STEVENS . . . . APPELLANT;
PLAINTIFF,

AND

BRODRIBB SAWMILLING COMPANY PROPRIETARY LIMITED . . . . RESPONDENT.
DEFENDANT,

GRAY. . . . . APPELLANT;
DEFENDANT,

AND

BRODRIBB SAWMILLING COMPANY PROPRIETARY LIMITED . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A.
1985-1986.

1985,
March 29.

1986,
Feb. 13.

Mason, Wilson, Brennan, Deane and Dawson JJ.

Negligence — Vicarious liability — Employee or independent contractor — Supervision — Control — Logging operations — Trucker injured by negligence of snigger — Liability of sawmiller for whom both performed work — Independent contractor — Liability of principal for injury sustained in performing work — Extra-hazardous activities — Safe system of work — Duty of principal to provide — Breach of duty.

A sawmiller engaged sniggers to move felled trees to a loading zone and truckers to carry the trees to the mill. Sniggers and truckers used their own vehicles, set their own hours of work, and were paid according to the volume of timber delivered to the mill. The sawmiller did not deduct income tax instalments from the payments. Sniggers and truckers were not guaranteed work and were free to seek other work if weather or other circumstances prevented them working for the sawmiller. An employee of the sawmiller had general supervision over operations, but exercised no control over the manner in which sniggers and truckers carried out their tasks. While a log was being manoeuvred onto a truck, a trucker was injured by the negligence of a snigger.

Held, (1) by the whole Court, that neither the trucker nor the snigger was an employee of the sawmiller, so that the latter was neither vicariously liable for the snigger's negligence nor personally liable to the trucker for breach of the duty of care owed by an employer to an employee.

Humberstone v. Northern Timber Mills (1949), 79 C.L.R. 389 and *Australian Mutual Provident Society v. Chaplin* (1978), 18 A.L.R. 385, applied.

(2) By Mason, Wilson, Brennan and Dawson JJ., that the notion that a principal is liable for the negligence of an independent contractor on the basis that the activities he was engaged to perform were extra-hazardous has no place in Australian law.

Torette House Pty. Ltd. v. Berkman (1939), 39 S.R. (N.S.W.) 156, approved.

Hughes v. Percival (1883), 8 App. Cas. 443, at pp. 446-447; *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. Ltd.*, [1921] 2 A.C. 465, at pp. 476-477, 490-491; *Read v. J. Lyons & Co. Ltd.*, [1947] A.C. 156; and *Stoneman v. Lyons* (1975), 133 C.L.R. 550, at pp. 563-565, 574-575, considered.

Honeywill & Stein Ltd. v. Larkin Bros. Ltd., [1934] 1 K.B. 191; *Matania v. National Provincial Bank*, [1936] 2 All E.R. 633, at pp. 645-646; and *Salsbury v. Woodland*, [1970] 1 Q.B. 324, at pp. 338, 345, 348, not followed.

(3) By the whole Court, that the sawmiller owed a general common law duty of care to the trucker, but (Deane J. dissenting) it was not in breach of that duty.

Per curiam. There is no reason for confining the obligation to provide a safe system of work to an employer. 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 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 provide a safe system.

Decision of the Supreme Court of Victoria (Full Court): *Brodribb Sawmilling Co. Pty. Ltd. v. Gray*, [1984] V.R. 321, affirmed.

Appeal from the Supreme Court of Victoria.

Brodribb Sawmilling Company Pty. Ltd. operated a sawmill near Orbost in the State of Victoria. It engaged tree fellers, sniggers and truckers to remove the timber from the logging area to the mill. The feller felled the trees, and the snigger moved the logs to a landing from which they were loaded on to a truck, by pushing or pulling them with a tractor. The snigger also constructed the landing which consisted of a sloping ramp upon which were two pairs of logs laid longitudinally to act as skids for logs being pushed up the ramp by a tractor. The company engaged Roy Albert Stevens to cart logs to the mill from the logging area. Stevens was to use his own truck. The company also engaged Stanley Charles Gray to snig and load logs. Gray was to use his own tractor. While Gray was loading logs on to Stevens' truck, he dislodged a log which rolled on to Stevens,

