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Vicarious liability, non-delegable duty and the Ng Huat Seng decision

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FEATURE
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Vicarious Liability, Non-delegable Duty and the *Ng Huat Seng* Decision

by Low Kee Yang

In recent times, courts in Singapore and elsewhere have been grappling with the issue of delegability of duty of care. In the process, they have vigorously defended the conventional position that a duty of care is, in general, delegable. Accordingly, attempts at broadening the ambit of vicarious liability and non-delegable duty, respectively, have been carefully scrutinized. The recent Singapore Court of Appeal decision of Ng Huat Seng v Munib Mohammad Madni adds to the judicial thinking on this complicated and controversial subject.

Introduction

The primary aim of tort law is to provide compensation to the innocent victim, and the ideal basis of such compensation is corrective justice – that the guilty defendant should compensate the innocent claimant. Where the tortious act is committed by someone other than the defendant, such as his employee, a contractor engaged by him, or someone with whom he has a casual or social relationship, the responsibility framework becomes somewhat more complicated.

So far as torts by employees are concerned, the law has quite readily accepted the notion that the employer should be held vicariously liable, albeit constraining its application by tests as to whether the delegate is an employee or an independent contractor and whether the tort was committed 'in the course of employment'. Vicarious liability applies only to torts committed by employees. Recently, however, vicarious liability was extended in *Various Claimants v Catholic Child Welfare Society*[1] (also known as the *Christian Brothers* case) and *Cox v Ministry of Justice*[2] to relationships akin to employment. Most recently, the UK Supreme Court in *Armes v Nottingham County Council*,[3]extended vicarious liability to a scenario which was not akin to an employment relationship.

As regards non-delegable duty, judges have continually reiterated that such liability is exceptional. The standard explanation is that tort liability is fundamentally fault-based and that a person is, in general, liable for his own carelessness and not the carelessness of others. Nevertheless, over the years, courts have recognised instances where the duty is non-delegable, such as where the defendant engaged in an ultra-hazardous activity or where employee safety is concerned. Quite recently, the UK Supreme Court in *Woodland v Swimming Teachers Association*[4] crafted a framework for ascertaining whether a non-delegable duty would be imposed. Post-*Woodland*, the UK approach towards non-delegable duty is that the claimant has to show that his case came within one of the recognized instances of non-delegable duty or that the features of the *Woodland* framework are satisfied. This approach was recently endorsed by the Singapore Court of Appeal in *MCST No 3322 v Tiong Aik*.[5]

Most recently, in *Ng Huat Seng v Munib Mohammad Madni*,[6] Singapore's apex court had occasion to deal with the issues of vicarious liability, selection of independent contractors and non-delegable duty.

Case in a Nutshell

The *Ng Huat Seng* case involves the demolition of a house, resulting in damage to an adjoining house. The defendant house owner engaged a contractor, Esthetix, to demolish his existing house and to design and build a new one. In the course of demolition, debris damaged the adjoining wall as well as part of the property of the claimant.

The District Court allowed the claim against Esthetix but not against the defendant owner. The reasons were:

1. Esthetix was an independent contractor and hence the owner was not vicariously liable;
2. the owner was not negligent in appointing Esthetix; and
3. the owner did not owe a non-delegable duty to the claimant as the demolition works were non ultra-hazardous.

The High Court dismissed the appeal upon similar reasoning and the claimant appealed further. The Court of Appeal affirmed the High Court's decision, essentially agreeing with the lower courts on all three issues of vicarious liability, selection of contractor and non-delegable duty.

Vicarious Liability

Counsel for the claimant argued, relying on *Skandinaviska Enskilda Banken AB (Publ) v Asia Pacific Breweries (Singapore) Pte Ltd*[7] (*Skandinaviska)*, *Christian Brothers* and *Cox*, that a multi-factorial approach should be applied to determine whether vicarious liability should be imposed in relationships, such as the present, which fell outside the setting of an employment relationship. On this basis, counsel argued, vicarious liability could be imposed on a defendant even for an independent contractor's negligence. The contention was a radical and bold one.

