HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ

MARIA SWEENEY APPELLANT

AND

BOYLAN NOMINEES PTY LIMITED
T/AS QUIRKS REFRIGERATION RESPONDENT

Sweeney v Boylan Nominees Pty Limited
[2006] HCA 19
16 May 2006
S451/2005

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

D F Jackson QC with M J Ward for the appellant (instructed by McLachlan Chilton Solicitors)

J E Maconachie QC with N E Chen for the respondent (instructed by Holman Webb)

CATCHWORDS

Sweeney v Boylan Nominees Pty Limited

Negligence – Vicarious liability – Respondent engaged a repairer to perform maintenance on refrigerator installed at a petrol station – Respondent obliged under lease agreement with third party to service and maintain refrigerator – Refrigerator door negligently repaired – Appellant struck and injured by insecurely fastened door.

Employer and employee – Independent contractor – Whether relationship between the respondent and repairer that of employment or independent contract – Repairer performed work for the respondent on a regular basis – Repairer performed work at the respondent's request and direction – Repairer frequently attended the respondent's premises to obtain parts with which to effect repairs – Repairer had no formal or written contract with the respondent – Repairer did not wear shirt bearing the respondent's insignia which the respondent required its employees to wear – Repairer did not receive wages or superannuation contributions from the respondent – Repairer had secured his own insurance policy for liability which he may incur in the course of his work.

Negligence – Vicarious liability – Whether respondent vicariously liable for the negligence of the repairer on the basis that the repairer was a "representative" of the respondent – Respondent provided the repairer with invoices bearing the respondent's name for the repairer to give to customers upon completion of work – Invoices described the repairer as the respondent's mechanic – Repairer authorised to receive payments from customers on behalf of the respondent – Whether the principles in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 apply.

Negligence – Vicarious liability – Legal policy – Whether increasing reliance on independent contractors rather than employees relevant – Whether independent contractors taking out policies of insurance relevant – Whether vicarious liability on the basis of representation might encourage defendants to disclose the nature of commercial relationships with independent contractors in advance of trial.

Evidence – Failure of the respondent to disclose until trial the nature of the commercial relationship which he had with the repairer – Administration of justice.

Words and phrases – "vicarious liability", "representative", "representation", "agent", "principal", "employee", "independent contractor".

1 GLEESON CJ, GUMMOW, HAYNE, HEYDON AND CRENNAN JJ. In August 2000 the appellant went to buy a carton of milk at a service station and convenience store near where she lived. When she opened the door of the refrigerator in which the milk was kept, the door came off and hit her on the head. She suffered injury to her head, neck and hand.

2 The appellant commenced an action in the District Court of New South Wales claiming damages for negligence. She sued those whom she alleged were the owners and operators of the service station and convenience store, and the present respondent. She alleged that the present respondent "maintained ... or distributed" the refrigerator. At trial, the claim against those who were alleged to be the owners and operators failed; the claim against the respondent succeeded. It was held that the respondent was vicariously liable for the negligence of a mechanic it had sent to service the refrigerator in response to the service station's complaint that the door of the refrigerator was not closing properly. The owners and occupiers were found to have done all that they could reasonably be expected to have done in the circumstances and thus not negligent. Judgment was entered in the District Court for the appellant against the respondent for $43,932 and costs.

3 The issue of the respondent's vicarious liability for the mechanic was an important issue at trial. Neither the mechanic, nor the company through which he may have conducted his business, was a party to the proceedings. On the appellant's case against the respondent, she would have succeeded in an action against the mechanic. Why the mechanic and his company were not parties does not emerge with any clarity from the material before this Court. There seems every reason to think, however, that the mechanic's identity, and the fact that the respondent asserted that he was an independent contractor, were matters that were known, or at least readily ascertainable, before the trial began.

4 The facts found at trial can be stated shortly. The respondent had leased the refrigerator to Australian Co-operative Foods Ltd. The lease obliged the respondent to service and maintain the refrigerator in a proper and workmanlike manner and to replace any part which required replacement due to the normal operation of the refrigerator. The evidence led at trial did not reveal what arrangements Australian Co-operative Foods Ltd had made with the owners and operators of the service station and convenience store that led to the refrigerator being installed in their premises. Nothing was then, or is now, said to turn on this.

5 About four or five hours before the appellant's accident, those operating the service station had told the respondent that the door of the refrigerator was

not closing properly. A mechanic came to the premises, tightened the screws in the hinges and, having demonstrated to the manager of the service station that the door was working correctly, left the premises. The trial judge may be understood as finding that the mechanic did not act with reasonable care.

6 The mechanic was not an employee of the respondent. He was described, in evidence at trial, as a contractor to the respondent. It was said that he performed duties at the respondent's request, when he was asked, and that he then "invoiced [the respondent] accordingly for the hours that he performed, and spare parts". The respondent provided him with no uniform, no tools or equipment and no vehicle in which to transport tools and equipment. The mechanic's van was marked with a name derived from the name of a company of which he was a director.

7 The trial judge held that the respondent was vicariously liable for the mechanic's negligence. He concluded that the mechanic "was acting as a servant or agent of [the respondent] with the authority and the approval of [the respondent] to undertake the work that he did". Two documents loomed large in the trial judge's consideration of the question of vicarious liability. First, the mechanic had given a written service report to the service station operators and to the respondent. The report was written on the respondent's form. Among other things, that form referred to "our mechanic". Secondly, the respondent in its claim report to its personal and public liability insurer again referred to "our mechanic" as having gone to the premises, and said nothing about the mechanic not being an employee.

8 Although some emphasis was given to these documents in the argument of the appeal to this Court, the better view is that the references to "our mechanic" said nothing about whether he was an employee of the respondent or its contractor. The most that can be gleaned from these references is that the mechanic did what he did for or on behalf of the respondent.

9 Until she made her claim, the appellant knew nothing of any repair being effected to the refrigerator immediately before her accident. She knew nothing about any of the arrangements that underpinned the repair being made, or the arrangements concerning the refrigerator's lease, or its use on the premises. Until she made her claim, all that the appellant knew about the refrigerator, or its repair, was that its door had come off and struck her.

10 On appeal to the Court of Appeal of New South Wales the judgment in favour of the appellant was set aside and in its place judgment was entered for the respondent. That Court (Giles and Ipp JJA, Brownie AJA) held[1] that Boylan (the respondent in this Court) was not vicariously liable for the negligence of the mechanic. By special leave the appellant now appeals to this Court. The appeal should be dismissed. The respondent was not vicariously liable for the negligence of the mechanic.

11 Three recent decisions of this Court have examined questions of vicarious liability: *Scott v Davis*[2], *Hollis v Vabu Pty Ltd*[3] and *New South Wales v Lepore*[4]. It is unnecessary to rehearse all that is established by those decisions. It is important, however, to begin examination of the issues in this appeal from a frank recognition of some considerations that are reflected in those decisions. First, "[a] fully satisfactory rationale for the imposition of vicarious liability in the employment relationship has been slow to appear in the case law"[5]. Secondly, "the modern doctrine respecting the liability of an employer for the torts of an employee was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy"[6]. That may suggest that the policy to which effect was given by "the modern doctrine" is clearly identified, but, as is implicit in the first proposition, the policy which is said to lie behind the development of the modern doctrine is not and has not been fully articulated. Thirdly, although important aspects of the law relating to vicarious liability are often traced to the judgment of Parke B in *Quarman v Burnett*[7], neither in that

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1 *Boylan Nominees Pty Ltd t/as Quirks Refrigeration v Sweeney* [2005] Aust Torts Reports ¶81-780.

2 (2000) 204 CLR 333.

3 (2001) 207 CLR 21.

4 (2003) 212 CLR 511.

5 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 37 [35].

6 *Hollis* (2001) 207 CLR 21 at 37 [34]; *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 56-57; *New South Wales v Lepore* (2003) 212 CLR 511 at 580 [196].

7 (1840) 6 M & W 499 [151 ER 509]. See also *Laugher v Pointer* (1826) 5 B & C 547 [108 ER 204].

decision, nor in other early decisions to which the development of the doctrine of vicarious liability may be traced, does there emerge any clear or stable principle which may be understood as underpinning the development of this area of the law. Indeed, as is demonstrated in *Scott*[8], the development of the law in this area has not always proceeded on a correct understanding of the basis of earlier decisions.

12 Nonetheless, as the decisions in *Scott*, *Hollis* and *Lepore* show, there are some basic propositions that can be identified as central to this body of law. For present purposes, there are two to which it will be necessary to give principal attention. First, there is the distinction between employees (for whose conduct the employer will generally be vicariously liable) and independent contractors (for whose conduct the person engaging the contractor will generally not be vicariously liable). Secondly, there is the importance which is attached to the course of employment. Whether, as has recently been suggested[9], these, or other, considerations would yield a compelling and unifying justification for the doctrine of vicarious liability need not be decided in this matter. In particular, whether, as suggested[10], the justification for the doctrine of vicarious liability is found in an employer's promise in the contract of employment to indemnify the employee for legal liability suffered by the employee in the conduct of the employer's business is a large question which is better examined in the light of full argument.

13 Whatever may be the justification for the doctrine, it is necessary always to recall that much more often than not, questions of vicarious liability fall to be considered in a context where one person has engaged another (for whose conduct the first is said to be vicariously liable) to do something that is of advantage to, and for the purposes of, that first person. Yet it is clear that the bare fact that the second person's actions were intended to benefit the first or were undertaken to advance some purpose of the first person does not suffice to demonstrate that the first is vicariously liable for the conduct of the second. The whole of the law that has developed on the distinction between employees and independent contractors denies that benefit or advantage to the one will suffice to

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8 (2000) 204 CLR 333 at 386-408 [162]-[226].

