
Dependent Contractors: Can the Test from *Stevens v Brodribb* Protect Workers who are Quasi-Employees?

Loretta de Plevitz*

The *Stevens v Brodribb* test

Working from the presumption that the law of employment is grounded in a contract made ostensibly between two equal partners, the Australian tests for distinguishing an employee from an independent contractor have focused on the obligations under the contract. Where the fundamental term of an employment contract was the payment of wages in exchange for the performance of work at the direction of the master, freedom from the principal's direction or right to direct¹ became all-important in the characterisation of a contract independent of control by a principal. However with the growing variety of work relationships an employer's right to "control" the employee no longer was a sufficient test. In *Stevens v Brodribb Sawmilling Co Pty Ltd*² Mason J observed that:

the existence 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 as merely one of a number of indicia which must be considered in the determination of that question... Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee.³

Mason J's judgment is accepted as the current High Court authority on deciding

* BA UNSW, LLB(Hons) QUT, Lecturer, School of Industrial Relations, Faculty of Commerce and Management, Griffith University, Nathan Qld 4111. QUT Medallist 1988.

1 *Zuijs v Wirth Bros* (1955) 93 CLR 561.

2 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

3 *Ibid* at 24.

whether a worker is an employee or an independent contractor. The essence of his “multi-factor” test is that the terms of the contract between the parties are analysed for incidents which may indicate either an employment or an independent contractor relationship: income tax deductions from pay and set hours and days of work point to an employment relationship, whereas the ability to delegate, the provision and maintenance of equipment, payment by the task, and no clear obligation to present for work may indicate an independent contractor. The court then weighs up the indicia to obtain an overall impression of the type of contract.

Stevens v Brodribb was a case of workplace negligence. Stevens, a driver on site, had been injured by the negligence of another worker, Gray. The issue for the sawmilling company was that if the men were independent contractors then it could be neither vicariously liable for Gray’s negligent acts nor personally liable to Stevens as an employee. The High Court held that the two men were independent contractors. On the issue of liability to the injured Stevens the majority held that a principal could owe a duty of care to an independent contractor although in this particular case Brodribb had not breached its duty of care.

Given the prevailing judicial view of the contractual nature of the work relationship it was to be expected that Mason J would focus on the “factors”, the terms of the contract. Unfortunately however those terms are not necessarily inclusive nor exclusive indicators of the nature of the work relationship. As Wilson and Dawson JJ observed: “the question is one of degree for which there is no exclusive measure.”⁴

As has been elsewhere noted⁵ the “factors” are open to manipulation: drafted by the principal, the contract of engagement can unilaterally impose terms such as “the relationship is one of independent contractor to principal, not employer to employee”; “the contractor has the right to sub-contract”; or “the worker must incorporate his or her business”. A contractor looking for work is hardly in a position to refuse to agree.

In fact as Gray J pointed out in *Re Porter; Re Transport Workers Union of Australia*⁶ a contractor’s work arrangements may be even more oppressive than an employee’s. His Honour gave instances of work being withheld for a week or two to “punish” the contractor for refusing work⁷ yet the contractor’s “right” to delegate to someone else when sick, disabled from driving or for some other urgent cause could only be exercised on the approval of the principal.⁸ A contractor may have no better security than an employee where a principal can unilaterally terminate the contract after three warnings of unsatisfactory service, failure to carry out the company’s reasonable requests, or for gross dishonesty, stealing or

4 *Ibid* at 36.

5 eg C Fenwick “Shooting for Trouble? Contract Labour-hire in the Victorian Building Industry” (1992) 5 *Australian Journal of Labour Law* 237.

6 (1989) 34 IR 179.

7 *Ibid* at 184.

8 *Ibid* at 187.

liquor or drug abuse.⁹

Stevens v Brodribb was handed down by the High Court in February 1986, only nine months after the *Hancock Report*¹⁰ was tabled in Federal Parliament. The Hancock Committee, established to examine the law relating to Australian industrial relations, identified as vulnerable to exploitation “so-called independent contractors who in fact work in the role of employees...under direction and supervision and, in a practical sense, function as employees.”¹¹ The Report suggested various factors which could be used to distinguish these workers from truly independent contractors: was their remuneration based on the amount of work performed or on time taken? were their hours of work specified? was the contractor free to work for others or economically tied to the principal? were there rights to sub-contract? was the agreement for one task only or did it envisage an on-going working relationship between the parties?¹² The Report recommended that the definition of “employee” in the *Conciliation and Arbitration Act 1904* (Cth) be expanded to include these factors. On these tests a “quasi-employee”¹³ or “dependent contractor”¹⁴ would be brought within the protection of the Federal industrial relations system. However those recommendations were never implemented.