Sundaresh Menon CJ, delivering the judgment of the five-member court,[8] began with a reminder[9] that vicarious liability is a form of secondary liability and which holds a defendant liable for the negligence of another even if the defendant had not been negligent at all.

The Chief Justice then endorsed[10] the High Court's adoption, post-*Christian Brothers* and *Cox*, of a two-stage inquiry in deciding whether to impose vicarious liability, namely:

(a) … was the **relationship** between the tortfeasor and the defendant of a type which was capable of giving rise to vicarious liability; and

(b) … did the tortfeasor's conduct possess a sufficient **connection** with the relationship between the tortfeasor and the defendant.

The keen observer will notice subtle variations or refinements taking place in the inquiry.

First Stage of Vicarious Liability Inquiry

In the past, the first stage was whether the tortfeasor was an employee, using a multi-factorial test of control, integration and economic reality. The *Christian Brothers* and *Cox* scenarios, which the courts felt were situations to which vicarious liability should extend, pushed courts to restate the test at a higher level of abstraction. In the words of Menon CJ:[11]

> Under the orthodox analysis, it has always been recognized that a prerequisite for the imposition of such liability is the existence of a **special relationship** between the **defendant** and the **tortfeasor** such as would make it **fair, just and reasonable** to impose liability on the defendant for the wrongful acts of the tortfeasor.
> (emphasis added)

The honourable Judge then cited[12] the five features of a relationship which, according to Lord Philips in *Christian Brothers*, make it just, fair and reasonable to impose vicarious liability:

(a) the employer would be more likely than the employee to have the means to compensate the victim and could be expected to have insure itself against that liabilty;

(b) the tort would have been committed as a result of activity undertaken by the employee on behalf of the employer;

(c) the employee's activity would likely be part of the business activity of the employer;

(d) the employer, by employing the employee to carry out the activity, would have created the risk of the tort being committed by the latter; and

(e) the employee would, to a greater or lesser degree, have been under the control of the employer at the time the tort was committed.

Whilst implicitly endorsing the above five features or factors of the requisite relationship for imposing vicarious liability, Menon CJ made it clear that they "do not present a new analytical framework". Rather, they are a helpful "guide"[13] and a "renewed and more fine-grained method" but they "do not detract from the normative roots" of vicarious liability.[14]

The Chief Justice accepted that *Christian Brothers* and *Cox* were correct applications of vicarious liability outside the strict confines of an employment relationship but emphasized that both cases involved relationships which possess the same fundamental qualities and were "closely analogous"[15] or "akin"[16] to the employment relationship. In fact, he thought[17] the relationship in *Christian Brothers* even closer than that of an employment relationship.

As to where or how the line is to be drawn, Menon CJ twice[18] quoted Lord Reed JSC in *Cox*, where the latter said that the extension of vicarious liability beyond the employment context is to be done:

'… not to the extent of imposing liability where a tortfeasor's acitivity are entirely attributable to the conduct of a **recognizably independent business** of his own or of a third party'. (emphasis added)

Echoing the view of the High Court, Menon CJ commented[19] that the inquiry set out in *Christian Brothers* and affirmed in *Cox* was not intended to inaugurate a radical change in the law of vicarious liability but to systematize and update it in the light of modern business realities.

To impose vicarious liability for the tort of an independent contractor, he remarked, would be "antithetical to the doctrine's very foundations".[20] There was nothing fair, just and reasonable about imposing secondary liability on a defendant in such a situation.[21]

He noted[22] that the relationship between the employer and the independent contractor is the "very antithesis" of such a relationship and that the fact that the tortfeasor is an independent contractor "will generally be sufficient, it itself"[23] to exclude the application of vicarious liability. He explained that while the law[24] does not confine the relationship to the employment relationship, there needs to be sufficient closeness such as to make it fair, just and reasonable to impose vicarious liability. He observed that where courts have done so, it was in situations which were closely analogous to the employment relationship and which had many of its features.

