PROXIMITY, ENTREPRENEURS AND THE EMPLOYEE-INDEPENDENT CONTRACTOR DISTINCTION: Stevens v. Brodribb Sawmilling Co. Pty Ltd

By

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1. Introduction

In the law of negligence, the importance of establishing an employer-employee relationship as opposed to an employer-independent contractor relationship is twofold. First, an employer owes a personal duty of care to his employees.[1] Secondly, an employer may be liable vicariously to third parties for the negligence of his employees.[2]

By contrast, an employer's liability for independent contractors has traditionally been very limited.[3] The law has taken the view that independent contractors are skilled persons who should generally be responsible for themselves. In general, employers owed no duty of care to independent contractors and vicarious liability does not attach to a person who engages an independent contractor.[4]

Accordingly, one might suspect there to have been numerous cases where employers have avoided liability by successfully classifying the alleged employees as independent contractors. The authorities show otherwise.[5]

However, when the High Court of Australia handed down its decision in *Stevens* v. *Brodribb Sawmilling Co. Pty Ltd*[6] in 1986 it effectively reduced the importance of the distinction. It did so by recognising that a person who engages an independent contractor may be personally liable to that independent contractor under a general common law duty of care based upon the notions of proximity and reasonable foreseeability.

In the course of its judgment, the High Court also clarified the correct approach to be taken in determining whether a person engaged by another is an employee or independent contractor.[7]

2. The Facts

Brodribb Sawmilling Co Pty Ltd owned a large sawmill in eastern Victoria for which it carried out extensive logging operations nearby. It engaged persons to do the necessary felling, snigging (loading) and truck driving.

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1. The duty is to take reasonable care to carry on his business operations so as not to subject his employees to unnecessary risks: *Smith* v. *Baker & Sons* [1891] AC 325. For convenience, the duty has been divided into three headings, namely, the duty to (i) provide adequate plant and machinery; (ii) select competent staff to supervise; and (iii) provide a safe system of work: *Wilsons & Clyde Coal Co. Ltd* v. *English* [1938] AC 57; *Commissioner for Railways (N.S.W.)* v. *O'Brien* (1958) 100 CLR 211.
2. *Broom* v. *Morgan* [1953] 1 QB 597; *Darling Island Stevedoring and Lighterage Co. Ltd* v. *Long* (1957) 97 CLR 36.
3. See G. Williams 'Liability for Independent Contractors' [1956] Camb. L.J. 180.
4. *Laugher* v. *Pointer* [1826] 108 ER 204; *Quarman* v. *Burnett* [1840] 151 ER 509. For exceptions to this rule, see J.G. Fleming "The Law of Torts" 7th edn. Law Book 1987 at 360-4.
5. Cf.eg. *Queensland Stations Pty Ltd* v. *Federal Commissioner of Taxation* (1945) 70 CLR 530 (in relation to taxation); *Humberstone* v. *Northern Timber Mills* (1949) 79 CLR 389 (in relation to workers' compensation); *Ready Mixed Concrete (SE) Ltd* v. *Minister of Pensions of National Insurance* [1968] 2 QB 497 (in relation to national employers' insurance); *AMP Society* v. *Chaplin* (1978) 18 ALR 385 (in relation to long service leave).
6. (1986) 160 CLR 16. For a brief note, see R. Powe "Timber Workers: Employees or Independent Contractors? Is the Distinction Still Relevant?" [1986] ACLD 36085.
7. Eg. See *Mahony* v. *Industrial Registrar of New South Wales* (1987) 8 NSWLR 1.

Gray was engaged to use a tractor supplied by him to push or pull felled logs to a loading ramp and then to load the logs onto a truck.

Stevens was engaged to drive the load of logs to the sawmill. For this purpose he was to use his own truck.

The logging operations were overseen by a "bush boss" who was an employee of Brodribb.