9 Neyers, "A Theory of Vicarious Liability", (2005) 43 *Alberta Law Review* 287.

10 Neyers, "A Theory of Vicarious Liability", (2005) 43 *Alberta Law Review* 287 at 301.

establish vicarious liability for the conduct of the second. But there is an important, albeit distracting, consequence that follows from the observation that the first person seeks to gain benefit or advantage from engaging the second to perform a task. It is that the relationship is one which invites the application of terms like "representative", "delegate" or "agent". The use of those or other similar expressions must not be permitted to obscure the need to examine what exactly are the relationships between the various actors.

14 In the present case, the appellant's contention that the respondent was vicariously liable for the negligence of the mechanic fastened upon a number of statements found in the reasons for judgment of Dixon J in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*[11]. It was submitted that those statements supported the conclusion that the mechanic did the work he did "as a representative" of the respondent. He was a "representative", so the appellant submitted, because the mechanic "represented" that he had an association with the respondent, and the respondent "represented" that same association. It was not said that these representations of association had in any way been relied on by the appellant. She knew nothing of these matters until after her accident. The "representing" was said to be constituted by what passed between the respondent and the service station operators before and at the time of the attempted repairing of the door.

15 At once it can be seen that "representative" and "represented" are used with radically different meanings when it is said that the mechanic was the respondent's "representative" because of what he and the respondent "represented". "Representative" is used to denote a relationship in which one person (here, the mechanic) stood in the shoes of, or acted on behalf of, another (here, the respondent). By contrast, "represented" is used to denote the conveying of information or the inducing of a belief in another.

16 The point to be made is more than linguistic. What is revealed is that like "agent", the word "representative" and its cognate forms are used in many different senses. It is necessary to distinguish between the different meanings. Saying that B did what he or she did as the "representative" of A does not reveal, without definition of what is meant, what was the relationship between the parties.

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11 (1931) 46 CLR 41.

17 In *Colonial Mutual Life*, Dixon J said[12]:

> "Some of the difficulties of the subject arise from the many senses in which the word 'agent' is employed. 'No word is more commonly and constantly abused than the word "agent". A person may be spoken of as an "agent" and no doubt in the popular sense of the word may properly be said to be an "agent", although when it is attempted to suggest that he is an "agent" under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading' (per Lord *Herschell* in *Kennedy v De Trafford*[13]). Unfortunately, too, the expressions 'for,' 'on behalf of,' 'for the benefit of' and even 'authorize' are often used in relation to services which, although done for the advantage of a person who requests them, involve no representation."

In *Colonial Mutual Life* the person, for whose statements the appellant was sought to be made vicariously liable, had been engaged by the appellant to canvass for proposals for life insurance. The statements which it was alleged that he made, and which were slanderous of the respondent company, had been uttered in the course of his attempting to induce persons to make proposals for life insurance by the appellant. He was not a servant of the appellant company. Yet it was held that the appellant was vicariously liable for his statements because he made them in acting as the company's agent.

18 In soliciting proposals, the person who made the slanderous statements was acting in right of the company and with its authority. He had express authority to canvass for the making of contractual offers to his principal. Although he had no authority from his principal to accept any offers that were made, "the Company in confiding to his judgment, within the limits of relevance and of reasonableness, the choice of inducements and arguments, authorized him on its behalf to address to prospective proponents such observations as appeared to him appropriate"[14]. "[T]he very service to be performed consist[ed] in standing in [the principal's] place and assuming to act in [its] right *and not in an independent capacity*"[15] (emphasis added) in a transaction with others. He acted

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12 (1931) 46 CLR 41 at 50.

13 [1897] AC 180 at 188.

14 (1931) 46 CLR 41 at 50 per Dixon J.

15 (1931) 46 CLR 41 at 48-49 per Dixon J.

in right of the principal, and not in an independent capacity, because he acted in execution of his authority to canvass for offers to contract with his principal.

19 In *Colonial Mutual Life*[16], Dixon J said that the rule imposing liability upon a master for the wrongs of a servant committed in the course of employment was (then)[17] commonly regarded as part of the law of agency. And as earlier noted, Dixon J emphasised the difficulties that attend the use of the word "agent". Rather than being used with a single and fixed meaning, the writings of Oliver Wendell Holmes Jnr, referred to by Dixon J in *Colonial Mutual Life*[18], show that words like "agent", "representative", "for", "on behalf of", are often used in this context as statements of conclusion that mark the limits to which vicarious liability is extended[19]. But when used in that way, they are statements of conclusion that do not necessarily proceed from an articulated underlying principle that identifies why there should be vicarious liability in one case but not another.

20 Rather, the conclusions that have been reached about the ambit of vicarious liability may best be understood as ultimately influenced by, even derived from, medieval notions of headship of a household[20] which in turn depended upon the application of analogies drawn from Roman law. Responsibility for the acts of a servant is, as Holmes said[21]:

> "easily explained, if we remember, that it originated when a servant was a slave, whom the master was obliged to keep in order as he was his cattle, and it is then manifest why it should be otherwise if he employed an independent contractor; for the latter corresponds to a free man in ancient

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16 (1931) 46 CLR 41 at 49.

17 See now, however, *Scott v Davis* (2000) 204 CLR 333 at 413 [239].

18 (1931) 46 CLR 41 at 49.

19 Holmes, *The Common Law*, (1881) at 230-232; Holmes, *Collected Legal Papers*, (1921), "Agency" at 102-104.

20 *Scott v Davis* (2000) 204 CLR 333 at 409-410 [230]; *Hollis* (2001) 207 CLR 21 at 37 [33].

21 "The Arrangements of the Law – Privity", (1872) 7 *American Law Review* 46 at 62.

> Rome, who had a separate legal existence, and was, therefore, responsible *in propria persona*".

But there is a further consequence of recognising the servile status of those for whom the master is to be held responsible as a basis for the initial development of much of this branch of the law. This further consequence is that the law has so far departed from its root that "it is as hopeless to reconcile the differences [between tradition and the instinct for justice] by logic as to square the circle"[22]. That is, as Holmes continued[23], "there is no adequate and complete explanation of the modern law, except by the survival in practice of rules which lost their true meaning when the objects of them ceased to be slaves".

21 *Colonial Mutual Life* must be understood against the background of the development of this area of law by the assertion and application of conclusions whose ultimate roots are found in analogies which are no longer apt (if they ever were). But whatever may now be seen to be the imperfections in the ultimate roots of this area of the law, the conclusion reached in *Colonial Mutual Life* fits entirely within the explanation of vicarious liability identified by Pollock[24] and reflected in the subsequent decisions of this Court culminating in *Scott*, *Hollis* and *Lepore*.

22 *Colonial Mutual Life* establishes that if an independent contractor is engaged to solicit the bringing about of legal relations between the principal who engages the contractor and third parties, the principal will be held liable for slanders uttered to persuade the third party to make an agreement with the principal. It is a conclusion that depends directly upon the identification of the independent contractor as the principal's agent (properly so called) and the recognition that the conduct of which complaint is made was conduct undertaken in the course of, and for the purpose of, executing that agency.

23 Pollock identified the element common to cases of vicarious liability as being that "a man has for his own convenience brought about or maintained some state of things which in the ordinary course of nature may work mischief to his neighbours"[25]. Pollock further concluded that where an employer conducted a

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22 Holmes, *The Common Law* at 231.

23 *The Common Law* at 232.

24 Pollock, *Essays in Jurisprudence and Ethics*, (1882) at 122.

25 See *Lepore* (2003) 212 CLR 511 at 582 [202] per Gummow and Hayne JJ.

business, and for that purpose employed staff, the employer brought about a state of things in which, if care was not taken, mischief would be done. But the liability to be imposed on the employer was liability for the way in which the business (that is, the *employer's* business) was conducted. Conduct of the business and the employee's actions in the course of employment in *that* business were the only state of things which the employer created and for which the employer would be responsible. Thus for Pollock[26], course of employment was not a limitation or an otherwise more general liability of the employer; it was a necessary element of the definition of the extent of liability.

24 The conclusion reached in *Colonial Mutual Life*, that the party engaging an agent (albeit as an independent contractor) to solicit for the creation of legal relationships between that party and others is liable for the slanders uttered in the course of soliciting proposals, stands wholly within the bounds of the explanations proffered by Pollock for the liability of a master for the tortious acts of a servant. It stands within those bounds because of the closeness of the connection between the principal's business and the conduct of the independent contractor for which it is sought to make the principal liable. The relevant connection is established by the combination of the engagement of the contractor as the agent of the principal to bring about legal relations between the principal and third parties, and the slander being uttered in the course of attempting to induce a third party to enter legal relations with the principal.

25 Now it may also well be that, as pointed out in *Lepore*[27], cases of the deliberate misdoings of a servant, like *Lloyd v Grace, Smith & Co*[28], are also to be understood as informed by notions of course of employment. It is not necessary to explore that question further here, beyond noting that, as was also pointed out in *Lepore*[29], such cases may yield to simpler analysis revealing the employer's direct rather than vicarious liability for what has occurred.

26 But the wider proposition that underpinned the argument of the appellant in this case, that if A "represents" B, B is vicariously liable for the conduct of A, is a proposition of such generality that it goes well beyond the bounds set by

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26 *Essays in Jurisprudence and Ethics* at 126.