Applying the law to the facts,[25] Menon CJ noted that Esthetix was an independent contractor carrying out a project for its own gain. He rejected the claimant's argument that the property was an enterprise which belonged to the claimant and hence the claimant should bear the risks of the enterprise, explaining that "but for" causation was an insufficient reason to impose vicarious liability. The Chief Justice did not think[26] that the relationship between the defendant and the tortfeasor created or significantly increased the risk of the harm that ensued.

Second Stage of Vicarious Liability Inquiry

Previously, at the second stage of the inquiry, the question or test was whether the tort was committed "in the course of employment", which post-*Lister v Hesley Hall*[27] (and, in Singapore, *Skandinaviska*), metamorphosed to whether there was a sufficiently close connection between the employee's scope of duties and the tort he committed. After *Christian Brothers* and *Cox*, the test is further refined and as clearly stated by the Chief Justice:[28]

> The second inquiry… is whether there is a sufficient connection between the relationship between the defendant and the tortfeasor on the one hand, and the commission of the tort on the other. Has the relationship created or significantly enhanced the risk of the tort being committed? This is the second and distinct part of the analysis … .

On the facts, since the first hurdle of special relationship was not crossed, the second inquiry did not arise.

Comment

The extension of vicarious liability to the *Christian Brothers* and *Cox* scenarios is to be welcomed and certainly provided the innocent victims with a deserved remedy. In terms of legal reasoning, the higher level of abstraction – in terms of reference to what is fair, just and reasonable – and the deeper analysis – in terms of the Lord Phillips' five features – are indeed a "more open-textured"[29] and "more fine-grained"[30] method for discerning which relationships should attract the imposition of vicarious liability. For now, it is clear that the line is drawn to include situations where the tortfeasor is within the defendant's organisation or enterprise and may be regarded as quasi-employees or persons whose relationship is akin to or analogous to that of an employee. But it would not extend to where the tortfeasor is an independent contractor.

Selection of Contractor

It is undisputed law that the employer has to exercise reasonable care in his selection of the independent contractor. What was alleged in the Court of Appeal was that the High Court judge had erred in taking into account the fact that the "turnkey" approach[31] was an accepted industry practice in the building and renovation of homes in calibrating the relevant standard of care in making the selection. It was further alleged that the defendants should have made independent assessments as to the suitability of the contractors.

On this issue, Menon CJ noted[32] that industry standards and common practice are important but not necessarily conclusive as to the requisite standard of care and that "negligent conduct does not cease to be so simply on account of repetition and normalization". However, he found no evidence either generally or on the facts to suggest that the turnkey approach was inappropriate. In his view, by ascertaining that the contractor was licensed by the Building and Control Authority to carry out the works, the defendants had "gone a considerable way" in demonstrating that they had not breached their duty of care. Further, the claimants did not present anything to suggest that the defendants "should be found to have known that … Esthetix was in fact not competent to undertake the demolition works … "[33]

In the writer's view, the negligent selection issue is quite straight-forward. In contrast, if on the facts a quick online search would have surfaced allegations of incompetence or other imperfections, then the position would have been different. *Ng Huat Seng* reinforces the established expectation that the defendant is required to do such due diligence as a reasonable home owner would have done.

Non-delegable Duty

Essentially, on non-delegable duty, Menon CJ restated and applied much of what was stated by the Court of Appeal in *Tiong Aik* and, in addition, commented on the exception of ultra-hazardous activity.

In essence, according to the *Tiong Aik* framework:[34]

1) Under the tort of negligence, a person is generally liable for his own carelessness and not for the carelessness of others;

2) Vicarious liability is a form of secondary liability whereas non-delegable duty is primary liability for the personal duties of the duty-bearer;

3) In determining whether there is a non-delegable duty, a two-stage test is used, the first being whether the case fell within one of the established categories and the second being whether the case possessed all of the five *Woodland* features;
4) The *Woodland* features are only threshold requirements. The Court still has to consider whether it is fair and reasonable to impose a non-delegable duty in the particular circumstances, having regard to relevant policy considerations. Further, the creation of new categories of liability should be done with caution and by clear analogy to a recognized category; and

5) Non-delegable duty remains exceptional because, in many instances, it would be "unrealistic or even impossible" for the duty-bearer to fulfil the duty in question.