Mason J’s test, though not exhaustive, picks up some of the factors suggested in the *Hancock Report*, for example the power to delegate and the mode of remuneration. However by concentrating on factors such as who provides the equipment and whether tax is deducted, a court can discard as irrelevant evidence which may better identify that the parties are not in a commercial contract operating at arms’ length, but in an ongoing relationship where the worker is economically dependent upon the principal in the same way as an employee is upon an employer. Indeed, though both Stevens and Gray were found in *Stevens’ case* to be independent contractors, both men had been engaged by Brodribb for six months of every year, were paid fortnightly based on the volume of timber cut, and though there was no obligation on Brodribb to provide work the workers turned up for work every day at more or less the same time. They worked under the direction of Brodribb’s “bush boss” who on a daily basis organised the work activities, allocated the areas to be worked and decided the volume of timber to be cut and whether work should proceed in bad weather. The mill manager had the right to terminate the engagement of any worker not carrying out his duties satisfactorily. Independence and freedom from control were illusory, but under Mason J’s test the element of “control” was now only one of many indicia of an employment relationship.

9 Clause 16 of the contract between Finemores Pty Ltd and its lorry owner-drivers examined by the Full Court of the Industrial Relations Court of Australia in *Gerrard and anor v Mayne Nickless Ltd* (1996) 135 ALR 494 at 501.

10 *Australia Report of the Committee of Review into Australian Industrial Relations Law and Systems* Vol 2 AGPS Canberra 20 May 1985 (the *Hancock Report*).

11 *Ibid* paragraph 7.75.

12 *Ibid* paragraph 7.77.

13 *Ibid* paragraph 7.75.

14 A concept found in the *Canada Labour Code, Consolidated Statutes of Canada* 1996, Ch L-2.

Dependent contractors in a flexible labour market

With the deregulation of the labour market over the past decade and a half dependent contractors are now found not only in cartage and logging but in work as varied as cleaning, information technology, pizza delivery, word processing, couriers, accountancy, child care, legal consultancy, data entry operations, and drafting. They provide their labour only or their labour plus use of their own vehicle, tools or computer programs. The worker's vehicle or equipment, insured and maintained by the worker, may be under hire-purchase from the enterprise and often must be painted in the company colours, thus denying the worker the opportunity to compete for work in an open market. The contractor may have to wear the company uniform, carry out his or her work under the letterhead and documentation of the principal, and may even be paid an hourly rate and work set hours. The hours of work and the obligation to work for the one principal restrict the worker to earning only a sum for labour after expenses are deducted; there is no opportunity to build up a true business with saleable goodwill. The contractor often bears not only her or his own business expenses but also costs which normally would be borne by the entrepreneur such as electricity, telephone and maintenance of the work vehicle. As aptly described in one contract agreement the worker is "captive" to the one principal, and must "devote himself in a permanent capacity to the operational requirements of the company".¹⁵ "The reality of the relationship is that there is nothing in terms of hours or days worked that would distinguish these people from the ordinary employee."¹⁶ It is suggested that at the very least the worker is a "dependent" rather than an independent contractor.

While the common law has established that a contractor is owed the same duty of care as employees,¹⁷ Australian legislatures have been slow to acknowledge the vulnerability of dependent contractors in other aspects of the work relationship. An exception is the anti-discrimination legislation which protects "contractors" or "persons working under a contract for services" from workplace race, sex or disability discrimination or harassment.¹⁸ However other internationally recognised human rights such as the right to form a union to promote and protect workers' economic and social interests¹⁹ or the right to be protected against arbitrary dismissal²⁰ have

15 Agreement between the Victorian Road Transport Association and the Transport Workers' Union of Australia Victorian Branch which was under scrutiny by Gray J in *Re Porter; Re Transport Workers Union of Australia* (1989) 34 IR 179 at 186-188.