27 (2003) 212 CLR 511 at 593 [235] per Gummow and Hayne JJ.

28 [1912] AC 716.

29 (2003) 212 CLR 511 at 593 [235]-[237] per Gummow and Hayne JJ.

notions of control (with old, and now imperfect analogies of servitude) or set by notions of course of employment.

27 These bounds should not now be redrawn in the manner asserted by the appellant. Hitherto the distinction between independent contractors and employees has been critical to the definition of the ambit of vicarious liability. The view, sometimes expressed[30], that the distinction should be abandoned in favour of a wider principle, has not commanded the assent of a majority of this Court.

28 In *Scott*, the majority of the Court[31] rejected the contention that the owner of an aircraft was vicariously liable for the negligence of the pilot of that aircraft if the pilot operated the aircraft with the owner's consent and for a purpose in which the owner had some concern. The argument that "a new species of actor, one who is not an employee, nor an independent contractor, but an 'agent' in a non-technical sense"[32] should be identified as relevant to determining vicarious liability, was rejected.

29 In *Hollis*[33], the Court amplified the application of the distinction between independent contractors and employees to take account of differing ways in which some particular enterprises are now conducted. As was said in the joint reasons[34]:

> "In general, under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise."

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30 *Scott* (2000) 204 CLR 333 at 370 [110] per McHugh J; *Hollis* (2001) 207 CLR 21 at 57-58 [93] per McHugh J.

31 (2000) 204 CLR 333 at 342 [18], 343 [20] per Gleeson CJ, 422-424 [268]-[273] per Gummow J, 440 [311] per Hayne J, 459-460 [357]-[358] per Callinan J.

32 *Scott* (2000) 204 CLR 333 at 423 [269] per Gummow J.

33 (2001) 207 CLR 21.

34 (2001) 207 CLR 21 at 40 [42].

But neither in *Scott* nor in *Hollis*, nor earlier in *Colonial Mutual Life*, was there established the principle that A is vicariously liable for the conduct of B if B "represents" A (in the sense of B acting for the benefit or advantage of A). On the contrary, *Scott* rejected contentions that, at their roots, were no different from those advanced in this case under the rubric of "representation" rather than, as in *Scott*, under the rubric "agency". As was said in *Scott* of the word "agent"[35], to use the word "representative" is to begin but not to end the inquiry.

30 It is as well to add something further about *Hollis*. *Hollis* hinged about whether the person whose conduct was negligent was to be identified as an employee of the principal. Seven considerations were identified in the facts of that case[36] as bearing upon the question. They included that the courier wore the principal's livery, that he was subject to close direction by the principal about not only the manner of performing the work (work which required only limited skills), but also both the financial dealings generated by the work and the times at which the work was done.

31 The circumstances of the present case are very different. The mechanic was not an employee of the respondent. He conducted his own business[37]. It may be that it could be inferred that he did that through, and as an employee of, the company whose name provided the name advertised on his vehicle. But this was not a matter to which close attention was given in evidence at trial and it is not necessary to pursue it to its conclusion. That the mechanic was engaged in a business other than that of the respondent was demonstrated by a number of circumstances but chief among them were his invoicing the respondent for each job he did and the respondent's concern to verify that the mechanic had proper workers' compensation and public liability insurance. The interposition of the mechanic's company would, of course, give further support to the conclusion that he was engaged in a business other than that of the respondent.

32 The mechanic or, if it were the case, his company, was engaged from time to time as a contractor to perform maintenance work for the respondent. Unlike the principal in *Hollis*[38], the respondent did not control the way in which the

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35 (2000) 204 CLR 333 at 423 [268].

36 (2001) 207 CLR 21 at 42-45 [48]-[57].

37 cf *Hollis* (2001) 207 CLR 21 at 42 [48].

38 (2001) 207 CLR 21 at 42 [49].

mechanic worked. The mechanic supplied his own tools and equipment[39], as well as bringing his skills to bear upon the work that was to be done. And unlike the case in *Hollis*[40], the mechanic was not presented to the public as an emanation of the respondent. The two documents to which the trial judge, as mentioned earlier, attached great weight neither require nor support the conclusion that he was. Neither says anything of the nature of the relationship between the mechanic and the respondent beyond the fact that the mechanic was acting at the request of the respondent. As previously stated, that presents the question to be answered in this case, it does not answer it.

33 Whatever may be the logical and doctrinal imperfections and difficulties in the origins of the law relating to vicarious liability, the two central conceptions of distinguishing between independent contractors and employees and attaching determinative significance to course of employment are now too deeply rooted to be pulled out. And without discarding at least the first and perhaps even the second, the appellant's claim against the respondent must fail. The mechanic was an independent contractor. He did what he did for the benefit of the respondent and in attempted discharge of its contractual obligations. But he did what he did not as an employee of the respondent but as a principal pursuing his own business or as an employee of his own company pursuing its business[41].

34 The conclusion that the mechanic was an independent contractor is determinative of the issue that arises in the appeal. The appeal must be dismissed with costs.

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39 cf *Hollis* (2001) 207 CLR 21 at 44 [56].

40 (2001) 207 CLR 21 at 42 [50].

41 *Colonial Mutual Life* (1931) 46 CLR 41 at 48.

35 KIRBY J. This appeal, from a judgment of the New South Wales Court of Appeal[42], concerns the law of vicarious liability. By that law, one person is rendered legally liable for the wrongs of another by virtue of a relationship with the other regardless of whether that person is personally at fault[43].

36 In a number of recent decisions, members of this Court have acknowledged that no single explanation can be offered, "completely satisfactory for all cases"[44], for the imposition of vicarious liability. In so concluding this Court has repeated what scholars have long said. Thus, Professor Fleming observed that vicarious liability should be "frankly recognised as having its basis in a combination of policy considerations"[45].

37 In deriving the answers to the issues in this case, the duty of this Court is to apply the applicable legal doctrine, as expressed in the cases. In doing so, it must keep in mind the changing social conditions that affect economic activities of employment, or quasi-employment, in contemporary Australia[46]. A legal notion that began in Roman law, in concepts of responsibility for the actions of slaves and animals[47], which is still replete with the language of servitude and talk of "servants" and "masters", and which has only lately accepted the language of "employment", is obviously in need of more than verbal repair and re-expression. But here no change in the law is necessary to sustain the appeal; merely its

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42 *Boylan Nominees Pty Ltd v Sweeney* [2005] Aust Torts Rep ¶81-780 per Ipp JA (Giles JA and Brownie AJA concurring).

43 Queensland Law Reform Commission, *Vicarious Liability*, Report No 56, (2001) at 1.

44 See, eg, *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 38 [35]; *New South Wales v Lepore* (2003) 212 CLR 511 at 611 [299]. See also *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 56-57.

45 Fleming, *The Law of Torts*, 9th ed (1998) at 410 referring to Atiyah, *Vicarious Liability in the Law of Torts*, (1967) ch 2 ("Atiyah"); Laski, "Basis of Vicarious Liability", (1916) 26 *Yale Law Journal* 105; Douglas, "Vicarious Liability", (1929) 38 *Yale Law Journal* 584; Flannigan, "Enterprise Control: The servant-independent contractor distinction", (1987) 37 *University of Toronto Law Journal* 25. See also Prosser and Keaton, *Prosser and Keaton on the law of torts*, 5th ed (1984) at 500.

46 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29 per Mason J; cf *Hollis* (2001) 207 CLR 21 at 53-54 [84]-[85].

47 Reasons of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ at [20] ("the joint reasons").

application. This is not an occasion to take the law back to the concededly imperfect analogies of servitude[48]. But it is important to apply the established category of vicarious liability to which the appellant appealed. Now is not the time to reverse recognition of the fact that, in specified circumstances, a principal is liable for the acts done by its "representative" in the world at large.

38 When this approach is adopted, the outcome of the present appeal is that the person who caused the damage to the injured party was not an employee of the defendant. However, that person was the representative agent of the party sued, performing that party's functions and advancing its economic interests, effectively as part of its enterprise. Although an independent contractor, the wrong-doer carried out his activities "representing the person who requests its performance in a transaction with others, so that the very service to be performed consists in standing in [its] place and assuming to act in [its] right and not in an independent capacity"[49]. Vicarious liability in the other party is thus established.

39 The result is that the primary judge in this case was correct in his orders[50]. The Court of Appeal erred in disturbing them[51]. The appeal succeeds. The judgment at trial should be restored.

The facts

40 *Circumstances of the incident*: Mrs Maria Sweeney ("the appellant") was injured on 2 August 2000 when a refrigerator door in the shop of a service station in Pymble, a Sydney suburb, fell off its hinge and hit her on the head. The incident was recorded by a video camera. It happened at about 4 pm.

41 Earlier in the day, a defect or hazard of the door had been reported by the proprietors of the service station ("the Patels") to Boylan Nominees Pty Limited trading as Quirks Refrigeration ("the respondent"). Boylan owned the refrigerator. It leased it to Australian Co-operative Foods Limited who placed it in the service station shop pursuant to a further lease. Under the "Master

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48 Joint reasons at [26].

49 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 48-49 per Dixon J ("*CML*").

50 *Maria Sweeney v Narendra Patel and Ors*, unreported, District Court of New South Wales, 12 March 2004 (No 1350/02) ("reasons of the primary judge").

51 Such a claim, with specific reliance on *CML*, was raised by the appellant expressly before the Court of Appeal by a notice of contention. It was decided against the appellant: see [2005] Aust Torts Rep ¶81-780 at 67,219-67,223 [64]-[85].

