mr Comninos wore no uniform, drove his own truck, and did not really ‘pretend’ to be part of Boylan’s organisation. (Kirby J specifically held that a reconsideration of the ‘organisation’ test for employment was not justified and must ‘await another day’.) The rule that there is no vicarious liability for the actions of an independent contractor has been reasserted regularly in recent years, most particularly in a pair of cases where an attempt was made by McHugh J (in minority reasoning in both decisions) to extend vicarious liability to ‘agents’ or even ‘representative agents’ on the basis of *CML.* The attempt failed in both cases, and now the third attempt to extend *CML* seems also to have failed. However, it seems arguable that there is a more natural reading of *CML* which lies somewhere between the two extremes of the majority on the one hand (who seem to confine the case so closely that it is as if *Donoghue v Stevenson*) were said to apply only to snails found in Scottish soft drinks) and Kirby J on the other.

Kirby J’s expansive reading of Mr Comninos’s role as ‘agent’ does seem to ignore the fact that, unlike Ridley in the earlier case, he was given no real authority to create, or negotiate for the creation of, legal relations on behalf of

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4 Found in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; 63 ALR 513.
7 Ibid, at [22].
8 Ibid, at [100].
9 Ibid, at [96].
10 Ibid, at [61] point (3).
12 [1932] AC 562 (HL); [1932] All ER Rep 1.
Boylan. Indeed, there is no evidence that Mrs Sweeney even knew of the existence of Mr Comninos or the company Boylan prior to her accident. As the majority commented, she ‘knew nothing of these matters until after her accident’. 13 The majority rejected the facile argument that Mr Comninos was a ‘representative’ of the company because of something that he had ‘represented’ (in the sense of an assertion that he had made). But, with respect, the majority judgment then used the rejection of this argument to move too quickly to the rejection of the view that Mr Comninos, for reasons suggested by Kirby J, could indeed be said to ‘represent’ Boylan, in the sense of ‘standing in their place’ in the work that he was doing. It seems at least arguable that in doing the work he was doing, he was, to use the phrase quoted by the majority from Dixon J’s judgment in CML, ‘standing in [the principal’s] place and . . . not in an independent capacity’. 14

Even if the view of the majority is accepted, that there should be liability only for the acts of ‘true’ agents — persons who have been armed with authority to enter into, or negotiate for, contracts on behalf of a principal — it seems that the limits of this liability have been too narrowly drawn by focusing on the specific facts of CML. This liability arguably should extend beyond simple liability for defamation, to encompass liability for other wrongs committed in the course of concluding a contract. Donut King Australia v Barber 15 seems to be an example of such a case; there Donut King were held liable (on the authority of CML as well as on other grounds) for misrepresentations made by an officer of a company in negotiating a ‘sub-franchise’ with the plaintiffs. 16

The judgment of Kirby J in Sweeney also justifiably raised the broader social context. Why should a refrigeration servicing company’s liability to members of the public injured by their faulty work, depend on the accident of whether an employee is sent out or the work is passed on to a contractor? And given this decision, why would the company now not decide to have all its work done by contractors, with their own companies, organising (or not!) their own insurance? Mr Comninos drove a truck with the words ‘Cool Runnings Refrigeration and Air Conditioning Pty Ltd’ on the side, implying that he himself may have been employed by his own one-man company. 17 While this fact was not in the end held to be relevant by the court, it brings the facts of the case close to those dealt with by the High Court in the earlier decision of Andar Transport Pty Ltd v Brambles Ltd. 18 In his stimulating comment on that decision, Glasbeek drew attention to the social context of companies ‘out-sourcing’ work to other entities, with the aim of reducing their own

14 Ibid, at [18] (emphasis added by majority). Cf the use of this phrase by Kirby J, ibid, at [38].
16 It might be possible to extend the argument made in J W Neyers, ‘A Theory of Vicarious Liability’ (2005) 43 Alta L Rev 287 (cited in Sweeney at [12]), that vicarious liability could be grounded on an implied term in the contract of employment to indemnify the employee, to reach the conclusion that an implied term of this sort should be found in ‘true’ agency arrangements.
17 (2006) 227 ALR 46; 152 IR 317 at [50].
18 (2004) 217 CLR 424; 206 ALR 387. There was no evidence taken from Mr Comninos, so we have no idea whether he had been employed by Boylan prior to setting up his own business, or not. If this were so the facts would be even closer.
responsibility for damage caused by the conduct of their enterprises.\textsuperscript{19} He suggested that another way of viewing the situation, where a larger company operates through sub-contracts with smaller companies to engage workers, would be to view the smaller companies as simply acting as ‘agents’ for the larger in creating legal relationships.