16 *Vabu Pty Ltd v Federal Commissioner of Taxation* (1995) 95 ATC 4218 per Ireland J at 4223.

17 *Stevens v Brodribb* (1986) 160 CLR 16; *Bus v Sydney City Council* (1989) 167 CLR 78.

18 *Racial Discrimination Act* 1975 (Cth) s 3(1); *Sex Discrimination Act* 1984 (Cth) s 4(1); *Disability Discrimination Act* 1992 (Cth) s 4(1); *Anti-Discrimination Act* 1977 (NSW) s 4(1); *Equal Opportunity Act* 1995 (Vic) s 4(c); *Anti-Discrimination Act* 1991 (Qld) s 4(b); *Equal Opportunity Act* 1984 (SA) ss 32, 54, 69, 85d; *Equal Opportunity Act* 1984 (WA) ss 13, 35D, 39, 56, 66D, 66Y; *Sex Discrimination Act* 1994 (Tas) s 3(g); *Discrimination Act* 1991 (ACT) s 4(1)(a); *Anti-Discrimination Act* 1992 (NT) s 4(1)(b).

19 Article 8(1)(a) *International Covenant on Economic, Social and Cultural Rights* to which Australia is a signatory.

20 Article 4 *Termination of Employment Convention*, 1982, ratified by Australia 1993.

not been extended to dependent contractors in the recently enacted *Workplace Relations Act* 1996 (Cth).²¹

Legislative definitions of “employee”

Industrial legislation tends to define “employee” by reference to the common law, and the *Workplace Relations Act* 1996 (Cth) is no exception. “Employee” is defined in s 4(1) to include “any person whose usual occupation is that of employee”. The application of the *Stevens v Brodribb* multi-factor test means that the type of worker described above is usually classified as an independent contractor with only limited rights under the Act. For example, contractors can become members of a union of employees if they are performing work that an employee would perform,²² but their economic and political interests are not necessarily adequately catered for as the union must be effectively representative of the employee members.²³ Nor can contractors start their own union.²⁴

Despite the International Convention which refers to the termination of the employment of a *worker*,²⁵ the unfair dismissal provisions in the *Workplace Relations Act* 1996 (Cth) apply only to employees.²⁶ It is possible that a contractor who has been harshly dismissed could apply to have his or her contract reviewed under the unfair contracts provisions,²⁷ though the remedies are limited to varying or setting aside the contract.²⁸ In any case any general effect of the provisions was curtailed by the High Court’s decision in *Re Dingjan; Ex parte Wagner*²⁹ where it was held that to be within jurisdiction the contract must be made direct with a corporation. This excluded the relatively common situation where the contractor has subcontracted with a natural person or partnership. On the contractor’s side he or she has to be a natural person,³⁰ so those contractors forced to incorporate as a condition of obtaining a contract are also denied access to the jurisdiction.

By comparison, the Canadian Federal *Labour Code* offers limited legislative protection for this category of worker by defining as “dependent contractors”,

21 The *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) as well as introducing considerable changes to Federal industrial law renamed the *Industrial Relations Act* 1988 (Cth) the *Workplace Relations Act* 1996 (Cth).

22 *Workplace Relations Act* 1996 (Cth) s 188(1)(b)(iii).

23 *Ibid* s 188(2).

24 *Ibid* s 188.

25 *Termination of Employment Convention*, 1982.

26 *Workplace Relations Act* 1996 (Cth) s 170CE(1).

27 *Ibid* ss 127A-C. Somewhat similar provisions exist in s 275(1) *Industrial Relations Act* 1991 (NSW) and s 290 *Workplace Relations Act* 1997 (Qld). The unfair contracts provisions in the *Industrial Relations Act* 1972 (SA) have been repealed by the *Industrial and Employee Relations Act* 1994 (SA) though some contractors eg outworkers and passenger vehicle drivers have access to the unfair dismissal provisions.

28 *Workplace Relations Act* 1996 (Cth) s 127B(1)(a) or (b).

29 (1995) 183 CLR 323.

30 *Workplace Relations Act* 1996 (Cth) s 4(1A).

workers who, inter alia, are “in a position of economic dependence on, and under an obligation to perform [work] duties for that other person.”³¹ Dependent workers can join a trade union to bargain and can be protected from the consequences of industrial action.