Applying the two-stage test, Menon CJ first considered the category of ultra-hazardous activity and whether such a category of non-delegable duties should be recognised under Singapore law. The Chief Justice noted that there has been trenchant criticism made against the doctrine and observed two contrasting approaches to the idea of ultra-hazardous activity.

Under the broader approach taken in *Honeywill and Stein, Limited v Larkin Brothers*[35] (*Honeywill*), the concept envisages activities which are inherently or intrinsically dangerous.[36] In contrast, the English Court of Appeal in *Biffa Waste Services Ltd v Maschinefabrik Ernst Hese GmbH*[37] (*Biffa Waste*) preferred the idea of activities which are "exceptionally dangerous whatever precautions are taken", thus significantly reducing the ambit of the doctrine. Chief Justice Menon found the *Biffa Waste* approach "attractive"[38] as it showed a keen appreciation of the difficulties which such a doctrine may present. As the learned judge observed,[39] if the doctrine were broadly defined, even the most mundane of daily activities can turn out to be ultra-hazardous. In contrast, he continued, with the exercise of reasonable care, most of these activities would be regarded as tolerably safe, giving examples of driving, charging of electronic devices and using kitchen appliances.
Elaborating upon the *Biffa Waste* conception of ultra-hazardous activities, Menon CJ quoted, approvingly, Burnton LJ's explanation that the doctrine takes into account:

(a) the persistence of a material risk of exceptionally serious harm to others arising from the activity in question;

(b) the potential extent of harm if the risk materializes; and

(c) the limited ability to exclude this risk despite exercising reasonable care.

The Chief Justice explained[40] that because the doctrine imposes an "extremely stringent" duty, it should be limited to "very limited" circumstances. To quote the learned Judge:
It is the **persistence** of such a risk **despite** the exercise of reasonable care makes it fair, just and reasonable to hold the defendant liable for any negligence … even if the negligent conduct was on the part of an independent contractor … . (emphasis original)

Applying the *Biffa Waste* interpretation of the doctrine, the learned judge found that the demolition work in the case before him was not ultra-hazardous.
However, it should be noted that the Chief Justice chose to leave open the question of whether the doctrine should be recognized as part of Singapore law. In effect, he decided that even if it were part of Singapore law (and to that end, he preferred the *Biffa Waste* position), the application of the doctrine would lead to the conclusion that the activity in question was not ultra-hazardous. The reader may wonder at the learned judge's reluctance to make a decision on the law.
The parting words[41] of the Chief Justice on non-delegable duty for ultra-hazardous activities, are particularly significant:[42]

> But – and this is important to note – the basis of liability remains negligence. In other words, the doctrine of ultra-hazardous acts does not create or impose liability in the absence of negligence. What the doctrine does is … to ensure that the party who is actually performing the activity does so with reasonable care.

In effect, the Chief Justice is confining non-delegable duty for ultra-hazardous activities to situations of negligence. The learned Judge reiterated:[43]

> If the principal fulfills its duty… [by ensuring that the party performing the activity takes care] but some harm nonetheless ensues, there will be no liability on the basis of negligence on the party performing the activity, **nor will there be liability** for breach of non-delegable duty on the principal's part. [emphasis added]

Thoughts on Ultra-hazardous Activity Doctrine

Earlier, it was noted that Menon CJ preferred the *Biffa Waste* definition of ultra-hazardous activity to the *Honeywill* definition. Upon closer scrutiny, it will be realized that the learned Judge's formulation is in fact wider than that of *Biffa Waste* – exceptionally dangerous "even if reasonable care is taken" instead of exceptionally dangerous "whatever precautions are taken". Obviously, the ambit of the latter situation is broader. Accordingly, more activities can be considered ultra-hazardous in Singapore than in the UK.
The second difference is more far-reaching. As mentioned above, the Chief Justice concluded the discussion of the doctrine with clear statements that the basis of liability for ultra-hazardous activities remains in negligence. The defendant's primary duty is to ensure that care his taken. If care is indeed taken, there will be no breach of non-delegable duty. Such a position is no doubt correct where the wrongful conduct in question is a negligent one. However, it is respectfully submitted that there should be liability for harm caused by an ultra-hazardous activity even where the conduct is non-negligent; the tort, though, would not be negligence but some other applicable tort, such as the rule in *Rylands v Fletcher* or (strict) liability for wild animals.