H. C. OF A. 1985-1986.

STEVENS v. BRODRIBB SAWMILLING CO. PTY. LTD.

causing him severe injuries. Stevens sued Gray and the company for damages in the Supreme Court of Victoria. Beach J. found that both Stevens and Gray were the company's servants, and that Gray had acted negligently in moving the logs. He also found the company negligent in failing to supervise the loading operations properly, in failing to ensure that safe procedures were adopted and in failing to provide adequate equipment. He awarded Stevens damages, and apportioned the total amount between the company and Gray in the proportions of two-thirds and one-third. Both defendants appealed to the Full Court of the Supreme Court which allowed the company's appeal and dismissed Gray's appeal (Kaye and Brooking JJ., Starke J. dissenting) (1). Stevens and Gray appealed to the High Court by special leave.

E. W. Gillard Q.C. (with him *M. Shannon*), for the appellant Stevens. If Gray and Stevens were independent contractors, the company nevertheless owed them a general duty of care. [He referred to *Kondis v. State Transport Authority* (2); *Anns v. Merton London Borough Council* (3); and *Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.* (4).] The duty extended to devising a safe system of work, taking steps to ensure that the men worked together in harmony and carefully, supervision, and a requirement that proper plant be used.

[MASON J. Your problem is to establish that in a relationship of employer and independent contractor the duty is to be equivalent to that owed by an employer to his servant. If the facts enable you to conclude that that is the duty, it would seem to be the corollary that the relationship was that of master and servant.]

[DAWSON J. The employer could discharge the duty you describe only by controlling the way the men went about their work. If he did that, he would be their master.]

[Counsel referred to *McArdle v. Andmac Roofing Co.* (5).] The company was in breach of its general duty of care. Moreover, Gray was a servant. In some cases there will be little scope for the exercise of control. In those circumstances control means lawful authority to control so far as there is scope for it: *Zuijs v. Wirth Bros. Pty. Ltd.* (6). The organization test is satisfied here. Where a person plays an integral part in the conduct of a business there is scope for the exercise of control over aspects of the work because the co-ordination of the work is a matter of importance to the conduct of

(1) [1984] V.R. 321.
(2) (1984) 154 C.L.R. 672.
(3) [1978] A.C. 728.
(4) [1985] A.C. 210.
(5) [1967] 1 W.L.R. 356; [1967] 1 All E.R. 583.
(6) (1955) 93 C.L.R. 561.

the business. Gray was under the control of the bush boss, and was bound to obey his directions. The boss would tell him where to build access roads, and what type of logs to pull out. The boss decided whether work would be done in inclement weather. Stevens was also a servant. The company had control over him. It had the exclusive right to remove timber. A person engaged who failed to do as he was told would be dismissed. The company controlled the operations of the drivers by giving them instructions as to what part of the logging area they were to work in, as to the weight of timber to be carried over roads, and whether weather conditions required work to cease. Alternatively, on the assumption that both men were independent contractors, the company owed a duty to Stevens to ensure that the logging and carting were performed with care, and that duty could not be delegated. [He referred to *Kondis v. State Transport Authority*.] If Stevens was an independent contractor, the company was liable to him for Gray's negligence because all the relevant activities were extra-hazardous: *Honeywill & Stein Ltd. v. Larkin Bros. Ltd.* (7); *Matania v. National Provincial Bank* (8). The doctrine is well established in England, Canada and America, and should be adopted here. [He also referred to *Stoneman v. Lyons* (9).]

J. J. Hedigan Q.C. (with him *T. Wodak*), for the appellant Gray. Both men were servants. Even if they were independent contractors, by reason of de facto control and supervision, and entrepreneurial control of the area and premises in which timber was harvested and the distribution of the harvested timber, the company owed a duty to those working towards the production of the timber.