The common law test is also found in Australia in statutes which impose fiscal obligations on employers in relation to their employees such as payroll tax, income tax and superannuation.³² As it has been estimated that businesses which avoid the statutory obligations owed to employees can save at least 17% of their running costs by using contractors,³³ it is not surprising that a whole new industry, analogous to the taxation advice industry, has taken advantage of the inconsistent outcomes of the multi-factor test³⁴ to advise businesses on how to structure the working relationship so that it appears to be one of principal to independent contractor rather than employer to employee.

Collins' test

As in Australia, English legislative drafting tends to identify whether a worker is an independent contractor or an employee by reference to the common law. In England the tests have focussed mainly on whether the worker was integrated into or was part of the organisational structure for which he or she was working.³⁵ The vagaries of outcome have prompted Collins³⁶ to propose a new test for the purposes of legislative protection or employer liability. The test creates an area between two axes. Along one axis is measured how far the worker is subject to the rules of the organisation. This may range from detailed regulation to nothing more than the principal's authority to check the finished service. The other axis is a continuum based on how the worker is paid: though typically a contractor is paid a fixed sum, he or she may be paid by the hour or the day, while an employee may be paid by commission, by the piece, by tips or by a percentage of the profits. Between the axes a worker must be considered an employee for the purpose of legislation; outside, he or she is a truly independent contractor with responsibility for his or her own social insurance and industrial protection.³⁷

31 *Canada Labour Code, Consolidated Statutes of Canada* 1996, Ch L-2 s 3(1)(c).

32 For example s 221A *Income Tax Assessment Act* 1936 (Cth) and s 12(3) *Superannuation Guarantee (Administration) Act* 1992 (Cth) apply to persons working under a contract wholly or principally for labour.

33 Business Services Survey *Australian Financial Review* 14 February 1995, p 33.

34 Eg the finding at first instance ((1995) 95 ATC 4218) that bicycle couriers were employees was overruled by the NSW Court of Appeal in *Vabu Pty Ltd v Commissioner of Taxation* (unreported) CA40206/95 of 6 September 1996 which held they were independent contractors.

35 Eg *Bank Voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248; *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497.

36 H Collins “Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws” (1990) 10 *Oxford Journal of Legal Studies* 353.

37 *Ibid* at 376 et seq.

On Collins' model the court starts from the presumption of the existence of an employment relationship; the onus is on the principal to prove that it has excluded managerial control over the worker. The existence of any "badges" of membership of the organisation "should drive a court towards a finding of an employment relationship, unlike the present approach which merely balances this against other factors."³⁸

Collins admits that the test as proposed may be difficult to apply: somewhat akin to mentally solving "a simultaneous equation",³⁹ or viewing "a double helix",⁴⁰ so for practical purposes the rule of thumb would be that an employment contract exists unless it is a task performance contract where no badges of membership of the organisation are apparent.

The advantage of Collins' test is that it combines the essence of the "control" test with a focus on the issue of whether the worker is performing his or her duties as "part and parcel" of the entrepreneur's business or of his or her own, thereby acknowledging the central place of economic dependence in constructing the relationship.

Looking to substance not to form

It has long been accepted in Australian law that even where parties express an intention to create an independent contract the courts will go behind the express contractual terms to examine the reality of the relationship.⁴¹ In doing so, the courts are applying the equitable principle that looks to substance not to form. Sir Anthony Mason has recently commented that "the concept of unconscionable conduct...has been the source of the recent rejuvenation of equity"⁴² and indicated that some courts are using equitable doctrines to penetrate the citadels of commerce and subject business relationships to higher standards of conduct.⁴³ It will be argued in the remainder of this article that Australian courts may be developing their own response to the issue of dependent contractors along these very lines. While as yet there is no coherent body of law which could clarify the broad principles, there may be sufficient dicta on which to construct a new test, one based on the substance, not the form of the relationship.

In *Re Porter; Re Transport Workers Union of Australia* Gray J suggested that where the

reality may be that economic considerations dictate that work will only be accepted from the other party to the contract ... there is no particular reason why a court should

38 *Ibid* at 379.

39 *Ibid* at 378.