On the day in question, Gray was having difficulty loading a log on to Stevens' truck. The log was shorter than most and had fallen between the two pairs of log skids which lay on the ramp. Stevens obtained a chain and placed one end around the log and the other on the tractor blades. He began to walk away but before he was clear Gray moved the tractor dislodging the log which rolled down the ramp pinning Stevens against the tractor.

Stevens suffered severe injuries and claimed damages against both Gray and Brodribb.

3. The Supreme Court of Victoria

At the trial, Gray and Stevens were found to be employees. Beach J. held that Gray was negligent in moving his tractor before Stevens was clear and that Brodribb was negligent in failing to properly supervise the logging operations, adopt safe procedures and provide adequate equipment. He found no contributory negligence by Stevens and apportioned $180 000 damages against Brodribb (two-thirds) and Gray (one-third).

Brodribb and Gray appealed to the Full Court of the Supreme Court of Victoria.[8] The majority (Kaye and Brooking JJ., Starke J. dissenting) allowed Brodribb's appeal but dismissed that of Gray. They held that Stevens and Gray were independent contractors and that Brodribb was not liable vicariously for Gray's negligence. They further held that, assuming Brodribb owed Stevens a duty of care, Brodribb was not negligent in failing to provide loading equipment, to supervise loading or to instruct sniggers and drivers that no log was to be moved while a man was on the ramp.

Starke J., who dissented, agreed with the trial judge that Stevens and Gray were both employees.

Stevens and Gray both appealed against the Full Court judgment in favour of Brodribb, although Gray's negligence was not contested.

4. The High Court of Australia

In the High Court, Stevens sought to make Brodribb liable in a number of ways. First, it was argued that if Gray and Stevens were employees, Brodribb was liable vicariously for the negligence of Gray; and personally for breach of employer's duty of care it owed to Stevens.

Alternatively, it was argued that if Gray and Stevens were independent contractors and not employees, Brodribb was still liable. Firstly, vicariously liable, because the case fell within two exceptions to the general rule that a person is not liable for the negligence of his independent contractor, namely:

> that the snigging operations constituted an extra-hazardous activity;
> and
> that Brodribb was in breach of a non-delegable duty.

Secondly, that Brodribb was personally liable because it had breached a duty of care owed to Stevens pursuant to the general principles of negligence.

However, these arguments failed. Mason, Wilson, Dawson and Brennan JJ. (Deane J. dissenting) dismissed both appeals.

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8. [1984] VR 321.

Although the High Court dealt with the issues generally in the order outlined above, it is proposed to discuss Brodribb's liability firstly on the basis that Gray and Stevens were independent contractors and secondly on the basis that they were employees.

(a) Brodribb's Liability as an Entrepreneur Engaging Independent Contractors

(i) Personal Liability

The question whether Brodribb was under a general common law duty of care to Stevens was, said Mason J.,[9] to be determined by reference to the elements of proximity and reasonable foreseeability discussed by Deane J. in *Jaensch* v. *Coffey*.[10] The other judges agreed.[11]

At this point, Deane J. took the opportunity to consolidate and expand on the introduction of proximity as an anterior general requirement in establishing that a duty of care exists. He confirmed that reasonable foreseeability by itself should not be the sole determinant of the existence of a duty of care — that some "effective additional limit" or "control mechanism" was required.[12]

In other words, Deane J. considered that the test for imposing a duty of care on every person who could reasonably foresee injury of the kind suffered by the plaintiff, either as an individual or as a member of a particular class, was too broad.[13]

In justifying this view, Deane J. reverted to the roots of the modern law of negligence. He noted[14] that in *Donoghue* v. *Stevenson*[15] Lord Atkin himself, after referring to Lord Esher's judgment in *Heaven* v. *Pender*[16], recognised that the duty to take reasonable care "must necessarily be restricted by some overriding control".[17] That overriding control, said Deane J., was that the day was only owed to a "neighbour" who was in a relationship of proximity with the defendant.[18]

