EMPLOYEE OR CONTRACTOR?

Hollis v Vabu Pty Ltd
High Court of Australia
Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne & Callinan J

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The recent High Court decision in *Hollis v Vabu Pty Ltd* (2001) HCA 44 concerned issues respecting the nature of the relationship of employment and the scope of the doctrine of vicarious liability. Although not a construction case, the issues addressed will be of direct concern to the Construction indemnity.

THE FACTS

Vabu traded under the business name of 'Crisis Couriers' a business delivering parcels and documents. In December 1994 it had 20–30 bicycle couriers, and motorcycle/ motor couriers.

On 22 December 1994, Mr Hollis was leaving a building where he had picked up a parcel, he had taken two steps on the footpath when he was knocked down by a cyclist. The cyclist remained unidentified save that he was wearing a jacket with 'Crisis Couriers' on the back. Mr Hollis suffered personal injuries as a result of the accident.

AT FIRST INSTANCE

The trial judge found that the cyclist was a bicycle courier employed by Vabu, and that a number of its couriers for some time prior to the accident had disobeyed traffic rules posing a danger to pedestrians. The trial judge made the following findings:

- Vabu set the rates of remuneration of its bicycle couriers, there was no scope for negotiation. Vabu allocated the work with no scope for bidding by individual riders;
- Vabu assumed all responsibility regarding training, discipline and attire of its bicycle couriers;
- Vabu provided couriers with equipment, which remained its property;
- Insurance and deductions from pay were imposed by Vabu on the bicycle couriers.

Notwithstanding the above findings the trial judge found in favour of Vabu. The judge considered the plaintiff's case, which was presented on three grounds:

1. Vabu was vicariously liable for the negligence of its bicycle couriers as servants or agents. This failed because 'the bicycle couriers' who worked for Vabu were not its servants or agents but independent contractors. Accordingly, Vabu was not liable for their negligent acts. If the couriers were 'an agent' of Vabu, there was sufficient evidence to show that the bicycle couriers were not 'the employees or agent of' Vabu.

2. Mr Hollis asserted that there was a common law estoppel that Vabu had warranted to its couriers and to the public that it had affected policies of public liability insurance in respect of members of the public injured by its bicycle couriers. The trial judge found that Mr Hollis had not proved that Vabu had warranted to members of the public that bicycle couriers were covered by public liability insurance as alleged.

3. Vabu had contravened section 52 of the *Trade Practices Act 1974*, in representing to members of the public that they were protected by public liability insurance in respect of injuries caused by the negligence of Vabu's bicycle couriers. Hollis also pleaded breach of section 55(a) because Vabu had mislead the public that the nature of Vabu's business was a courier service insured in respect of injury to members of the public. The trial judge rejected this claim on the basis that Vabu had made no representations or warranty to the public.

Arguments 2 and 3 reflected the failure of an application by Mr Hollis to join CIC Insurance Limited as a defendant to the proceedings under section 6 of the *Law Reform Miscellaneous Provisions Act 1946 NSW*. The application was opposed by Vabu and dismissed by the trial

judge on the grounds that Mr Hollis had failed to produce evidence that the bicycle courier in question had 'entered into a contract of insurance'.

The judge also considered that he was bound by the decision in the NSW Court of Appeal of *Vabu Pty Ltd v Federal Commissioner of Taxation* ('the taxation decision') which concluded that bicycle couriers were independent contractors and not employees of Vabu.

THE TAXATION DECISION

The issue of whether Vabu was an employer in respect of all of its couriers under the meaning of the *Superannuation Guarantee (Administration Act) 1992*. Section 12(3) provided 'if a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract'.

Vabu sought a declaration that it was not an employer within the meaning of the Act and was obliged to lodge a Superannuation Guarantee Statement. Ireland J declined the relief because at common law the relationship between Vabu and its couriers was one of employment.