Operating Lease Agreement", Boylan agreed to service and maintain the refrigerator "in a proper and workmanlike manner".

42 Pursuant to the Patels' notification, Mr Nick Comninos arrived at the service station at about 2.30 pm. He partly dismantled the door of the refrigerator. He purported to effect a repair and to test the door, demonstrating the apparent absence of defect to the Patels' attendant[52].

43 As found, the defect that had originally occasioned the Patels' report to Boylan was not in fact repaired. The primary judge decided that Mr Comninos had failed to fix it. He concluded that this constituted negligence on Mr Comninos's part and that such negligence was the cause of Mrs Sweeney's injuries[53].

44 The worksheet or invoice for this inadequate repair was tendered in evidence. It appears under a prominent heading "Quirks Refrigeration". Below this title, in small type, appears the statement "A Division of Boylan Nominees Pty Ltd". The document reports the service effected by the mechanic ("Repaired door & tested left running well."). It records the date and time of the service call. The printed form then provides:

> "1. This authorises you to service my/our refrigerator and I/we agree to pay cash for work done and material used.
>
> 2. I/we hereby instruct your mechanic to work overtime for which I/we agree to pay the rates set out … (Cross out if not applicable).
>
> 3. Any unsatisfactory repairs of which you are the sole judge to be rectified by you free of charge provided same are reported to you within seven days of the completion of the service and such claim shall be limited solely to the rectification free of charge of the unsatisfactory work no claim for loss consequential or otherwise being admissible."

There then appears in bold type the statement:

> "Terms: Cash on completion of work. Our mechanic is authorised to collect the amount due."

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52 Reasons of the primary judge at 13.

53 Reasons of the primary judge at 30.

45 The form concludes with a space for the "Mechanic's Signature" and the "Customer's Signature". It was agreed that the mechanic's signature was that of Mr Comninos. On the face of things, therefore, Mr Comninos represented himself as "our" mechanic, that is, Boylan's mechanic. The form facilitated that representation.

46 On the day after Mrs Sweeney's injury, she received a letter from the service station signed by Mr Naren Patel. After expressing regret for the incident, the letter stated:

> "I have informed the refrigeration company of the incident, and I am presently investigating the matter with them on your behalf. I will inform you in due course of any reply that I receive from them."

47 The "refrigeration company" referred to was Boylan. According to the evidence, Boylan submitted an insurance claim form for Mrs Sweeney's claim to its public liability insurer. This form, signed on 21 August 2000 by an officer of Boylan, disclosed that the refrigerator in question was "owned by Quirks (Boylan Nominees)". It recorded the opinion that Boylan was liable:

> "The door hinge is broken, and it would seem that we are probably liable given the status of the cabinet, and our responsibility as owners."

48 The report also went on to represent that the repair, found to have been defective, was performed by Boylan's own mechanic, just as the worksheet had earlier suggested:

> "Door not closing properly, so mechanic retightned [sic] screw which had come loose. We visited the site at 2.00 pm approximately. We tightened the door screws, refer accident details."

49 In the description of the property and damage in the insurance form Boylan's officer wrote:

> "We are advised that we received a call to fix a loose door, and our mechanic went to the Service Station where he tightened the door screws, and demonstrated to the manager that the door was working correctly – this is apparently on video.
>
> Quirks have the broken hinge which was the cause of the door falling onto Mrs Sweeney, after we previously fixed it."

50 *Relationship with the mechanic*: Mrs Sweeney did not sue Mr Comninos. Nor (if it is relevant) did she sue a company (Cool Runnings Refrigeration and Airconditioning Pty Ltd) whose name was said at trial to appear on

Mr Comninos's van[54]. Her action was brought in the District Court of New South Wales against the Patels (as occupier of the premises in which the hazardous refrigerator door existed) and Boylan (allegedly responsible for the maintenance and upkeep of the refrigerator and for the negligent repair of the defective door by Mr Comninos).

51 Before the trial, the Patels and Boylan, by a common cross-claim, joined Williams Refrigeration Australia Pty Ltd ("Williams Refrigeration"), to the proceedings, but not Mr Comninos or his company, as cross-defendants. In the result, this cross-claim, as brought, was rejected by the primary judge. It did not trouble the Court of Appeal, or this Court. We are not therefore concerned with any liability of Williams Refrigeration.

52 In the ordinary course of events, a person such as Mrs Sweeney would have been unaware of the relationship between Mr Comninos and Boylan. All she would have known was that a heavy refrigerator door had fallen on her, causing injury and damage. The grounds of defence filed by Boylan made no explicit or implicit reference to the position of Mr Comninos. The defence was extremely brief and stated in very general terms. It denied the allegations in the statement of claim and contested that it "was negligent as alleged or at all".

53 When the trial commenced, Boylan claimed that Mr Comninos was an independent contractor. In its case, Boylan called Mr Wayne Duckworth, its former operations manager. It was he who gave evidence as to the relationship between Boylan and Mr Comninos, pursuant to which the latter had performed the work on the refrigerator door[55].

54 According to Mr Duckworth's evidence, accepted by the primary judge, Mr Comninos had no formal or written contract with Boylan[56]. He was supplied with no uniform, whereas Boylan's employees wore a shirt with its insignia[57]. This differentiation was unlikely to have been known by Mrs Sweeney. It may not have been noticed by the Patels. Mr Comninos used his own van. He was not paid wages by Boylan nor were superannuation payments made for him.

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54 Reasons of the primary judge at 19. I shall hereafter refer to Mr Comninos alone as including reference to "Cool Runnings Refrigeration and Airconditioning Pty Ltd" unless otherwise indicated. Mr Comninos gave no evidence in the trial. The precise status and role of the company (if any) was left to inference or conjecture.

55 Reasons of the primary judge at 18-22.

56 Reasons of the primary judge at 18.

57 Reasons of the primary judge at 18. See also [2005] Aust Torts Rep ¶81-780 at 67,216 [38].

Whereas Boylan's employees filled in daily service reports, contractors like Mr Comninos, who were used as work pressure required in place of employees, rendered weekly invoices[58]. Mr Duckworth regarded Mr Comninos as a qualified tradesperson. He had inspected his trade certificate as a refrigeration mechanic[59]. This had been issued in the name of Mr Comninos personally. Mr Duckworth had introduced a procedure so that persons like Mr Comninos "had to provide us with their current liability and also their worker's [sic] comp [details]".

55 As against the foregoing, other evidence, also accepted by the primary judge, threw additional light on the precise relationship between Mr Comninos and Boylan. This evidence had to be evaluated by the primary judge without the benefit of testimony from Mr Comninos himself[60]. Although it was open to any party to call him, none did. It was therefore left to the judge to decide the legal character of the relationship from the evidence of Mr Duckworth, the written documents and the inferences available from this material.

Factual elements of representation

56 The features of Mr Comninos's work which the primary judge found significant were that:

- he performed work for the respondent on a daily basis[61];
- he performed the same work as Boylan's employees, doing the same activities on its behalf as Boylan's work requirements necessitated[62];
- he proceeded to Boylan's jobs at the direction of Boylan's employees[63];

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58 [2005] Aust Torts Rep ¶81-780 at 67,216 [38].

59 Reasons of the primary judge at 18.

60 Reasons of the primary judge at 24.

61 Reasons of the primary judge at 18.

62 Reasons of the primary judge at 17, 22.

63 Reasons of the primary judge at 31.

- he regularly attended at Boylan's premises to obtain from Boylan parts necessary to effect repairs, doing so in the same manner as employees[64];

- Boylan was fully aware of the regular course of work undertaken in this way by Mr Comninos on its behalf[65];

- Boylan provided Mr Comninos with a book of service reports bearing the title "Quirks Refrigeration" which reports Mr Comninos provided to Boylan's customers on behalf of Boylan[66];

- provision of service reports, for execution by the customer, was part of Boylan's intended relationship with its customers[67];

- the form authorised Mr Comninos to collect the "amount due" to Boylan from its client[68] and described him as "our mechanic"[69]; and

- when Boylan reported Mrs Sweeney's injury to its public liability insurer, it represented Mr Comninos as being "our mechanic" and described his activities as part of Boylan's own acts in tightening the door screws of the defective refrigerator[70].

The decisional history

57 *Decision at trial*: The primary judge rejected Mrs Sweeney's claim against the Patels[71]. That decision is not now in issue. The primary judge found that the relevant negligence was that of Mr Comninos[72] and that her damages

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64 Reasons of the primary judge at 20.

65 Reasons of the primary judge at 20.

66 Reasons of the primary judge at 20-21.

67 Reasons of the primary judge at 22-23, 31.

68 Reasons of the primary judge at 22.

69 Reasons of the primary judge at 22, 25. The pronoun "our" is significant. Had a lack of responsibility for representation been intended the word "a" would have been substituted. Cf joint reasons at [8].

70 Reasons of the primary judge at 13.

71 Reasons of the primary judge at 34-35.

72 Reasons of the primary judge at 38-39.

amounted to $43,932[73]. These findings, and a special costs order, have also not been contested in this Court.

58 The primary judge concluded that Boylan was vicariously responsible for the consequences of Mr Comninos's negligent repair of the refrigerator door. He referred to the principle stated by this Court in *Stevens*[74] that the relationship of employment is dependent upon multiple considerations. Such considerations assist in the determination of the "ultimate question", namely, "whether a person is acting as the servant of another or on his own behalf"[75]. He referred to this Court's then recent decision in *Hollis*[76]. His examination of that decision led him to a conclusion that "Mr Comninos was acting as a servant or agent of [Boylan] with the authority and the approval of [Boylan] to undertake the work that he did"[77]. It was on that dual basis that the primary judge entered judgment in favour of Mrs Sweeney against Boylan in the sum specified.