Deane J. noted the recent trend of the High Court in expressly or impliedly requiring a relationship of proximity, citing *Jaensch* v. *Coffey*[19] and *Sutherland Shire Council* v. *Heyman*.[20] He then defended the notion against criticism from English authorities[21] by saying that the requirement of proximity gives consistency and certainty to the law of negligence.[22]

So the High Court clearly re-affirmed proximity as a prerequisite to establishing a duty of care.[23]

Mason J., with whom Brennan J. agreed,[24] held that Brodribb could reasonably foresee

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9. *Supra* n.6. at 30.
10. (1984) 155 CLR 549 at 579-87 esp. at 587.
11. Wilson & Dawson JJ. at 45; Brennan J. at 47; Deane J. at 50-3.
12. *Ibid.* at 50.
13. *Ibid.*
14. *Ibid.* at 50-1.
15. [1932] AC 562.
16. (1883) 11 QBD 503 at 509.
17. [1932] AC 562 at 580-2.
18. *Supra* n.6. at 51. This concept of 'proximity' was explained by Deane J. in *Jaensch* v. *Coffey supra* n.10. at 584-5 and later in *Sutherland Shire Council* v. *Heyman* (1985) 157 CLR 424 at 497-8.
19. *Supra* n.10.
20. *Supra* n.18.
21. *Supra* n.6. at 51-2. Deane J. mentioned *Candlewood Navigation Corporation Ltd* v. *Mitsui Osk Lines Ltd* [1986] AC 1 at 24-5; *Leigh and Sillivan Ltd* v. *Aliakmon Shipping Co. Ltd* [1985] 2 WLR 289 at p. 326-7; Sir Robert Goff "The Search for Principle", Proceedings of the British Academy vol. 69 (1983) 169 at 178-9.
22. *Ibid.* at 52-3.
23. Since *Stevens* v. *Brodribb,* proximity has been entrenched as an anterior general requirement in establishing a duty of care by the High Court in *San Sebastion Pty Ltd* v. *Minister Administering the Environment Planning and Assessment Act 1979* (1986) 162 CLR 341; *Cook* v. *Cook* (1986) 162 CLR 376; *Australian Safeways Stores Pty Ltd* v. *Zaluzna* (1987) 162 CLR 479; *Hawkins* v. *Clayton* (1988) 78 ALR 69.
24. *Supra* n.6 at 47.

that there was a real risk that a worker carrying out Stevens' duties would sustain an injury of the kind that occurred. He also found that there was a relationship of proximity between Brodribb and Stevens sufficient to found a common law duty of care.[25]

Mason J. pointed out that there was a distinct risk of personal injury to those engaged in the operations and that although the individual workers were responsible for their own safety, Brodribb allocated fellers, sniggers and truck drivers to specified areas and co-ordinated and supervised the operations through its bush boss. The workers had to rely on Brodribb's skill in the arrangements it made for the interdependent activities. Accordingly, Mason J. held that Brodribb owed a duty to provide a safe system of work.[26] He contended that: "Although the obligation to provide a safe system of work has been regarded as one attaching to an employer, there is no reason why it should be so confined".[27]

He continued:

> The fact that they [the independent contractors] or that he [the employer] does not retain a right to control them in the manner in which they carry out their work, should not affect the existence of an obligation to prescribe such a system. Brodribb's ability to prescribe such a system was not affected by its inability to direct the contractors as to how they should operate their machines.[28]

Deane J. agreed, confirming that the question of whether Brodribb owed a relevant common law duty of care to Stevens was to be decided upon "the substantive content, rather than the technical characterization of the relationship".[29]

Mason J. formulated the duty as follows:

> If an entrepreneur engages independent contractors to do work which might as readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work and where there is a need for him to give directions as to when and where the work is to be done and to co-ordinate the various activities, he has an obligation to prescribe a safe system of work.[30]

Brennan J. limited the duty to one of personal negligence in the selection or supervision of the contractor:

> If there is no failure to take reasonable care in the employment of independent contractors competent to control their own systems of work, or in not retaining a supervisory power or in leaving undefined the contractors' respective areas of responsibility, the entrepeneur is not liable for damage caused merely by a negligent failure of an independent contractor to adopt or follow a safe system of work either within his area of responsibility or in an area of shared responsibility.[31]

More specifically, Deane J. said the duty meant:

> ...there lay the obligation [upon Brodribb] to take reasonable care to provide a safe system of work at least in those fields of operation in which [Brodribb] required interaction between the activities of the various fellers, sniggers and truck drivers whom it retained and assigned and whose activities it organised for the felling, loading and carrying of timber from its licensed areas of forest for cutting and treatement in its Orbost sawmill.[32]

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25. *Ibid.* at 30. Deane J. agreed at 53.
26. *Ibid.* at 30-1.
27. *Ibid.* at 31.
28. *Ibid.*
29. *Ibid.* at 50.
30. *Ibid.* at 31.
31. *Ibid.* at 48.
32. *Ibid.* at 53.

In determining whether the duty was non-delegable Mason J. referrd to his passage in *Kondis* v. *State Transport Authority*[33] but concluded that the relationship in this case did not satisfy that formula.[34]

Wilson and Dawson JJ. (in a joint judgment) disposed of this question by saying that there was no delegation of the duty in this case.[35]

Damage not being in dispute, the final issue was whether Brodribb had breached its duty to prescribe a safe system of work.

Whilst the judges recognised that the duty owed by Brodribb to Stevens was similar to the duty which an employer owes his employees, they nevertheless held that the standard of care was less than that owed by an employer to employees. Wilson and Dawson JJ. said:

> The extent of the duty would have to take account of the independent functions of the contractors and be something less than that owed by an employer to his employees. To equate the duty with that owed by an employer to his employees would be to give no weight to the very circumstance which differentiates the contractors from employees".[36]

Stevens argued that Brodribb had been negligent for a number of reasons: first, it was said that the ramp was unsafe for loading short logs. The trial judge held that Gray had constructed the ramp according to established practice and that if the distance between the two sets of logs was reduced, the tractor would then be unable to manoeuvre between them. This view was adopted by the High Court.[37]

Secondly, it was argued that Brodribb was negligent in failing to provide a forklift to unload the loads. This point was rejected because the judges felt that it was not feasible to use forklifts in the bush, nor to transport them to each site. These forklifts were large and expensive and there was no evidence that such forklifts were used in any other similar logging operations. In any event, there was uncertainty as to whether the use of a forklift would have avoided accidents.[38]

Thirdly, Stevens argued that there was negligence in failing to supervise the loading operation or to ensure that safe procedures were adopted. The High Court pointed to the fact that there had not been any accident during loading operations in the past and that Gray and Stevens were experienced contractors.[39] Brennan J. felt that imposing such supervision might have been an "irritating distraction" to experienced contractors.[40] He went further to suggest that if Brodribb prohibited truck drivers from helping in the loading of logs the risk of injury might even be increased.[41]

Wilson and Dawson JJ. said that the danger to which Stevens was exposed by being on the ramp during logging operations was an obvious danger and that any instruction that no log was to be loaded whilst a man was on the ramp would have been unlikely to have avoided the accident.[42]

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33. (1984) 154 CLR 672 at 687.
34. *Supra* n.6 at 32-3.
35. *Ibid.* at 45-6.
36. *Ibid.* at 45. See also Brennan J. at 47 and note the remarks of Kirby P. in *Quinn* v. *Rocla Concrete Pipes Ltd* (1986) 6 NSWLR 586 at 597.
37. Mason J. at 31; Wilson & Dawson JJ. at 46; Brennan J. at 48.
38. *Ibid.*
39. Mason J. at 31-2; Wilson & Dawson JJ at 46-7; Brennan J. at 48.
40. *Supra* n.6. at 48.
41. *Ibid.*
42. *Ibid.* at 46.
43. *Ibid.* at 53-4.