40 *Ibid* at 380.

41 *Narich Pty Ltd v Commissioner of Pay-Roll Tax* (1983) 50 ALR 417.

42 Sir Anthony Mason "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *The Law Quarterly Review* 238.

43 *Ibid* at 238.

ignore the practical circumstances, and cling to the theoretical niceties. The level of economic dependence of one party upon the other, and the manner in which that economic dependence may be exploited, will always be relevant factors in the determination whether a particular contract is one of employment.⁴⁴

Humberstone v Northern Timber Mills

Let us start with an examination of that economic dependence by looking at Dixon J's judgment in the old case of *Humberstone v Northern Timber Mills*.⁴⁵ Humberstone owned a truck and though he initially held himself out to be hired as a carrier by the public at large, during the twenty-five years preceding his death at work he had confined his work to carrying logs, timber and boxes for Northern Timber Mills. Even when he did some occasional "back work" for other customers he sought Northern's permission. He had neither business sign nor phone. He turned up every day at 7.30 am at Northern's premises and carted whatever load he was ordered to. He paid for the maintenance and licensing of his vehicle and for his petrol which he purchased from Northern's pumps. He was paid weekly at a rate calculated on the weight of the load and the distance carried. Humberstone died as a result of exertion at work and the issue before the High Court was whether his widow had the right to compensation pursuant to amendments to the *Workers Compensation Act 1946 (Vic)* passed after Humberstone commenced work for Northern. It was held that Humberstone had worked for Northern as an independent contractor but under one continuing contract rather than a series of daily hirings. Therefore the later amendments could not apply. Dixon J commented on the problems of creating a dichotomy between independent contractors and employees:

The regulation of industrial conditions and other laws have in many respects made the classic tests difficult of application and it may be that ultimately they will be re-stated in some modified form.⁴⁶

In identifying the public policy which draws some contractors and not others into the protection of workers' compensation legislation Dixon J found that those protected may have "no *independent* business or trade".⁴⁷ There may be no

element of systematic practice or holding out which the idea of openly conducting a distinct or independent trade or business and seeking custom implies...[The contractor's] relation with the principal is special or particular either because it is outside the course of the general business of the contractor or the general practice of his trade or because he has no such general business or is not a general practitioner of his trade.⁴⁸

44 (1989) 34 IR 179 at 184-5.

45 (1949) 79 CLR 389.

46 *Ibid* at 404.

47 *Ibid* at 401 [emphasis added by author].

48 *Ibid* at 402.

His Honour observed that Humberstone's "special or particular" relationship with his principal arose not from the form of the relationship between an independent contractor and an entrepreneur, but from the substance of the dependency between them. His Honour found that the timber mill depended from day to day on the carriers and the carriers depended on the mill for work,⁴⁹ therefore it was reasonable to imply one continuing contract on terms which required reasonable notice of termination.⁵⁰

In a more recent example of this type of analysis Munro J in *Papa v Finemores Pty Ltd*⁵¹ commented that the more the subcontractor is treated as a "species of employee" the greater will be the justification for varying the contract⁵² to provide reasonable notice of termination equivalent to that required for an employee.

Deane J's judgment in *Stevens v Brodribb*

Writing extra-judicially Sir Anthony Mason has said that the "boundless expansion of the tort of negligence"⁵³ has taken over the protective role previously carried out by the law of Equity. In *Stevens v Brodribb* his Honour held that where the contractor is doing work which could be done by an employee this gives rise to a special relationship which imposes a duty of care on the entrepreneur:

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. 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 [sic] 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. The fact that they are not employees, or that he 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 a safe system.⁵⁴

Although Mason J has been taken to have given the leading judgment in *Stevens v Brodribb*, it is Deane J's analysis which was subsequently applied by the majority⁵⁵ of the High Court to abolish the rules which maintained categories of duty of care.⁵⁶ There is now but one general duty of care towards our legal neighbours – its con-

49 *Ibid* at 403.

50 *Ibid*.

51 Unreported decision no 1498/1994 of the Australian Industrial Relations Commission, 31 August 1994 (Print L4930).

52 Pursuant to s 127B(1)(a) *Industrial Relations Act* 1988 (Cth).

53 Mason *supra* n 42 at 239. His Honour himself played a not inconsiderable part in this expansion.

54 (1986) 160 CLR 16 at 31 [emphasis added by author].