59 *Decision of the Court of Appeal*: The Court of Appeal, also by reference to *Stevens* and *Hollis*, concluded that Mr Comninos was not an employee of Boylan[78]. It decided that Mr Comninos was in essence carrying on a trade or business of his own. In particular, the Court of Appeal held that the mutuality of obligations, normal to an employer/employee relationship, was missing from this case because "Mr Comninos was free to accept or decline work" from Boylan[79].

60 This conclusion led the Court of Appeal to consider whether Boylan was nonetheless liable for the acts of Mr Comninos as an agent or representative. In this respect, that Court examined the reasons of Dixon J in *CML*[80], repeatedly referred to in a series of decisions in which McHugh J had explored the liability of a principal for work carried out by an independent contractor as a

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73 Reasons of the primary judge at 52.

74 (1986) 160 CLR 16. See reasons of the primary judge at 35.

75 (1986) 160 CLR 16 at 37.

76 (2001) 207 CLR 21.

77 Reasons of the primary judge at 38.

78 [2005] Aust Torts Rep ¶81-780 at 67,218 [58].

79 [2005] Aust Torts Rep ¶81-780 at 67,218 [56].

80 (1931) 46 CLR 41 at 48.

representative of the principal[81]. The Court of Appeal rejected the conclusion that *CML* constituted "a basis for widening the presently recognised grounds on which a finding of vicarious liability could be made"[82]. It found that this conclusion was required by an analysis of the majority approaches adopted by this Court in a number of decisions[83]. It suggested that McHugh J had pressed the reasoning of the majority in *CML* beyond its true application. In any event, it concluded that "even on the basis of the wider approach", the facts of the present case did not render Mr Comninos a "representative" of Boylan. They fell short of the indicia of "representation" upheld by McHugh J as his basis of liability in *Hollis*[84].

The issues

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 *before* 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.

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81 *Northern Sandblasting* (1997) 188 CLR 313 at 366; *Scott v Davis* (2000) 204 CLR 333 at 346 [34], 355 [61]; *Hollis* (2001) 207 CLR 21 at 57-58 [93]. See [2005] Aust Torts Rep ¶81-780 at 67,219-67,222 [65]-[81].

82 [2005] Aust Torts Rep ¶81-780 at 67,222 [81].

83 [2005] Aust Torts Rep ¶81-780 at 67,221-67,222 [78]-[84]. Cf *Starks v RSM Security Pty Ltd* [2004] Aust Torts Rep ¶81-763 at 65,994 [34].

84 [2005] Aust Torts Rep ¶81-780 at 67,222-67,223 [85].

85 [2005] Aust Torts Rep ¶81-780 at 67-222 [83] citing *Torette House Pty Ltd v Berkman* (1939) 39 SR (NSW) 156 at 170; *Stevens* (1986) 160 CLR 16 at 30, 41; *Hollis* (2001) 207 CLR 21 at 70 [121]. See also *Honeywill & Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd* [1934] 1 KB 191.

(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]. Because there are some resonances of this view in the

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86 Sched 1, cl 2(1).

87 [2005] Aust Torts Rep ¶81-780 at 67,219 [63] citing *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418. See also *Coulton v Holcombe* (1986) 162 CLR 1 at 7-9.

88 See, eg, *Stevenson Jordan & 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.

89 *Bazley v Curry* [1999] 2 SCR 534 at 548 [22]. See also *Lepore* (2003) 212 CLR 511 at 612-613 [303].

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

91 *Northern Sandblasting* (1997) 188 CLR 313 at 366; *Scott* (2000) 204 CLR 333 at 346 [34], 355 [61]; *Hollis* (2001) 207 CLR 21 at 57-58 [93].

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.

62 For Mrs Sweeney, the foundation for her submissions was the reasoning of the majority in *CML*, specifically that of Dixon J. She did not seek to cast any doubt on that reasoning in *Hollis*. It was the reasoning in *CML* that was invoked, rather than any later re-expressions or elaborations of it by McHugh J or other judges. Apart from noticing the endeavours of McHugh J to draw the *CML* principle to attention, and to apply it, as an alternative basis for finding vicarious liability outside the employment relationship, it is unnecessary for the purposes of the present appeal to decide whether McHugh J's reasons express a different principle or the same principle restated. It is sufficient to return to *CML*, as Mrs Sweeney asked, and to consider whether it applies to the present circumstances.

63 *Remaining issues*: The foregoing analysis cuts away immaterial issues. It is possible, therefore, to identify the following as the issues to be addressed by this Court:

(1) *The employment relationship issue*: Having regard to the principles stated in the authorities, and particularly in *Hollis*, was the primary judge correct to find that the true character of the relationship between Mr Comninos and Boylan included that of employment? Did the Court of Appeal err in coming to the opposite conclusion?

(2) *The representative agent issue*: Within the principle stated by Dixon J in *CML*, was the work performed by Mr Comninos done by him as a representative agent of Boylan, standing in its place and therefore identified with Boylan for the purpose of vicarious liability? Or, as the Court of Appeal found, was it simply done by Mr Comninos as an independent contractor in pursuit of his own independent business so that he alone, and not Boylan, is responsible in law for the consequences of any wrong?

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92 Reasons of the primary judge at 38.

93 [2005] Aust Torts Rep ¶81-780 at 67,221-67,222 [80]-[84].

(3) *The legal policy issues*: In the event that the last two issues are uncertain of resolution, do any considerations of legal policy favour the provision of vicarious liability in this case? Thus, does the changing character of work under contemporary Australian conditions (and the increasing number of activities performed for larger enterprises by persons formally engaged as independent contractors) suggest that some wider ambit of the employment relationship (or of the relationship of agent representatives) is appropriate so that the doctrine of vicarious liability can respond appropriately to contemporary circumstances? Conversely, given the antiquity of the principle that principals are not, in general, vicariously liable for the torts of independent contractors, is the creation of exceptions to that principle a matter more properly left to a legislature than decided by this Court?

(4) *The procedural issue*: Considering the way in which the separate liability of Mr Comninos was first raised in these proceedings, is a conclusion adverse to Mrs Sweeney consonant with the proper administration of justice?

The employment relationship issue

64 *Applicable test*: Because the test to be applied in deciding whether a relationship of employment has been established was examined so recently in *Hollis*, it is unnecessary to re-express it for the purposes of this appeal. Mrs Sweeney did not suggest a different test. She argued that, within the established principles, the Court of Appeal had erred in finding that Mr Comninos was not an employee of Boylan and that Boylan was not vicariously liable for his conduct on that basis.

65 The bicycle courier considered an employee in *Hollis* was not a member of a clear-cut conventional employment relationship. There were some indicia that supported the opposite conclusion. Indeed, such a conclusion had been reached in the earlier "taxation" decision of the New South Wales Court of Appeal[94].

66 In his reasons in *Hollis*, McHugh J basically adhered to the approach of the taxation decision. He held that the "classical tests" of employment affirmed the conclusion against employment[95]. He opposed what he described as any

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94 *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) 33 ATR 537 from which this Court has refused special leave to appeal: *Federal Commissioner of Taxation v Vabu Pty Ltd* (1997) 35 ATR 340. See *Hollis* (2001) 207 CLR 21 at 27 [8], 49 [70].

95 *Hollis* (2001) 207 CLR 21 at 49 [69].

unsettling of these tests by what he saw as an extension of their operation to a case of a business relationship "not typical of a traditional employment relationship"[96].

67 I adhere to the principles stated in the joint reasons in which I participated in *Hollis*. However, I accept McHugh J's statement that "certain aspects of the work relationship between Vabu and the couriers suggested an employer/employee relationship"[97] whilst other aspects of their relationship suggested "someone who acts as an independent contractor in the sense of someone who acts as an independent principal, exercising an independent discretion in carrying out a task for his own business interest and who is retained simply to produce a result"[98]. The joint reasons in *Hollis* do not hold otherwise.

68 The detailed attention to the facts of the relationship set out in the joint reasons in *Hollis*, and to the multiple features that betokened an employment relationship[99] in totality, shows that a conclusion, in hybrid cases of the present kind, is not one to be painted in black and white[100]. On the contrary, the joint reasons in *Hollis* were at pains to demonstrate that repeated references to the relationships of "employment" and "independent contract" simply identify the issue for decision. They do not constitute a substitute for analysis[101].

69 The changing character of employment and of quasi-employment relationships; the fundamental concerns underlying the doctrine of vicarious liability[102]; the inadequacies of the notion of control, taken on its own, to differentiate employees from independent contractors[103]; and the need, in each case, for assessment and judgment are all points that the joint reasons acknowledged in *Hollis.*

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96 (2001) 207 CLR 21 at 48 [68].

97 (2001) 207 CLR 21 at 48 [68].

98 (2001) 207 CLR 21 at 48 [68].

99 (2001) 207 CLR 21 at 42-45 [48]-[57].

100 Luntz and Hambly, *Torts: Cases and Commentary*, 5th ed (2002) at 908.

101 *Hollis* (2001) 207 CLR 21 at 38 [36]. See also the joint reasons at [13], [29].

102 *Hollis* (2001) 207 CLR 21 at 41 [45].

103 *Hollis* (2001) 207 CLR 21 at 40-41 [43]; Glass, McHugh and Douglas, *The Liability of Employers in Damages for Personal Injury*, 2nd ed (1979) at 72-73.