Accordingly, a majority of the High Court held that there was no breach by Brodribb of its duty of care.

Deane J., however, dissented on this point. He found that in relation to the loading of logs, the snigger's functions and the truck driver's functions "necessarily overlapped" to an extent which obviously required co-ordination and co-operation between the two. This was particularly the case he said where the length of the logs was shorter than the two pairs of skids. He held that Brodribb had provided no system at all in dealing with this problem — instead it was to be dealt with as it arose.[43] Deane J. concluded: "The consequence was that a truck driver was unnecessarily exposed to any danger involved in the unplanned and unexpected".[44]

(ii) Vicarious Liability

The general rule is that a person who employs an independent contractor to do work for him is not vicariously liable for his negligence.[45] However, over the years a number of exceptions to this rule have been established by the courts, albeit in an ad hoc manner.[46] Two of these exceptions were relied upon by Stevens to argue that Brodribb was vicariously liable for Gray's negligence, namely:

— the doctrine of extra-hazardous activities; and
— breach of a non-delegable duty.

The first-mentioned exception derives from *Honeywill & Stein Ltd* v. *Larkin Bros. Ltd*[47] where it was held:

> if a man does work on or near another's property which involves danger to that property unless proper care is taken, he is liable to the owners of the property for damage resulting to it from the failure to take proper care, and is equally liable if, instead of doing the work himself, he procures another, whether agent, servant or otherwise, to do it for him.[48]

Mason J. treated this exception as an example of strict liability for breach of a duty of care which the employer owes to the plaintiff personally.[49] He traced the history of the doctrine in Australia, England, U.S.A. and Canada[50] and noted that in *Torette House Pty Ltd* v. *Berkman*[51] the Supreme Court of New South Wales rejected the doctrine.[52] He also noted that the traditional response of the common law to the creation of special dangers has been to require a higher standard of care in exercising a duty which exists.[53] Accordingly, Mason J. concluded that the doctrine had no place in Australia.[54]

Wilson and Dawson JJ. agreed. In addition, they questioned whether logging operations could in any event be classified as an extra-hazardous activity.[56]

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44. *Ibid.* at 54.
45. *Laugher* v. *Pointer* (1826) 108 ER 204; *Quarman* v. *Burnett* (1840) 141 ER 509. More recently, see *Steppke* v. *National Capital Development Commission* (1978) 21 ACTR 23.
46. See Fleming, *supra* n.4 at 630-4.
47. [1934] 1 KB 191.
48. *Ibid. at 199-200.*
49. *Supra* n.6 at 29.
50. *Ibid.* at 29-30.
51 (1939) 39 SR (NSW) 156.
52. *Supra* n.6. at 30.
53. *Ibid.* at 30. Mason J. cited *Adelaide Chemical and Fertilizer Co. Ltd* v. *Carlyle* (1940) 64 CL:R 514 at 522-3, 534; *Swinton* v. *China Mutual Steam Navigation Co. Ltd* (1951) 83 CLR 553 at 566-7; *Thompson* v. *Bankstown Corporation* (1953) 87 CLR 619 at 645; *Imperial Furniture Pty Ltd* v. *Automatic Fire Sprinklers Pty Ltd* [1967] 1 NSWR 29 at 31, 44; *Todman* v. *Victa Ltd* [1982] VR 849 at 851-2.
54. *Ibid.* at 30.
55. *Ibid.* at 42-3.
56. *Ibid.* at 40.