55 Brennan CJ, however, consistently resisted the need to show proximity as a separate feature in establishing a duty of care.

56 See for example *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340 at 355 per Gibbs CJ, Mason, Wilson and Dawson JJ.

tent depends on the circumstances.⁵⁷

In *Jaensch v Coffey*⁵⁸ Deane J had rejected the concept that reasonable foreseeability was sufficient to establish a duty of care. The real touchstone of its existence, he said, was proximity between the parties. Returning to Lord Atkin's reasoning in *Donoghue v Stevenson*⁵⁹ he found that a duty of care will only arise where the parties are "neighbours" in law. Such a relationship might be found in the physical, causal or circumstantial proximity between the parties. As a prime example of a circumstantial relationship Deane J gave the "overriding relationship of employer and employee".⁶⁰ However

the considerations relevant to an issue of proximity will obviously vary in different classes of case and the question whether the relationship is "so" close "that" the common law should recognise a duty of care in a new area or class of case is, as Lord Atkin foresaw, likely to be "difficult" of resolution in that it may involve value judgments on matters of policy and degree.⁶¹

In *Stevens' case* Deane J had the opportunity to apply the proximity principle to embrace a relationship where no duty of care had previously existed. In a short judgment he defended his formulation of proximity. In the interdependence of the logging activities and the risk to personal safety of those engaged in them, the need for "co-ordination and co-operation"⁶² in some "rational system"⁶³ imposed an obligation to take reasonable care to avoid injuring one's legal neighbour. In his Honour's opinion that obligation had not been carried out. Alone of the judges Deane J would have restored the trial judge's decision in favour of the plaintiff.

For the purposes of establishing a duty of care Deane J found it unnecessary to classify the workers as employees or independent contractors. The essence of his judgment is that the issue was one of substance not of form:

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...What is decisive...is the substantive content, rather than the technical characterisation, of that relationship.⁶⁴

Though the High Court has now resiled⁶⁵ from its support of Deane J's notion

57 Eg occupiers of land now owe a general duty of care to persons on the land: *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479.

58 (1984) 155 CLR 549 at 583 et seq.

59 [1932] AC 562 at 580 et seq.

60 *Jaensch v Coffey* (1984) 155 CLR at 584.

61 *Ibid* [emphasis added in the original] .

62 (1986) 160 CLR 16 at 53.

63 *Ibid*.

64 *Ibid* at 50.

65 *Hill v Van Erp* (1997) 188 CLR 159.

that proximity provides the unifying theme in establishing a duty of care, Lord Atkin's principles remain. The nature of the relationship between the parties will still affect whether or not a duty of care exists.

The standard of care

As for the standard of the duty of care, though Wilson and Dawson JJ suggested in *Stevens v Brodribb* that the extent of the duty of care owed to contractors may "be something less than that owed by an employer to his employees",⁶⁶ later High Court cases⁶⁷ held that the relationship between the plaintiff and defendant will also determine the extent and content of the standard of care. Special and exceptional circumstances may take that relationship out of the ordinary case. On the application of those principles it was to be expected that the closer a contractor's relationship of economic dependence upon the principal approached an employer-employee relationship, the more the contractor should be treated in law like an employee. And so it proved in *Bus v Sydney City Council*⁶⁸ where the High Court unanimously held that a principal in taking reasonable care to avoid exposing a contractor to risks must take into account the likelihood of the inadvertence of the contractor, even one who is skilled. This brought the standard of care into line with that owed by an employer.⁶⁹

The non-delegable duty

During this same period the High Court was developing the notion of the non-delegable duty of care. This duty arises where one person has explicitly or implicitly undertaken the care, supervision or control of another or of another's property in circumstances where it may reasonably be expected by the affected person that due care would be exercised. For example, where activities involve dangerous substances the standard of reasonable care expected may be of "a degree of diligence so stringent as to amount practically to a guarantee of safety".⁷⁰

The two major cases by which the High Court established non-delegable duty, *Kondis v Victorian State Transport Authority*⁷¹ and *Burnie Port Authority v General Jones Pty Ltd* both concerned the liability of the defendant for the negligent acts of an independent contractor. In *Kondis v Victorian State Transport Authority* the Court held that an employer could not shed liability for the injuries of its employees by blaming them on an independent contractor brought in to do work:

66 (1986) 160 CLR 16 at 45.