While that analysis is not directly applicable here, the questions that Glasbeek raised at the end of his comment are important. In framing liability rules it is worth asking ‘whose business this was, and how much of the risk should be borne by it’.\textsuperscript{20} If it was a common practice for Boylan to have repair work done on their behalf by Comninos,\textsuperscript{21} one may say that he was ‘economically integrated’ into Boylan’s business. They were able to describe him in common terminology as ‘our mechanic’. Thus it was indeed Boylan’s business that was being done and hence it is not unfair that they should bear the risks created by their enterprise. There is a strong argument that, if (as the majority held here) the doctrine of vicarious liability cannot be extended beyond employees, the concept of ‘employee’ should once again be revisited and the arguments in favour of some version of the ‘organisation’ test be seriously considered.\textsuperscript{22}

The case also raises important ethical issues about how litigation is conducted.\textsuperscript{23} It is not exactly clear at what point Mrs Sweeney’s lawyers became aware that Boylan were claiming that Mr Comninos was a contractor and not an employee. Apparently it was not mentioned in their filed statement of defence.\textsuperscript{24} Mr Comninos was not a party to the litigation (despite the fact that he may have had his own insurance)\textsuperscript{25} and as a result Mrs Sweeney was left with no remedy and a large costs bill. There is now presumably some doubt as to whether or not she will receive permission to sue Mr Comninos, as the limitation period of three years applying to personal injury claims has expired. Kirby J in particular was scathing in his comments about ‘trial by evidentiary ambush’.\textsuperscript{26} He offered this as another reason why the court ought to have been prepared to extend vicarious liability to persons who represent others in doing work that the others have promised to do: in his words, ‘the representative agent of the party sued, performing that party’s functions and

\textsuperscript{20} Ibid, at 239.
\textsuperscript{21} See (2006) 227 ALR 46; 152 IR 317 at [56] per Kirby J, who recorded the trial judge’s findings which included the facts that Comninos worked ‘on a daily basis’ for Boylan, performing the same work as its employees, subject to directions from its managers, carrying a book of service reports bearing the title ‘Quirks Refrigeration’ and collecting money on its behalf.
\textsuperscript{22} See the comments of Kirby J referred to above at n 10.
\textsuperscript{24} The majority simply note that the reason for Mr Comninos’ absence from the litigation ‘does not emerge with any clarity’, but that the fact of the assertion of his status as an independent contractor was ‘at least readily ascertainable’ before the trial began: (2006) 227 ALR 46; 152 IR 317 at [3]. There may have been some hints but it seems fairly clear that the plaintiff’s advisers did not see the issue until it was too late.
\textsuperscript{25} See ibid, at [107] per Kirby J.
\textsuperscript{26} Ibid.
advancing its economic interests, effectively as part of its enterprise’.  

A more rational allocation of liability, more in accordance with the expectations of the community, would indeed go some way to avoiding the pitfalls for the unwary shown in this case. It is to be regretted that the fiction that all ‘independent contractors’ are free spirits competing on an equal basis in the commercial marketplace is still being perpetuated, in initiatives such as the recently introduced Independent Contractors Bill 2006 (Cth). The complexities of the workplace, including the phenomenon of ‘dependent contractors’ who work for only one customer, are obscured by legislation which pretends that all contractors are alike. Given that the government seems to have made a deliberate decision to leave the boundaries of the employment relationship to be determined by the common law, it can only be hoped that the High Court will take up the opportunity in the future to consider the possible application of a broader test for employment, taking into account the social reality of power structures in the modern workplace.

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27 Ibid, at [38].
29 See the Opposition comments, ibid, p 16, for some data on ‘dependent contractors’. While the evidence is not clear as to whether this was Mr Comninos’ situation, the facts that he worked for Boylan ‘on a daily basis’ and was directed to jobs by Boylan’s employees (see (2006) 227 ALR 46; 152 IR 317 at [56] per Kirby J) suggest that at least the bulk of his work would have been for Boylan.
30 See the Government members’ comments in the Senate Report, above n 28, p 6.