70 *Application of the test*: So was the primary judge correct to conclude in this case that, as in *Hollis*, a relationship of employment of a new and somewhat wider variety, had been established, rendering the Court of Appeal's contrary view erroneous?

71 In support of the conclusion of the primary judge Mrs Sweeney invoked the following instruction contained in the joint reasons in *Hollis*[104]:

> "In general, under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise. In delivering the judgment of the Supreme Court of Canada in *Bazley v Curry*[105], McLachlin J said of such cases that 'the employer's enterprise [has] created the risk that produced the tortious act' and the employer must bear responsibility for it. McLachlin J termed this risk 'enterprise risk' and said that 'where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong'[106]."

72 In the present case, it was not unreasonable for the primary judge to have inferred the likelihood that the Patels (Boylan's customer), in dealing with Mr Comninos, thought that they were dealing with Boylan. Even more so, Mrs Sweeney was entitled to assume that the "refrigeration company", referred to in the Patels' letter, was a single entity, namely Boylan. Especially in the absence of evidence from Mr Comninos himself, clarifying the bare details sketched by Mr Duckworth, the relationship of Mr Comninos with Boylan was (as in *Hollis*) a complex one. It lay in the borderland between an employment-like relationship and a wholly independent contract. Counsel for Boylan argued that the relationship was clear-cut. But if Mr Comninos really had an independent business it would have been in the interests of Boylan to call him as a witness to say so and to demonstrate why that was the correct conclusion. This Boylan failed to do.

73 *Conclusion: non-employment*: Whilst the issue, as in *Hollis*, is arguable both ways, I am not convinced that Mr Comninos was an employee of Boylan. There are various elements in the evidence that support this conclusion. They gather strength, by way of contrast, from the fact that the couriers in *Hollis*

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104 *Hollis* (2001) 207 CLR 21 at 40 [42].

105 [1999] 2 SCR 534 at 548.

106 [1999] 2 SCR 534 at 548-549.

supplied their own transport (a single bicycle) whereas Mr Comninos used a van which was not supplied by Boylan[107]. The couriers in *Hollis* wore a uniform supplied by the putative employer which was how the tortfeasor was identified. No livery was provided by Boylan to Mr Comninos[108]. Further, the "employer" in *Hollis* superintended the couriers' finances, tools and equipment. It exercised significantly greater control over the couriers than was proved in the case of Boylan and Mr Comninos.

74 It follows that the primary judge erred in deciding that a relationship of employment was established and that Boylan was vicariously liable for Mr Comninos's wrongs on that basis. In so far as the primary judge thought that the decision in *Hollis* authorised, or required, a conclusion of an employment relationship, he was mistaken. The Court of Appeal did not err in giving effect to the opposite conclusion. To that extent the appeal fails.

The representative agent issue

75 *Applicable test*: But did the primary judge correctly conclude that Mr Comninos was an agent of Boylan, acting not in a wholly independent capacity, but as a representative of Boylan, thereby giving rise to vicarious liability on Boylan's part for his negligence? If the judge was correct in that respect his orders would be upheld on that footing notwithstanding the erroneous finding of employment.

76 In *CML*, a life insurance company, Colonial Mutual Life Assurance Society Ltd, engaged Mr Ridley, a canvasser, to sell its policies to customers. A condition of the agreement forbade Mr Ridley to use language that would bring any person or institution into disrepute. Whilst attempting to secure business for Colonial Mutual, Mr Ridley made defamatory statements about another life insurance company. This produced an action for slander, brought against Colonial Mutual. This Court, by majority[109], held that, in the circumstances described, Colonial Mutual was vicariously liable for the wrong done by Mr Ridley. Importantly, this was because Mr Ridley, in performing his services for Colonial Mutual, had not acted independently. He had acted as Colonial Mutual's representative. It was therefore liable for his defamatory statements.

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107 See above these reasons at [50].

108 See above these reasons at [54].

109 Gavan Duffy CJ, Rich, Starke and Dixon JJ; Evatt and McTiernan JJ dissenting.

77 In his reasons in *CML*, Dixon J explained the applicable rule[110]:

> "In most cases in which a tort is committed in the course of the performance of work for the benefit of another person, he cannot be vicariously responsible if the actual tortfeasor is not his servant and he has not directly authorized the doing of the act which amounts to a tort. The work, although done at his request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal. But a difficulty arises when the function entrusted is that of representing the person who requests its performance in a transaction with others, so that the very service to be performed consists in standing in his place and assuming to act in his right and not in an independent capacity."

78 Whilst the area of the law in question is an exceedingly difficult one, *CML* has never been overruled. It was not doubted by any of the judges in *Hollis*. The passage of time, and the emergence of new "hybrid" forms of "employment" make the principle stated in *CML* one especially apt for the relationships with business enterprises in contemporary Australia.

79 *Conclusion: representative agent established*: When the *CML* principle is applied in the present case, in the terms in which it was expressed by Dixon J, it is my view that the primary judge was right to conclude on that basis that Boylan was vicariously liable for Mr Comninos's wrongs. The Court of Appeal erred in concluding to the contrary.

80 The facts supporting this opinion are those recounted above[111]. In particular, they include those elements of the evidence, found by the primary judge and not really in dispute, that Boylan represented to others that Mr Comninos was its employee or agent. Moreover, Boylan armed Mr Comninos with the means by which he could make that representation convincingly to those with whom he was dealing on behalf of Boylan.

81 The fact that Mr Comninos turned up to attend to the defect in the refrigerator when the Patels contacted their "refrigeration company" gave rise to an inference that he was Boylan's employee or representative agent for the

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110 (1931) 46 CLR 41 at 48-49.

111 See above these reasons at [56].

purpose of performing the obligation that Boylan had assumed as lessor of the refrigeration equipment. If it had been otherwise, it could be inferred that Boylan would make this clear, at least to people such as the Patels. If it was claimed that Boylan had done so, this could have been proved by calling Mr Comninos to say as much. Boylan did not tender his evidence. The inference is inescapable that third parties, including the Patels and Mrs Sweeney, were left by Boylan to infer that Mr Comninos was an employee or representative agent of Boylan[112].

82 This inference is reinforced by the worksheet, provided by Boylan to Mr Comninos, for on-supply to customers such as the Patels. As the primary judge found, that form "promote[d] that relationship"[113]. Moreover, the relationship, so promoted, was one in which Mr Comninos was presented as representing Quirks Refrigeration. He was described in terms as "*our* mechanic". He was even authorised to receive payments in cash for Boylan[114]. The Court of Appeal considered that this expression "our mechanic" was ambiguous[115]. It might be so as to the relationship of employment[116]. But it certainly identified Mr Comninos as the representative of Boylan's enterprise. Correctly, the primary judge inferred that the worksheet was designed and created by Boylan for its purposes[117]. Boylan knew, or ought to have known, that it would be used in relation to Boylan's customers by contractors such as Mr Comninos.

83 Additionally, in the insurance claim form, Boylan's officer made it clear that, for the purpose of Boylan's activities, Mr Comninos was integrated into its enterprise[118]. Thus, "*We* tightened the door screws", "*we* received a call", "*our* mechanic went to the Service Station" and the door fell on Mrs Sweeney "after *we* previously fixed it". There could scarcely have been a clearer contemporaneous indication of the mind and purpose of Boylan and the complete integration of Mr Comninos into its enterprise for this purpose.

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112 Cf *Jones v Dunkel* (1959) 101 CLR 298 at 305; *Hampton Court Ltd v Crooks* (1957) 97 CLR 367 at 371-372; *Payne v Parker* [1976] 1 NSWLR 191 at 194, 200-201, 212.

113 Reasons of the primary judge at 31.

114 Cf *CML* (1931) 46 CLR 41 at 49.

115 [2005] Aust Torts Rep ¶81-780 at 67,217 [42].

116 See above these reasons at [72].

117 See above these reasons at [44]-[45].

118 See above these reasons at [47]-[49].

84 Although, once the parties came to the trial and the separate legal status of Mr Comninos became important for legal purposes, Mr Duckworth laid emphasis on the elements of the independence of Mr Comninos's activities, this was not how it looked at the relevant time, which was when the door was negligently "fixed". The contemporary documents make it clear that, at that time, Mr Comninos was viewed by everyone as part of Boylan's business. He was represented to be such and he represented himself similarly by signing the form that Boylan had provided to him as "Our [that is Boylan's] mechanic".

85 It follows that, on the face of things, this is a clear case for the application of the special principle in *CML*. So how does Boylan seek to escape its liability on this basis?

86 *Rejecting Boylan's arguments*: Two unconvincing arguments were advanced by Boylan. I shall deal with them in turn.

87 First, it was suggested that the principle in *CML* was to be confined to cases where the independent contractor was not merely the *representative* of the principal but was a representative authorised to make *representations*. True it is, this was the factual position of Mr Ridley, the offending insurance canvasser, in *CML*. However, it is not the way the majority in *CML* expressed the wider principle of vicarious liability. In the reasons of Gavan Duffy CJ and Starke J, the principle that was applied was one of broader ambit attributed to a rule established in the Privy Council decision in *Citizens' Life Assurance Co v Brown*[119]. That decision was regarded as "conclud[ing] the present case". Gavan Duffy CJ and Starke J said[120]:

> "[W]e apprehend that one is liable for another's tortious act 'if he expressly directs him to do it or if he employs that other person as his agent and the act complained of is within the scope of the agent's authority.' It is not necessary that the particular act should have been authorized: it is enough that the agent should have been put in a position to do the class of acts complained of."