Take the example of a nuclear power station. Quite clearly, the activity of operating such a power station is an exceptionally dangerous one even if reasonable care is taken or, for that matter, all precautions are taken. Under English law, there will be non-delegable duty even if the person to whom the task is delegated had taken all care. According to the Chief Justice, there will not be a breach of a non-delegable duty since reasonable care had been taken. The reason for such radical departure from the English position is not apparent from the judgment.

Justice on the Facts

The outcome of the *Ng Huat Seng* decision is that the plaintiff land owner is limited to his claim against the contractor. If his claim is not satisfied or not fully satisfied by the contractor, he has no remedy against the defendant land owner. The question is whether such a legal position is fair and just.
Certainly from the point of corrective justice it is the contractor who should compensate the plaintiff. However, as between the plaintiff and the defendant, surely the plaintiff is innocent or, at least, more innocent. The notions of benefit of defendant and risk creation suggest that a remedy

should be afforded the plaintiff in the *Ng Huat Seng* scenario. The tort law objectives of distributive justice and deterrence also support giving a remedy.

The *Ng Huat Seng* scenario highlights a fundamental inadequacy in tort law:[44] the inability to moderate or reduce a claim on account of the defendant's mitigatory conduct, such as the taking of reasonable care, or the defendant's innocence (or helplessness). Contributory negligence (which takes into account the plaintiff's conduct) aside, the law delivers a binary outcome – the plaintiff receives his full claim or gets nothing. If there is a concept of mitigatory diligence or innocence, a fairer outcome, and one that is more in line with what rough justice would require, can be achieved. For example, perhaps the plaintiff land owner in *Ng Huat Seng* should receive half or two-thirds of his claim.[45] Of course this requires a very radical change to the current law.

Armes v Nottingham County Council

Mention should also be made of the very recent *Armes* decision. A detailed analysis of the complexities and implications of the decision is not practicable or appropriate within the confines of this article; instead, a summary overview will be given.

The case concerns sexual abuse of children placed in foster care by the local authority. There was no issue of the authority being negligent in the selection or supervision of the foster parents. The question was whether the local authority was liable either on the basis of non-delegable duty or on the basis of vicarious liability.

Let us pause for a moment. There are several possible outcomes in this scenario. The first is that the local authority is not liable on both bases. The second is that it is liable on both bases. The third is that it is liable on one basis but not on the other. The outcomes have serious implications on the true nature of each of the two doctrines and how they interact.

The High Court and the Court of Appeal chose the first outcome – the local authority was not liable on either basis.[46] The Supreme Court (Lord Hughes dissenting) chose the third outcome – the local authority was liable on one basis but not on the other; more specifically, the English apex court decided that the local authority was vicariously liable for the foster parents' sexual assaults but was not in breach of a non-delegable duty.

Lord Reed, delivering the judgment of the majority, dealt with non-delegable duty first. Essentially, the learned Judge reasoned that since statute had clearly delineated the local authority's specific duties in respect of placement and supervision, it cannot be that there is also a general non-delegable duty for the safety of the children. Such a duty would be "too broad" and "too demanding".

As regards vicarious liability, Lord Reed referred to Lord Philips' five factors in *Christian Brothers* for determining if the relationship between the defendant and the tortfeasor was one onto which vicarious liability should be imposed. He then referred to and endorsed the view he had earlier expressed in *Cox* that factors two to four of the Phillips factors reflect the "principal justifications" of vicarious liability and the resultant reformulation of the test for relationships other than employment as follows:

> … where harm is wrongfully done by an individual who carries on activities as an **integral part** of the business activities carried on by the defendant and for [the defendant's] **benefit** … and where the commission of the wrongful act is a **risk created** by the defendant … . [emphasis added]

Applying such a test to the facts at hand, and considering the relevant policy arguments as well as the importance of deterrence, Lord Reed concluded that it was appropriate to impose vicarious liability on the local authority for the sexual abuse committed by the foster parents.