B. H. Stott Q.C. (with him *B. D. Bongiorno*), for the respondent. The concept of a person carrying on business on his own account is more useful than the control test or other indicia suggested by the cases in determining the servant-independent contractor issue: *Montreal v. Montreal Locomotive Works* (10); *Market Investigations Ltd. v. Minister of Social Security* (11); *Global Park Ltd. v. Secretary of State for Social Services* (12); *Fall v. Hitchen* (13). Stevens was self-employed as a cartage contractor. In performing his contract he used his own truck to transport logs. This strongly indicates that he was not a servant: *Humberstone v. Northern Timber Mills* (14). The ratio of his expenses to income (71 per cent)

(7) [1934] 1 K.B. 191.
(8) [1936] 2 All E.R. 633.
(9) (1975) 133 C.L.R. 550.
(10) [1947] 1 D.L.R. 161, at p. 169.
(11) [1969] 2 Q.B. 173, at p. 184.
(12) [1972] 1 Q.B. 139, at p. 150.
(13) [1973] 1 W.L.R. 286; [1973] 1 All E.R. 368.
(14) (1949) 79 C.L.R., at pp. 404-405.

H. C. OF A. 1985-1986.

STEVENS v. BRODRIBB SAWMILLING CO. PTY. LTD.

is consistent with conducting his own business and not with his being an employee: *Australian Mutual Provident Society v. Chaplin* (15). He was not subject to control in the actual execution of the work, but undertook to produce a given result. That too indicates that he was an independent contractor: *Queensland Stations Pty. Ltd. v. Federal Commissioner of Taxation* (16); *Humberstone v. Northern Timber Mills* (17); *Wright v. Attorney-General (Tas.)* (18); *Marshall v. Whittaker's Building Supply Co.* (19). The indicia point to a person carrying on business on his own account. The contract was with the owner qua owner, not driver; the contract was the same whether Stevens drove or employed a driver; the contract was the same whether Stevens formed a partnership; the emphasis was on mechanical traction; payment was not in the nature of a wage but was based on logs delivered; Stevens was responsible for his own maintenance of the truck he provided; if logs were not available he could cart for other contractors or other mills; he was not paid sick leave or holiday pay. Income tax was not deducted. He was told to self-insure and did so. In inclement weather he bore the loss of being unable to work. In these circumstances, control is not relevant, because no amount of control could make the contract one of employment. In any event, the evidence as to control is equivocal and relates more to co-ordination of activity than to manner of execution. Gray was self-employed as a snigger, loader and carter. He employed his son to do the carting and on some occasions employed Stevens to snig and load. [He referred to *Australian Mutual Provident Society v. Chaplin* (20).] The doctrine of extra-hazardous activities is not part of the common law: *Torette House Pty. Ltd. v. Berkman* (21); *Stoneman v. Lyons* (22). In any event the operation was not extra-hazardous. If a duty exists it is a duty to take reasonable care. There is not one duty for timber millers and another for explosives manufacturers: *Todman v. Victa Ltd.* (23). Danger or hazard in the activity is not determinant of the existence of duty. It is relevant only to the question of the standard of care to be applied, if a duty exists. The company is not vicariously liable for Gray's negligence because Gray and Stevens were both independent contractors:

(15) (1978) 18 A.L.R. 385, at p. 394.
(16) (1945) 70 C.L.R. 539, at p. 545.
(17) (1949) 79 C.L.R., at pp. 396, 405.
(18) (1954) 94 C.L.R. 409, at pp. 414-415, 417-418.
(19) (1963) 109 C.L.R. 210, at p. 218.
(20) (1978) 18 A.L.R., at p. 391.
(21) (1939) 39 S.R. (N.S.W.) 156, at pp. 167-170.
(22) (1975) 133 C.L.R. 550, at pp. 562-566, 574-577.
(23) [1982] V.R. 849, at pp. 851-852.