The second exception relied on by Stevens, relating to non-delegable duties, is based on the notion that sometimes the law imposes on persons a duty not only to take reasonable care but to ensure that reasonable care is taken.[57] Thus, an employer who engages an independent contractor to do work will be liable for that person's negligence even if the employer exercised reasonable care in selecting him[58] — the difficulty has been in identifying when such a non-delegable duty arises.[59] *Kondis*[60] had attempted a discriminating test. There Mason J. required:

> Some element in the relationship between the parties that makes it appropriate to impose on the defendant a duty to ensure that reasonable care and skill is taken for the safety of the persons to whom the duty is owed.[61]

In *Stevens* v. *Brodribb* Mason J. cited *Kondis* where he had said that a non-delegable duty will arise where a person:

> has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised.[62]

However, Mason J. found that the facts in this case were substantially different from *Kondis* because the required relationship between the parties did not exist. Whereas in *Kondis* the crane driver assumed the control or supervision of the injured labourer, here Gray had in no sense assumed control or supervision of Stevens while loading the truck.[63]

Wilson and Dawson JJ., who also referred to the test adopted by Mason J. in *Kondis*, disposed of the question by saying that on the facts, the duty to exercise reasonable care in the co-ordination of the activities of the contractors had not been delegated.[64].

Brennan J. concluded that no special duty arose on the facts.[65] He held that the duty to use reasonbable care in organising an activity does not import a duty to avoid any risk of injury. If it is reasonable to engage an independent contractor who is competent to control his own system of work without supervision by the employer, then the employer's duty does not require him to retain control of working systems.[66] He said:

> The circumstances may make it necessary for the entrepreneur to retain and exercise a supervisory power or to prescribe the respective areas of responsibility of independent contractors if confusion about those areas involves a risk of injury. But once the activity has been organised and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur.[67]

On the facts, Brennan J. held that Brodribb was not negligent in leaving the problem of manoeuvring short logs to competent independent contractors to deal with. Having properly organised the loading of logs, Brodribb's obligation did not, according to Brennan J., extend to the conduct of loading operations.[68] He explained: "The way in which the

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57. Mason J. at 32; Wilson & Dawson JJ. at 44.
58. Mason J. at 32.
59. Noted by Wilson & Dawson JJ. at 44.
60. *Supra* n. 33.
61. *Ibid.* at 687.
62. *Supra* n. 6 at 32.
63. *Ibid.* at 32-3
64. *Ibid.* at 45-6.
65. *Ibid.* at 49.
66. *Ibid.* at 47.
67. *Ibid.* at 47-8.
68. *Ibid.* at 48-9.

independent contractors chose to deal with the problem of jammed logs was a matter for them".[69]

Brennan J. suggested that it may have been different if the persons working near the loading ramps had been employees.[70].

Therefore, Brodribb was found by the High Court not to be vicariously liable for Gray's negligence as an independent contractor.

(b) Brodribb's Liability as an Employer of Employees

As mentioned earlier, Stevens and Gray were both found by the High Court to be independent contractors of Brodribb and not employees. Such a conclusion meant that there was no need for the Court to discuss whether Brodribb, as an employer of employees, had breached its personal duty to provide adequate plant and equipment, a safe place of work and a safe system of work.

The Court's decision also ended debate over Brodribb's vicarious liability for the negligence of its employee.

(c) Making the Distinction Between Employees and Independent Contractors

The unanimous conclusion that Stevens and Gray were independent contractors was reached only after considerable discussion by the three judges who considered the point[71] about the correct approach to be taken in making the distinction. In doing so some admissions were made that the distinction can be difficult to make.[72]

Although this aspect of the case has in the past received considerable attention, some discussion of it here is still warranted.

The High Court stated that the classic test for determining whether there is a contract of service as opposed to a contract for services is the degree of control which one person has over the other.[73] However, the court recognised that there are problems in relying on actual control alone[74] — that it is not so much actual control which is important, but rather the right of the employer to exercise it.[75] The Court looks at who has "ultimate authority".[76]

But in any event, the High Court held that control is no longer regarded as the only relevant factor. As Mason J. held:

> the evidence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question...[77]

Mason J. listed other relvant matters as:

(i) the mode of remuneration;

(ii) the provision and maintenance of equipment;