88 The fact that Dixon J (with whom Rich J agreed) did not limit his expression of the applicable principle to contractors of a particular kind, with specified functions of representation, is clear from his Honour's explanation of the foundation for the liability that he upheld[121]:

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119 [1904] AC 423.

120 (1931) 46 CLR 41 at 46.

121 (1931) 46 CLR 41 at 49 (emphasis added).

> "[I]n performing these services for the Company, he does not act independently, but as a *representative* of the Company, which accordingly must be considered as itself conducting the negotiation in his person."

89 Given that it would reduce the holding in *CML* to a very confined and peculiar rule to limit it to exclude conduct other than acts of representation as such, such a reading of what Dixon J said in that case should not be adopted. It is required neither by his Honour's language; nor by the foundation he states; nor by previous understandings of that foundation; nor by its purpose. As Dixon J explained[122]:

> "The wrong committed arose from the mistaken or erroneous manner in which the actual authority committed to him was exercised when acting as a true agent representing his principal in dealing with third persons."

90 Mr Comninos, when he repaired the refrigerator door, was acting as a true agent for Boylan. He represented it in his dealings with third persons, specifically the Patels (who notified Mrs Sweeney of their "refrigeration company" not of Mr Comninos). He was so described to Boylan's insurer.

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].

92 This argument is also unpersuasive. Obviously, the *CML* decision qualifies any rigid application of the immunity of principals from liability for the tortious acts of their independent contractors. But the immunity of principals has

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122 (1931) 46 CLR 41 at 50. As McHugh J points out in *Hollis* (2001) 207 CLR 21 at 59 [97], the concept of "representation" was not new to this area of discourse. It was the element suggested by Littledale J in *Laugher v Pointer* (1826) 5 B & C 547 at 554 [108 ER 204 at 207] to explain the vicarious liability of masters for the wrongs done by servants.

123 (1840) 6 M & W 499 [151 ER 509].

124 (1986) 160 CLR 16 at 43.

125 See, eg, *Northern Sandblasting* (1997) 188 CLR 313 at 366; *Hollis* (2001) 207 CLR 21 at 36 [32], 42 [51], 47 [66].

never been absolute[126]. The absence of a strict dichotomy between employees and independent contractors is revealed by the concept of non-delegable duties of care, the existence of torts which do not require proof of fault, such as public and private nuisance[127], and other exceptions to the general rule that employers are only vicariously liable for the torts of their employees[128].

93 Now, it is true that there has been criticism of the *CML* exception. Dixon J anticipated this criticism in his reference, in *CML*, to the writings of "purists" who were "disposed to impugn the course that authority has taken in widening the liability for the wrongs of others"[129]. Professor Atiyah also noted similar criticisms[130]. But he did not doubt the existence of the broader ground for vicarious liability accepted in *CML*.

94 No attempt was made in this appeal to suggest that the *CML* principle, which has stood for 75 years, should now be abolished. Even Boylan disclaimed such a submission. The result is that an independent contractor, with its own business, cannot generally look to the principal to assume vicarious liability for its wrongs. But if the contractor has been armed with the authority to act as the principal's representative, law and justice sustain the rule in *CML* that, if sued, the principal will be liable for its representative's wrongs to others acting within the scope of that authority.

95 Whilst the rule in *CML* remains, it should be applied by this Court in accordance with its terms. It is part of Australian law. Its terms apply in the present case. Mr Comninos was the representative of Boylan which afforded him the means to persuade others that he should be admitted to their premises, permitted to repair a refrigerator placed there for which Boylan was responsible by lease and even allowed to receive Boylan's money and to give a receipt for what he received[131].

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126 Brooks, "Myth and Muddle – An Examination of Contracts for the Performance of Work", (1988) 11(2) *University of New South Wales Law Journal* 48 at 85.

127 See, eg, *Spicer v Smee* [1946] 1 All ER 489.

128 See Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 725-732.

129 *CML* (1931) 46 CLR 41 at 49 referring to Dr Baty, *Vicarious Liability*, (1916) at 44 which Dixon J notes was "criticized by Sir F Pollock, 32 *Law Quarterly Review* (1916), p. 226."

130 Atiyah at 109.

131 That Mr Comninos did not do so in the present case is immaterial. The worksheet issued to him by Boylan described him as "Our mechanic" and expressly authorised this to happen against the receipt given by the mechanic.

96 The respondent submitted that the joint reasons in *Hollis* favoured maintaining a firm distinction between independent contractors and employees[132]. However, the word "representation" used in the joint reasons in *Hollis* is entirely consistent with the use of the word by Dixon J in *CML*. It is a noun expressing what a "representative" does. This is made plain by the words that the search is for "identification with the alleged employer as indicative of a relationship of principal and independent contractor"[133]. There is nothing in the treatment of the *CML* rule in *Hollis* that suggests an outcome of this appeal adverse to Mrs Sweeney. That is scarcely surprising because, in *Hollis*, vicarious liability was upheld by the majority within the category of an employment relationship. Invocation of *CML* was not therefore necessary, still less essential, as it is in this instance.

97 *Conclusion: Boylan is vicariously liable*: The result is that a person such as Mrs Sweeney was entitled to treat Mr Comninos as the representative of Boylan's "refrigeration company", just as the Patels, by inference, believed he was. If Boylan complains about having to assume vicarious liability for the wrongs done by Mr Comninos, they may be answered in the way contemplated by the *CML* principle. They should not have put Mr Comninos into the position that he could represent himself as Boylan's agent. They should have taken steps to make it plain to third parties that people, such as Mr Comninos, were not their "representatives" but represented their own business alone, being a separate, independent enterprise. At trial Boylan should have joined Mr Comninos as a third party liable to indemnify it or to contribute to any judgment. Because, to the contrary, Boylan armed Mr Comninos with the means to make the representations that he did (and took no steps to correct such representations or claim indemnity or contribution) Boylan must accept the legal consequences.

98 It follows that it was open to the primary judge to hold that Boylan was vicariously liable for the wrong committed by Mr Comninos, its representative, and that this was the cause of Mrs Sweeney's injury. The Court of Appeal erred in disturbing that conclusion and the judgment at trial that gave effect to it.

99 *Representative agent: a caveat*: Nothing I have said in these reasons should be taken to suggest that I favour the adoption of a rule which exposes a principal to vicarious liability in respect of torts committed by an independent contractor in circumstances where the contractor "represents" the principal *simpliciter*[134]. *CML* does not support the adoption of such a rule. I did not

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132 See, esp, (2001) 207 CLR 21 at 39 [40].

133 (2001) 207 CLR 21 at 39 [40].

134 Cf joint reasons at [26], [29].

apprehend the appellant as presenting her case in such terms. Nor would I decide it so.

100 The principle in *CML* constitutes a long-standing, confined and carefully drawn exception to the general rule that principals are not liable for the torts of independent contractors. *CML* has never previously been doubted by this Court. The mere fact that an independent contractor acted at the request of a principal for the latter's benefit, does not, without more, attract the exception. As Dixon J indicated, for the principle in *CML* to be engaged, the principal must arm the contractor with the means to hold himself or herself out "so that the very service to be performed [by the contractor] consists in *standing in his [principal's] place and assuming to act in his [principal's] right* and not in an independent capacity"[135].

The policy issues

101 *Vicarious liability*: Boylan submitted that the foregoing result flew in the face of established legal doctrine and should not be accepted. I have endeavoured to show that it is, instead, the application of settled legal doctrine, as established by the decision of this Court in *CML* which has never been overruled. To Boylan's argument that this Court should read down, or somehow distinguish, the principle in *CML*, so as to avoid the imposition of vicarious liability on it in the present case, there are three responses based on considerations of legal policy[136].

102 First, changes in workplace and employment relationships that have occurred since *CML* was decided (and which have accelerated in recent years) make the rule enunciated in that decision a particularly useful one for contemporary Australian society. Thus, Professor Atiyah predicted that, as a social development, the liability of those in whose enterprise wrongs are done[137]:

> "… will assume greater practical importance in the near future. There is evidence to suggest that, in certain spheres of industry, and particularly in the building trade, employers are finding it convenient to 'sub-contract' work rather than to do it by employing their own men simply because it enables them to get the advantages of employing labour without the

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135 (1931) 46 CLR 41 at 48-49 (emphasis added).

136 Contra Williams, "Liability for Independent Contractors", (1956) *Cambridge Law Journal* 180; Queensland Law Reform Commission, *Vicarious Liability*, Report No 56, (2001) at 53.

137 Atiyah at 334-335 (citation omitted).

> corresponding obligations. … The purpose of this device appears to be largely to avoid the increasing legal burdens which public law (rather than the doctrine of vicarious liability) places on employers … One incidental by-product of this state of affairs is to bring into relief the general exemption accorded by the doctrine of vicarious liability to the employer of an independent contractor. … If this kind of arrangement becomes at all common, and if the courts are satisfied by the terms of the contracts in question that they are truly contracts for the employment of independent contractors, it will not be surprising if the courts come under pressure to extend the doctrine of vicarious liability for contractors still further."

103 In elaboration of this prediction, founded in notions of economic equity and social justice as between the injured and those "responsible" for the injuries, Professor Atiyah pointed to the difficulty that "the man in the street would find … to grasp the law's fine distinctions between a servant and an independent contractor"[138]. That person would, he suggested, view "an organisation … as a composite entity which ought in justice to pay for damage which 'they' have caused"[139]. Although not always spelt out in such terms, it is policy notions of this kind that underpin the rule as to representative agents stated in *CML*. So far as legal principle and policy inform the boundaries of the rule in contemporary circumstances, they do not suggest its confinement as urged for Boylan.