Two other points should be noted. First, Lord Reed explicitly disagreed with the position taken by Burnett LJ in the Court of Appeal that if there is no vicarious liability, there cannot be non-delegable duty, and the actual Supreme Court decision dispels the converse notion – that if there is no non-delegable duty, there cannot be vicarious liability – as well. Secondly, Lord Reed also disagreed with Burnett LJ's view that there cannot be non-delegable duty for intentional torts.

The key takeaways, so far as English law is concerned, of the *Armes* decision are:

1) as vicarious liability and non-delegable duty are separate bases for imposing liability, the fact that one basis does not apply does not mean the other cannot apply;

2) the *Cox* reformulation of the *Christian Brothers* factors is an appropriate one for deciding vicarious liability as regards non-employment relationships; and

3) deterrence is a principal justification for imposing vicarious liability.

But the *Armes* decision is not without difficulties or controversies, the foremost of which is – if indeed the reason for not imposing non-delegable duty is that legislation has defined and delineated the specific duties and liabilities of the local authority, how could it be right to impose liability via another approach (namely, vicarious liability)?

Another important point is that the *Armes* case illustrates that apart from selection and delegation, there is another zone of liability – supervision. More specifically, the Supreme Court observed that the local authority, apart from approving the foster parents, exercised powers of inspection, supervision and removal. On the facts, the authority had not been negligent in their exercise of these powers. The point is that the typical approach of the courts in non-delegable duties cases has been that as long as the defendant had appointed the independent contractor with care, there is no further liability. Such an approach ignores the reality that in many situations, including the *Tiong Aik* scenario, there should be a primary duty of supervision, the ambit of which depends on the context and the actual circumstances.

Armes Case and Singapore Law

It cannot be assumed that the *Armes* scenario would be decided in the same way in Singapore. There are at least two reasons. First, much depends on the specific delineation of duties under the relevant Singapore statutes. Secondly, the degree of immunity accorded to public bodies depends on the language used in the incorporating statute; a common stance is that a public body acting in good faith has no legal liability.[47]

A more immediate question is – how does *Armes* and the law there expressed affect the *Ng Huat Seng* type scenario? The short answer is that the two scenarios are very different ones. However, if we apply the *Cox* reformulation, the two factors of defendant's benefit and risk creation are probably satisfied whilst the third -integral part of the defendant's business activities – appears, technically at least, not to be satisfied. In any case, Singapore courts would next apply, quite robustly, the test of just, fair and reasonable. Further, the courts may have a different view as to the importance of deterrence in this scenario.

Concluding Remarks

The doctrines of non-delegable duty and vicarious liability have entered an era of substantial re-examination and evolution.[48] Whilst this is taking place, there is a determination to keep the ambit of each of them from growing too quickly as well as persistence to keep the two apart.

For non-delegable duty, it has become clear that the claimant has to show that his case comes within one of the recognised categories or to satisfy the *Woodland* framework as well as the test of fair, just and reasonable.

For vicarious liability, the concept has in recent times expanded beyond relationships of employment to those akin to employment. With *Armes*, it has been extended even further.

Whilst each of these doctrines evolves, courts in England and in Singapore have vigorously defended the distinctions between the two doctrines even though the two are becoming even more similar. Certainly, the overarching objectives of each of the doctrines seem to converge.

As for what is a fair outcome in the *Ng Huat Seng* scenario, opinion will be divided; this writer leans towards giving the plaintiff land owner a remedy[49] against the defendant land owner, and there are enough legal principles and tools as well as policy arguments to justify such a position if a court is so minded. Legal technicalities and subtleties aside, the scenario is basically about the defendant asking the tortfeasor to perform a task on his behalf.