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69. *Ibid.* at 49.
70. *Ibid.*
71. Mason, Wilson & Dawson JJ.
72. See Deane J. at 49.
73. Mason J. at 24; Wilson & Dawson JJ. at 35. See *Performing Right Society Ltd* v. *Mitchell and Booker (Palais de Danse) Ltd* [1924] 1 KB 762.
74. E.g. See Wilson & Dawson JJ's reference at 36 to *Montreal* v. *Montreal Locomotive Works* [1947] 1 DLR 161 at 169.
75. Mason J. at 24; Wilson & Dawson JJ. at 36. See *Zuijs* v. *Wirth Bros Pty Ltd* (1955) 93 CLR 561 at 571.
76. Mason J. at 24. See *Humberstone* v. *Northern Timber Mills* (1949) 79 CLR 389 per Dixon J. at 404.
77. *Ibid.* at 24. Mason J. cited *Queensland Stations Pty Ltd* v. *Federal Commissioner of Taxation* (1945) 70 CLR 539 at 552; *Zuijs* v. *Writh Bros Pty Ltd* (1955) 93 CLR 561; *Federal Commissioner of Taxation* v. *Barrett* (1973) 129 CLR 395 at 401; *Marshall* v. *Whittaker's Building Supply Co.* (1963) 109 CLR 210 at 218.

(iii) the obligation to work;
(iv) the hours of work and provision for holidays;
(v) the deduction of income tax; and
(vi) the delegation of work by the putative employee.[78]

Further indicia were listed by Wilson and Dawson JJ. They said factors which tended to establish a contract of service rather than a contract for services were:
(i) the right to have a particular person do the work;
(ii) the right to suspend or dismiss the person engaged;
(iii) the right to the exclusive services of the person engaged; and
(iv) the right to dictate the place of work, hours of work and the like.[79]

Indicia pointing to a contract for services included:
(i) work involving a profession, trade or distinct calling on the part of the person engaged;
(ii) the provision by the worker of his own place of work or of his own equipment;
(iii) the creation by him of goodwill or saleable assets in the course of his work;
(iv) the payment by him from his remuneration of business expenses of any significant proportion; and
(v) payment to the worker of remuneration without deduction for income tax.[80]

Wilson and Dawson JJ. stressed that none of those factors were themselves conclusive nor was the list exhaustive[81] — rather it was merely a guide.[82] They also said that the terms of the contract will always be of "considerable importance".[83]

The three judges also discussed the role of the organisation test.[84] Mason J. regarded it "simply as a further factor to be weighed, along with control..."[85], although of the two concepts he felt that legal authority to control was more cogent.[86]

Wilson and Dawson JJ. held that the organisation test "may place a different emphasis upon the tests to be applied but of itself offers no new test for the solution of the problem..."[87] They too felt that to apply the control test was the "surest guide".[88]

Having set down that approach, the three judges then considered what they saw as the relevant factors in this case. First, they noted that Brodribb exercised some control through its bush boss and its mill manager but felt that their control fell short of the type of supervision or right to control required. Rather it was consistent with a "right to direct or superintend the performance of the task".[89] As Wilson and Dawson JJ. noted: "Even the most independent of independent contractors is subject to some direction in the performance of his work..."[90]

The judges accepted that Stevens and Gray provided and maintained their own equipment, set their own hours of work and received payments, not by fixed salary or wages but by reference to the volume of timber delivered to the sawmill.[91]

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78. *Ibid.*
79. *Ibid.* at 36.
80. *Ibid.* at 37.
81. *Ibid.*
82. *Ibid.*
83. *Ibid.*
84. See Mason J. at 26-28; Wilson & Dawson JJ. at 36.
85. *Ibid.* at 27.
86. *Ibid.*
87. *Ibid.* at 36.
88. *Ibid.*
89. Wilson & Dawson JJ. at 37. See Mason J. at 25-6.
90. *Ibid.* at 37-8.
91. Mason J. at 25; Wilson & Dawson JJ. at 38.