The Court of Appeal allowed Vabu's appeal. Meagher JA observed that the decision in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) meant that the old test of control was now superseded by something more flexible and concluded that the cumulative effect of the conditions of work gave Vabu a deal of control over its couriers, but a person may supervise others without becoming their employer. Several matters supported the fact that they were not employees. The couriers supplied their own vehicles, beared their own expenses for maintaining the vehicles, made payments for repairs and insurance which were 'very considerable'. Other considerations were that the couriers had to provide their own street directories, telephone books, ropes, blankets and tarpaulins. The couriers received no wage or salary. Meagher JA commented:

Normally, if they were true employees, one would expect a certain sum to be paid each day, week or month. The company's documents provide for no such thing. They are paid a prescribed rate for the number of successful deliveries they make. It is not, I think, fanciful to say that each courier conducts his own operation, permitting himself for his own economic advantage to be supervised by the company. If this were not so, why would the documents anticipate that the courier may use a business name or corporate name if he so wishes? A company does not usually have employee corporations.

Meagher JA concluded that although this part of the case was hardly without difficulty, the couriers would be classified at common law as independent contractors.

Sheller JA concluded that the relationship between the couriers and Vabu did not answer the description in section 12(3) of the Act being one 'wholly or principally for the labour of' a person. In the Court of Appeal in the present case, Sheller JA proceeded on the basis that the bicycle couriers were independent contractors.

THE EVIDENCE IN THE PRESENT LITIGATION

The court reviewed the evidence in the present litigation in particular the 'employment forms'. The contractual relationship allowed Vabu to impose its work practices (partly oral and in writing) as shown by the employment forms. The important aspects of the employment forms being the rate of remuneration for deliveries were not recorded in written documents. References to annual sick leave were made although no payments for annual sick leave were given and no superannuation deductions had been made by Vabu in 1994. The relationship between the parties was found not merely from the contractual documents, but the system which was operated and the work practices imposed by Vabu. This went to establishing 'the totality of the relationship' between the parties.

THE PRESENT LITIGATION —THE DECISION OF THE COURT OF APPEAL

Mr Hollis' 2nd and 3rd arguments were abandoned in the Court of Appeal, the Court of Appeal also dismissed Mr Hollis' appeal in respect of the refusal of the application to join CIC as a defendant. In relation to the first argument, there were 2 heads:

1. Vabu was vicariously liable for the negligence of the bicycle courier as its servant or agent;

2. Vabu was directly liable to Mr Hollis by way of a non-delegable duty of care owed to him as the user of a public thoroughfare.

In the Court of Appeal Sheller JA concluded that the bicycle couriers were independent contractors, rejecting claims that Vabu was vicariously liable for the acts of its bicycle couriers. He also rejected Mr Hollis' submission that the activity in which the bicycle couriers were engaged was hazardous and dangerous and that a significant number of them disobeyed the traffic rules and posed a danger to pedestrians. He also held that there could not be a finding that Vabu directly authorised the offender officer to drive his bicycle in an illegal or negligent manner, an argument used to invoke an agency exception to the usual rule of non-liability of a principal, that issue having been discussed in *Scott v Davies*.

The words employee and independent contractor do not necessarily display their legal content purely by virtue of their semantic meaning.

Sheller JA rejected the claim based upon a non-delegable duty of care, Mr Hollis had 'elided the step of finding a duty with that of determining its delegability'. The business conducted by Vabu was not inherently dangerous to other street users, and there was no special relationship importing a non-delegable duty of care between Vabu and those street users.

Davies AJA dissented. He referred to evidence given before the parliamentary joint standing committee upon road safety, holding that Vabu did owe a duty of care to other street users.

THE APPEAL TO THE HIGH COURT

Was the Court of Appeal in error in finding that Vabu 'was not vicariously liable for torts committed during the course of work being performed at its request, and on its behalf by bicycle couriers retained by it'?

VICARIOUS LIABILITY

In *Northern Sandblasting v Harris*, McHugh J referred to the force of arguments which would justify the imposition of liability on employers for the acts of independent contractors. It has long been accepted as a general rule that an employer is vicariously liable for tortous acts of an employee and that a principal is not liable for the tortous acts of an independent contractor: *Northern Sandblasting*. The essence of the employee/ employer relationship derives from medieval notions of headship of a household. The nature of employment relationships has changed greatly since then, not only the character of employment, but also the common law of negligence has developed considerably.