67 *Cook v Cook* (1986) 162 CLR 376; *Gala v Preston* (1991) 172 CLR 243.

68 (1989) 167 CLR 78.

69 *McLean v Tedman* (1984) 155 CLR 306.

70 *Burnie Port Authority v General Jones Pty Ltd* (1992-1994) 179 CLR 520 at 554, joint judgment of Mason CJ, Deane, Dawson, Toohey and Gaudron JJ, their Honours quoting Lord Macmillan in *Donoghue v Stevenson* [1932] AC at 612.

71 (1984) 154 CLR 672.

the employee's safety is in the hands of the employer: it is his [sic] responsibility. The employee can reasonably expect therefor that reasonable care and skill will be taken. In the case of the employer there is no unfairness in imposing on him a non-delegable duty: it is reasonable that he should bear liability for the negligence of his independent contractors in devising a safe system of work. If he requires his employee to work according to an unsafe system he should bear the consequences.⁷²

The majority of the High Court extended this duty to persons outside the employment relationship in *Burnie Port Authority v General Jones Pty Ltd* observing that:

there are certain categories of case in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor.⁷³

Thus the law as it presently stands imposes liability on a principal for the wrongful acts or omissions of an independent contractor in situations where others rely on that principal to take care. According to the majority in *Burnie Port Authority* this has both the advantage of fairness and practicality because:

it is the person in control who has authorized or allowed the situation of foreseeable potential danger to be imposed on the other person by authorizing or allowing the dangerous use of the premises and who is likely to be in a position to insist upon the exercise of reasonable care. It is also supported by considerations of utility: "the practical advantage of being conveniently workable, of supplying a spur to effective care in the choice of contractors, and in pointing the victim to a defendant who is easily discoverable and probably financially responsible." (Thayer "Liability without Fault" (1916) 29 *Harvard Law Review* 801 at 809).⁷⁴

Therefore in relation to the circumstances outlined above, a principal now bears the same liability for the wrongful acts of an independent contractor as an employer bears for the wrongful acts of an employee under the doctrine of vicarious liability. The lines between principals and employers, independent contractors and employees are blurring.

The nature of the relationship as the basis of a new test

Whereas the test formulated by Mason J in *Stevens* relies on a quantitative characterisation of the factors as the mutual rights and obligations of the parties under the terms of their independent contract, the above principles rest on the

72 (1984) 154 CLR 672 at 687-688 per Mason J.

73 (1992-1994) 179 CLR 520 at 550 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

74 *Ibid* at 552.

quality of the relationship between the parties. The focus is on the social and economic implications of contract work, an approach more in tune with the nature of the work relationship.

It is suggested that an on-going relationship, expectations such as turning up for work at the same time each day, special knowledge and experience of the job requirements, the obligation to work as directed, and the rights of the principal to punish or dismiss may become controlling elements in the relationship taking it out of the “ordinary” relationship between a truly independent contractor and the principal and imposing on it legal obligations similar to those owed to an employee. It may be that if the High Court were faced with the issue of the status of a worker who was thus dependent on the principal it would now avoid a contractual analysis and see the “factors” as indicators of the substance of the relationship. On this analysis economic dependence assumes an importance not given to it in the multi-factor test where it may be but one of the indicia considered by the court. This approach accords with Collins’ which argues that a solution to the problem involves “an abandonment of deference to the contractual arrangements agreed by the parties.”⁷⁵

Conclusion

While encouraging the opening up the labour market to more “flexible” work arrangements Federal and State legislatures are unlikely to respond to demands for increased legislative protection of dependent contractors. Like the issue of native title it may be left to the common law to take up the issue. However the common law of freedom of contract is no longer, if it ever was, the most appropriate mechanism for determining obligations in the labour market. It overlooks the imbalance of power inherent in a relationship where the worker’s next job is dependent on accepting the principal’s terms. If legislatures persist in defining “employee” by reference to the common law a more appropriate judicial test based on the substance not the form of the arrangement may deliver a more just outcome.

75 Collins *supra* n 36 at 377.