Stoneman v. Lyons (24); *Colonial Mutual Life Assurance Society Ltd. v. Producers & Citizens Co-operative Assurance Co.* (25); *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool) Ltd.* (26), and because Gray's negligence was in the manner of conducting the operation as distinct from the character of the operation itself. It was collateral. The method was selected by him for achieving the result contracted for. [He referred to *Torette House Pty. Ltd. v. Berkman* (27) and *Stoneman v. Lyons* (28).] The company did not owe any special or general duty of care to Stevens. There is no basis for upsetting the Full Court's conclusion that, if a duty of care existed, the evidence did not establish that a breach of duty occurred.

Cur. adv. vult.

1986, Feb. 13.

The following written judgments were delivered:—

Mason J. These appeals, which are brought from a decision of the Full Court of the Supreme Court of Victoria, arise out of an action for damages for personal injuries commenced in the Supreme Court by the appellant Roy Albert Stevens against the appellant Stanley Charles Gray and the respondent Brodribb Sawmilling Company Pty. Ltd. ("Brodribb"). They raise significant issues concerning the liability of an employer to a person engaged to perform a function forming part of the employer's business operations for injuries caused through the carelessness of another.

Brodribb is the owner of a large hardwood sawmill at Orbost in eastern Victoria for which it conducts extensive logging operations on the nearby Errinundra Plateau under licences from the Forests Commission of Victoria ("the Commission"). The licences, which are issued in accordance with the provisions of the *Forests Act* 1958 (Vict.), grant exclusive rights to remove timber from designated areas of forest, subject to conditions which include compliance with certain directions given by officers of the Commission. It has not been suggested, however, that officers of the Commission are in any way responsible for ensuring the safety of persons engaged in logging operations.

In order to facilitate its logging operations, Brodribb's practice over the years has been to engage persons whose functions fall within three categories, namely, felling, snigging and truck driving, and to allocate them to specified parts of its logging areas known as

(24) (1975) 133 C.L.R., at pp. 562-563, 564.
(25) (1931) 46 C.L.R. 41, at p. 48.
(26) [1947] A.C. 1, at p. 10.
(27) (1940) 62 C.L.R. 637, at pp. 647-648.
(28) (1975) 133 C.L.R., at p. 565.

"compartments". It is the function of a feller to fell trees and of a snigger to push or pull logs to a loading ramp constructed by him by means of a tractor or bulldozer and to load them on to trucks for delivery to the sawmill by the truck driver. The logging operations are overseen by a "bush boss" who is an employee of Brodribb.

It was in the course of such logging operations that Stevens' injuries were sustained. In November 1977, while engaged by Brodribb as a truck driver, he was struck by a log. For the purpose of loading Stevens' truck Gray was making use of a loading ramp which had been constructed by him one week before. The selection of the site at which the ramp was constructed was the joint decision of Gray, the bush boss and an officer of the Commission. However, the construction of the ramp, in accordance with Brodribb's standard practice, had been entirely a matter for Gray. It was a simple earthen structure retained by one large log at the front, next to which Stevens drove his truck. Along the slope of the ramp were laid two sets of two small parallel logs, known as skids, which were usually slippery and which were set sufficiently far apart to enable a bulldozer to move backwards and forwards between them. The loading procedure was for Gray to manoeuvre logs on to the skids and to use the blade of his bulldozer to push them along the skids and onto the truck.

On the occasion in question, Gray had successfully loaded three logs onto Stevens' truck but was experiencing difficulty in loading a fourth log. This was because the log was substantially shorter than the others and would not straddle both pairs of skids. Gray attempted to balance the log on one set of skids and to use the blade of his bulldozer to push it onto the truck. Twice he pushed the log up the ramp and twice it became jammed between the edge of the ramp and the side of the truck. Each time he was able to extricate the log by using the bulldozer's blade. He tried a third time and again the log jammed. This time, in response to Stevens' protest about possible damage to his truck, Gray decided to pull it out using a chain. To that end Stevens, who had until that time been standing by observing the loading operation, obtained a chain from his truck and attached it to the log. As he did so, Gray moved the bulldozer back down the ramp so that its blade was 10-12 feet from the log. Stevens then attached the other end of the chain to the blade of the bulldozer and proceeded to walk to its rear. Before Stevens was able to move away from the bulldozer, Gray swung it around, releasing the log which rolled down the ramp, pinning Stevens between it and the bulldozer. It is now not disputed that in so doing Gray acted negligently.