104 The relevance of the changing character of economic activity in Australia was addressed in *Hollis* both in the joint reasons[140] and in the reasons of McHugh J[141]. McHugh J observed that "[i]f the law of vicarious liability is to remain relevant in the contemporary world, it needs to be developed and applied in a way that will accommodate the changing nature of employment relationships"[142].

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138 Atiyah at 335.

139 Atiyah at 335.

140 (2001) 207 CLR 21 at 40-41 [43].

141 (2001) 207 CLR 21 at 50 [72], 53-54 [84]-[85], 57-58 [93].

142 (2001) 207 CLR 21 at 54 [85].

105 The changing character of many features of contemporary employment and quasi-employment is recognised in recent federal[143] and State[144] legislation[145]. Such changes make it inappropriate to confine, or narrow, the *CML* rule. If anything, the new circumstances may, in the future, require an enlargement of that rule. In the present case, it is sufficient to apply the *CML* rule, according to the terms in which it was expressed, to arrive at the legally correct outcome which is also the outcome that is just in the circumstances.

106 Secondly, to the extent that Boylan argued for a strict dichotomy between the liabilities of employers for employees and of principals for independent contractors, the exigencies of the times militate against such supposed strictness. In many, perhaps most, cases nowadays, where the actual wrongdoer is an independent contractor and that fact is known, that party will be separately sued. It will have its own insurance (as it is said apparently Mr Comninos had in addition to Boylan's insurance covering his negligence[146]). However, due to the proliferation of independent contracts in place of employment, cases will arise where the contractor is not insured or cannot be identified or where it cannot be established which of several contractors was responsible for causing the damage[147]. The law of vicarious liability may then make the difference between recovery and non-recovery. Accordingly, this is an important area of law and justice. It cannot be assumed that *CML* is unnecessary because many independent contractors are identified by those whom they injure and most now have their own insurance or other means of bearing their separate liabilities.

107 Thirdly, maintenance and enforcement of the rule in *CML*, and its application to a case such as the present, would encourage greater rationality in the conduct of litigation. It would, for example, have been open to Boylan, long before the trial of Mrs Sweeney's action, including in its defence, to disclose frankly to those representing Mrs Sweeney the existence of an independent contractor with his own insurance. It would also have been open to Boylan to join Mr Comninos as a cross-defendant in the same way as it joined Williams Refrigeration. Such a course would have permitted the trial judge to assign the

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143 See, eg, *Workplace Relations Act* 1996 (Cth), ss 832-834.

144 See, eg, *Industrial Relations Act* 1996 (NSW), esp Ch 2, Pt 9.

145 See also *Secure Employment Test Case (No 3)* [2006] NSWIRComm 38 at [7]-[8] concerning the ostensible preference of employers to increasingly rely on independent contractors.

146 *Boylan* [2005] Aust Torts Rep ¶81-780 at 67,215 [29].

147 Atiyah at 333.

ultimate responsibility (if any) wherever it lay. Instead, the details of the commercial arrangements within the "refrigeration company" lay in wait for the trial. Withdrawing or limiting the *CML* rule serves only to encourage and reward such outcomes where a party at trial sets out to catch its opponent on the back foot. It encourages trial by evidentiary ambush. Maintaining the liability of the principal for the representative agent discourages such potential miscarriages. If enforced, it deprives the principal of forensic rewards for its silence about the separate business status of a person such as Mr Comninos.

108 *Parliamentary solution*: Finally, Boylan argued that the dichotomy between employment and independent contract, which it urged should be strictly maintained, should not be disturbed because this was the function of the legislature, rather than of the courts. The usual authorities for restraint were cited[148]. But for every such judicial opinion there is another explaining why, in particular cases, courts have found remedies in the case of wrongs by re-expressing the common law or by applying its rules justly to new factual circumstances[149]. Such generalities do not resolve, they merely state the problem for judicial decision-making.

109 Boylan placed special emphasis upon the fact that the Parliament of New South Wales had entered upon the task of re-expressing the common law of vicarious liability, but had confined its labours to a small item which, it was said, was deliberate[150]. We were urged to draw the inference that Parliament was satisfied with the present law and had rejected any larger measure of reform.

110 There are many answers to this submission. The most important is that Mrs Sweeney did not seek an enlargement of the *CML* rule; simply its application. On this basis, no widening of vicarious liability is involved in this appeal, merely its operation in the circumstances of this case.

111 In any event, this Court has the responsibility of stating the common law for the whole of Australia. The enactment of a particular statute by a single State does not relieve this Court of that responsibility. The suggested inference of parliamentary satisfaction with the state of the common law, because of the

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148 See, esp, *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633.

149 See, eg, *Brodie v Singleton Shire Council* (2001) 206 CLR 512; *Cattanach v Melchior* (2003) 215 CLR 1.

150 *Law Reform (Vicarious Liability) Act* 1983 (NSW). The Act deals with the vicarious liability of employees of the Crown. Cf McGee and Scanlan, "Judicial attitudes to limitation", (2005) 24 *Civil Justice Quarterly* 460 at 476.

narrow focus of a particular enactment should be given little weight[151]. This is because many reasons will normally exist to explain legislative inaction other than satisfaction with the state of the common law[152]. Moreover, even if it were possible to attribute inaction to satisfaction with the existing law that is not a convincing reason for abandoning this Court's constitutional function. Unless Parliament's purpose is realised in legislation it has no legal force. It is a mistake to think otherwise[153].

112 *Conclusion: policy favours recovery*: To the extent that it is relevant in this case to consider such matters, when Mrs Sweeney has appealed to decisional authority rather than to policy, they support the existence of vicarious liability in employment for the wrongs of Mr Comninos. True, those wrongs were committed by an independent contractor. However, exceptionally, Boylan is legally responsible for them because they were done by the contractor as its authorised representative. They were done with authority provided by Boylan to let Mr Comninos appear to third parties as its representative and thus as part of Boylan's enterprise.

113 On this basis the application of the *CML* principle does no offence to the nominated considerations of legal principle and policy. *CML* governs the case. Legal policy reinforces that conclusion. This conclusion requires that the appeal be allowed and Mrs Sweeney's judgment restored.

The procedural issue

114 Because of the conclusion reached by the majority of this Court, Mrs Sweeney loses. She loses on a basis that would not ordinarily have been known to her at the time of, or after, her injuries. It was contrary to the suggestion in the letter from the Patels that there was a single "refrigeration company", responsible for the defect that had caused her injuries. It was not pleaded in Boylan's notice of defence. The nature of the true defence was first revealed at trial.

115 In *Donaldson v Harris*[154], Wells J described litigation in accordance with the "old common law" as "based, with rigorous logic, upon the system of

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151 Cf *R v Reynhoudt* (1962) 107 CLR 381 at 388; *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 329, 351.

152 *Harriton v Stephens* [2006] HCA 15 at [143].

153 Atiyah, "Common Law and Statute Law", (1985) 48 *Modern Law Review* 1 at 26-27.

154 (1973) 4 SASR 299.

litigation by antagonists". The common law protected the "treasured right of each litigant to store up, in secret, as many unpleasant surprises for his opponent as he could muster, and only reveal them at the last minute at the trial … in the presence of the judicial umpire"[155]. Wells J quoted Wigmore[156] as explaining that the common law regarded "the concealment of one's evidential resources and the preservation of the opponent's defenceless ignorance, as a fair and irreproachable accompaniment of the game of litigation."

116 In *Nowlan v Marson Transport Pty Ltd*[157], Heydon JA (with the agreement of Mason P)[158] and Young CJ in Eq[159] condemned the culture of personal injury litigation in the District Court of New South Wales disclosed in that case. Their Honours pointed to the difference that had long prevailed on "the other side of Westminster Hall"[160]. They referred to changes in the practice of the Federal Court of Australia and of the State Supreme courts[161] and other courts elsewhere in Australia and also in England from which the common law tradition derived. They suggested a need for the District Court of New South Wales to discourage the vestigial relics of ambush trial[162]. I can only agree.

117 This Court does not know the full details of how the independent contract of Mr Comninos first came to be known to Mrs Sweeney and her legal representatives. I will not, therefore, condemn anyone. But this case is not a proud moment in our administration of justice. At the least, it suggests the need for attention by trial judges in the District Court of New South Wales to the considerations expressed by all members of the Court of Appeal as that Court was constituted when *Nowlan* was decided. Only when judges exact a price,

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155 (1973) 4 SASR 299 at 302 citing (1628) Co Litt 36a: *Nemo tenetur amare adversarium suum contra se* (No one is bound to arm an adversary against one's self).

156 *Evidence*, 3rd ed (1940), vol 6 at 376.

157 (2001) 53 NSWLR 116.

158 (2001) 53 NSWLR 116 at 128-129 [28]-[32].

159 (2001) 53 NSWLR 116 at 131 [40]-[46].

160 (2001) 53 NSWLR 116 at 127 [27] quoting Sir George Jessel.

161 (2001) 53 NSWLR 116 at 128 [28] citing *White v Overland* [2001] FCA 1333 at [4].

162 (2001) 53 NSWLR 116 at 131 [46] per Young CJ in Eq.

principally in costs, for "treasuring up" unpleasant evidentiary surprises will the practice and culture be changed.

Orders

118 The appeal should be allowed with costs. The judgment of the Court of Appeal should be set aside. In place of that judgment, the appeal to the Court of Appeal should be dismissed with costs. The judgment of Robison DCJ should be restored.