All three judges considered that the case resembled the facts in *Humberstone* v. *Northern Timber Mills*[92]. They cited Dixon J. who there said:

> The essence of a contract of service is the supply of the work and skill of a man. But the emphasis in the case of the present contract is upon mechanical traction.[93]

They also referred to *AMP Society* v. *Chaplin*[94] which held that an unlimited power of delegation such as existed in this case was "almost conclusive" against the contract being one of service.[95]

Finally, there was recognition that all parties in this case regarded their relationship as one of independent contract and not one of employment.[96]

5. Conclusion

Stevens v. *Brodribb* makes it clear that the duty of an employer to provide a safe system of work applies equally to entrepreneurs who engage independent contractors. This was certainly the interpretaion of Kirby P in *Quinn* v. *Rocla Concrete Pipes Ltd.*[97]

In so holding, the High Court reaffirmed the role of proximity in establishing a duty of care in negligence. The Court referred to cases such as *Jaensch* v. *Coffey*[98] (nervous shock) and *Sutherland Shire Council* v. *Heyman*[99] (economic loss). Since then the trend has continued with *San Sebastian*[100] (negligent misstatement), *Cook* v. *Cook*[101] (personal injuries and the place of proximity in verifying the standard of care), *Zaluzna*[102] (occupier's liability) and *Hawkins* v. *Clayton*[103] (solicitors' negligence). Therefore, in dealing with entrepreneurs' liability, *Stevens* v. *Brodribb* represents a significant link in the chain.

However, *Stevens* v. *Brodribb* remains unique in that whilst those cases mentioned applied the notion of proximity to refine duties of care which pre-existed, this case breaks new ground in creating "entrepreneurs' liability".

By paving the way for greater responsibility towards independent contractors, the effect of the decision is to reduce the importance of the "increasingly amorphous"[104] distinction between employees and independent contractors in negligence. As Deane J. says:

> the general principles of the law of negligence which are applicable to determine the existence and content of a common law duty of care are concerned essentially with matters of substance. In the application of those principles, technical and marginal considerations which may be decisive of characterisation as an 'independent contractor' or as an 'employee' in a borderline case are, of themselves, unlikely to be of critical importance.[105]

Nevertheless, the distinction would appear to be still "commonly decisive"[106] of the

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92. *Supra* n.5.
93. *Ibid.* at 404-5 cited by Mason J. at 26; Wilson & Dawson JJ. at 38.
94. *Supra* n.5.
95. *Ibid.* at 391. Mason J. at 26; Wilson & Dawson JJ. at 38.
96. Mason J. at 26.
97. *Supra* n. 36 at 597.
98. *Supra* n.10.
99. *Supra* n. 18. See also *Hackshaw* v. *Shaw* (1984) 155 CLR 614 and *Papatonakis* v. *Australian Telecommunications Commission* (1985) 156 CLR 7 which dealt with the duty of care owed by an occupier to a trespasser/neighbour and to an invitee/neighbour respectively prior to *Australian Safeways Stores Pty Ltd* v. *Zaluzna supra* n. 23.
100. *San Sebastian Pty Ltd* v. *Minister Administering the Enviromental Planning and Assessment Act 1979* supra n. 23.
101. *Supra* n.23.
102. *Ibid.*
103. *Ibid.*
104. Deane J. at 49.
105. *Ibid.* at 49-50.
106. *Ibid.* at 49.

existence of vicarious liability so that whereas an employer may be vicariously liable for the negligent acts of his employees, the general rule remains that an employer will not be vicariously liable for the negligent acts of his independent contractor. So it was in this case where the conclusion that Gray was an independent contractor of Brodribb meant that it was not liable for his negligence. In fact, the High Court, by deciding that the doctrine of extra-hazardous activities no longer forms part of the law in Australia, has removed one of the exceptions to the general rule and thereby appears to have strengthened it.

Finally, the court makes it clear that where the distinction must be made, control is of vital importance but that the court takes a multi-factor approach.

Whilst the case has gained more attention on this latter aspect, it is submitted that the true importance of the case, particularly in the light of subsequent developments, lies in its discussion of proximity and the duty of care owed to independent contractors.