The words employee and independent contractor do not necessarily display their legal content purely by virtue of their semantic meaning. The dichotomy between respective relationships was explained in *Colonial Mutual Life Assurance Society Limited v Producers and Citizens Cooperate Assurance of Australia Limited.* Dixon J expressed:

[T]he work, although done at [the principal's] request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal.

This statement merited close attention by the High Court. Because a business enterprise may be benefited by the activities of an employee of independent contractor, this is not a sufficient indication as to whether that person is an employee. However Dixon J fixed upon the *absence* of representation and of identification with the alleged employer as an indication that the relationship was one of principal and independent contractor. This was applied by Windeyer J in *Marshall v Whitakers Building Supply Company.* In that case his honour said that the distinction between employee and independent contractor is:

[R]ooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own.

McHugh J said in *Northern Sandblasting* that:

[T]he rationale for excluding liability for independent contractors is that the work which the contractor had agreed to do is not one as the representative of the employer.

CONTROL

The notion of control was adjusted in *Stevens v Brodribb* and the developments have since continued. Traditional notions of the distinction involved the employer knowing as much as the employee, and the employer working with the employee. The common law has been flexible in dealing with technological changes in society. Control is now not regarded as the sole criterion, rather it is the totality of the relationship between the parties that has to be considered.

THE DECISION

The Court of Appeal were in error in concluding that the bicycle couriers were independent contractors. Too much emphasis was placed on the fact that they owned their own bikes and bore their own expenses. Practically, the bike couriers were not running their own business or enterprise, they did not have independence in the conduct of their operation. The bicycle couriers were engaged on Vabu's business. The work practices were imposed by Vabu, which indicates they were employees. The essence of the findings were:

1. The couriers were not providing skilled labour or labour which required special qualifications. They were not running their own enterprise.

2. The couriers had little control over the manner in which they performed their work. They were assigned to work in a 'work roster' and were not able to refuse work.

3. The facts showed that the couriers represented to the public as a courier service of Vabu. They were required to wear uniforms and certain attire was prohibited. Vabu's system of business was to encourage pedestrians to identify the couriers as part of their own working staff.

4. Vabu superintended the courier's finances. There was no scope for the courier's to bargain their rate of remuneration.

5. It was noted that the couriers had to provide their own equipment and to replace the cost of equipment damages. Although a more beneficial employer might have provided the equipment and paid for the cost of repairs, there was nothing contrary to a relationship of employment in the fact the employees were required to do this. The capital outlay was relatively small, the bikes were not tools that were inherently capable of use only for courier work. The bikes also provided a means of personal transport outside working hours. This does not indicate a relationship of independent contractor and principal.

6. Vabu retained control of the allocation and direction of various deliveries. The couriers had little latitude. Vabu's business involved martialling and the direction of the labour of couriers.

This decision is at odds with the New Zealand case of *TNT Worldwide Express v Cunningham*. In that case the contract specifically made the plaintiff out to be an independent contractor as opposed to an employee. Because the NSW Parliament had not changed the law in relation to liability for collisions between pedestrians and courier cyclists, the court was invited to defer to that legislative inactivity. Whereas in *Esso Australia v Commissioner for Taxation* the common law has to develop by analogy to enacted law, the common law should not stand still because the legislature has not moved.

In conclusion, the courier who knocked down Mr Hollis was in a relationship of employee/employer with Vabu. Vabu was vicariously liable for the consequences of the courier's negligence in performing the work.

CONCLUSION

The variance of decisions in the reported judgments serve only to show how difficult the distinction between employee and independent contractor is to draw in practice. Whereas the traditional control test, being just one criterion in determining employment status is important, it is equally important also to have regard to 'the totality of the relationship' between the parties. Close attention should be paid not only to the terms of the contract, whether they be oral or in writing, but also to the systems operated by the employer.