1. ↑ [2012] 3 WLR 1319.
2. ↑ [2016] 2 WLR 806.
3. ↑ [2017] UKSC 60.
4. ↑ [2013] 3 WLR 1227.
5. ↑ [2016] 4 SLR 521.
6. ↑ [2017] SGCA 58.
7. ↑ [2011] 3 SLR 540.
8. ↑ The other members were Chao Hick Tin JA, Andrew Phang Boon Leong JA, Judith Prakash JA and Tay Yong Kwang JA.
9. ↑ At [41].
10. ↑ At [16] and [42] respectively.
11. ↑ At [41].
12. ↑ At [54]. See also [49].
13. ↑ At [62].
14. ↑ At [64].
15. ↑ At [62].
16. ↑ At [54] and [56].
17. ↑ At [55].
18. ↑ At [59] and [64]. The learned judge added, at [64], that he could not see how vicarious liability could possibly be extended to tortious acts committed by an independent contractor, 'who, by definition, is engaged in his own enterprise'.
19. ↑ At [63].
20. ↑ At [64].
21. ↑ At [64].
22. ↑ At [42]
23. ↑ At [43].
24. ↑ Especially after Christian Brothers and Cox.
25. ↑ At [69] to [70].
26. ↑ At [70].
27. ↑ [2002]1 AC 215, HL.
28. ↑ At [44].
29. ↑ At [17], quoting the High Court judge.
30. ↑ At [64].
31. ↑ In this approach, the contractor takes responsibility for all aspects of the project, and this usually covers architectural design, engineering, materials selection, construction and project management.
32. ↑ At [74].
33. ↑ At [76].
34. ↑ See [80]-[86] of the judgment.
35. ↑ [1934] 1 KB 191.
36. ↑ In Honeywill, the English Court of Appeal (at 200) used the words 'a dangerous operation in its intrinsic nature'.
37. ↑ [2009] 3 WLR 324.
38. ↑ At [94].
39. ↑ At [94].

40. ↑ At [95].

41. ↑ Which we will return to later.

42. ↑ At [107].

43. ↑ In contrast, where the performing party is negligent, he is liable for negligence and the principal is liable for breach of non-delegable duty: [107].

44. ↑ And also in contract law.

45. ↑ Such a result, the writer submits, is preferable to the current all or nothing approach.

46. ↑ According to the High Court, there was no vicarious liability as the relationship between the defendant and the tortfeasor was not akin to an employment relationship and there was no non-delegable duty because even though the case possessed all the Woodland features, it would not be fair, just and reasonable to impose liability. The Court of Appeal held there was no vicarious liability as there was insufficient control and that there was no non-delegable duty (although the three judges gave different reasons).

47. ↑ See eg. s 16 of the Agri-food and Veterinary Authority Act and s 32 of the Building Control Act.

48. ↑ As Lord Phillips remarked in the Christian Brothers case (at [19]), the law of vicarious liability is 'on the move' and, as Lord Reed noted in Cox (at [1]), 'it has not yet come to a stop'.

49. ↑ An alternative would be to create a fund from which innocent victims could be compensated.

50. ↑ This writer had proposed elsewhere the radical solution of making the non-delegability of a duty of care the general rule and delegability the exception: see KY Low, 'Non-delegable Duty of Care: Woodland v Swimming Teachers Association and Beyond', Singapore Law Gazette, March 2015 16 at 24.

The two theoretically distinct yet practically intertwined doctrines of vicarious liability and non-delegable duty have reached a level of complexity, subtlety and sophistication that perplexes the legal expert let alone the man in the street. This Gordian knot awaits unraveling.[50]

**In writing this article, I benefitted from discussions with Aaron Yoong and Nicholas Liu respectively. Errors and deficiencies are mine alone.*

Footnotes

Tags:

ARMES V NOTTINGHAM CC, NG HUAT SENG, NON-DELEGABLE DUTY, ULTRA-HAZARDOUS ACTIVITY, VICARIOUS LIABILITY

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