In addition to the admitted negligence of Gray, Stevens sought to

impute liability to Brodribb in two ways. First, it was said that Brodribb is vicariously liable for the negligence of Gray because the relationship between them was that of employer and employee. Alternatively, it was submitted that even if Gray was an independent contractor and not an employee, Brodribb is nevertheless vicariously liable because this case falls within two exceptions to the general rule that a principal is not liable for the negligent conduct of his independent contractors; namely that the snigging operations were an extra-hazardous activity and that Brodribb was in breach of a non-delegable duty. Secondly, it was argued that Brodribb is personally liable for the breach, by its own acts, of a duty of care owed to Stevens, either because Stevens was an employee of Brodribb and was thus owed the complex of duties arising in relationships of employment, or because, notwithstanding the absence of such a relationship, a duty of care was owed pursuant to the general principles of the law of negligence.

At trial, Beach J. held that both Stevens and Gray were employees of Brodribb. In addition to the negligence of Gray in moving his bulldozer before Stevens was clear, the judge found that Brodribb was negligent in that it failed properly to supervise loading operations, to ensure that safe procedures were followed and to provide adequate loading equipment such as a forklift truck. In the result, he entered judgment for Stevens in the sum of $180,000 and apportioned liability two-thirds against Brodribb and one-third against Gray.

By majority, the Full Court of the Supreme Court dismissed an appeal by Gray but allowed an appeal by Brodribb and set aside judgment against it (29). The majority (Kaye and Brooking JJ.) held that both Stevens and Gray were independent contractors and that, in the circumstances, Brodribb was not liable for the negligence of Gray. They further held that, on the assumption that Brodribb owed Stevens a duty of care, Brodribb was not negligent in failing to provide loading equipment or in failing to supervise loading or to give instructions to sniggers and loggers that no log was to be moved while a man was on a ramp. Starke J., who dissented, agreed with the primary judge that Stevens and Gray were servants of Brodribb.

The first question to determine is whether the relationship between Brodribb and Gray was one of employer and employee or one of principal and independent contractor. It will also be convenient at this point to consider whether Stevens was an employee of Brodribb or an independent contractor, for, although not directly relevant to the matter presently under consideration,

(29) [1984] V.R. 321.

H. C. OF A. 1985-1986.

STEVENS v. BRODRIBB SAWMILLING Co. PTY. LTD.

Mason J.

both issues arise from a common factual foundation. A prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter. It has been held, however, that the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it: *Zuijs v. Wirth Bros. Pty. Ltd.* (30); *Federal Commissioner of Taxation v. Barrett* (31); *Humberstone v. Northern Timber Mills* (32). In the last-mentioned case Dixon J. said:

> "The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions."

But 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 merely as one of a number of indicia which must be considered in the determination of that question: *Queensland Stations Pty. Ltd. v. Federal Commissioner of Taxation* (33); *Zuijs' Case*; *Federal Commissioner of Taxation v. Barrett* (34); *Marshall v. Whittaker's Building Supply Co.* (35). 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.

Much of the evidence at the trial was directed to determining the precise nature of the relationship between Stevens and Brodribb and Gray and Brodribb. The logging season on the Errinundra Plateau is of some six months' duration and in 1977 it began towards the end of September. Stevens and Gray were engaged at the beginning of the season — Stevens as a truck driver and Gray as a truck driver and snigger. Both men had extensive experience in the timber industry and had been engaged by Brodribb to carry out similar functions during previous logging seasons. Along with others engaged to perform those functions, they provided and maintained their own equipment, set their own hours of work and received

(30) (1955) 93 C.L.R. 561, at p. 571.
(31) (1973) 129 C.L.R. 395, at p. 402.
(32) (1949) 79 C.L.R. 389, at p. 404.
(33) (1945) 70 C.L.R. 539, at p. 552.
(34) (1973) 129 C.L.R., at p. 401.
(35) (1963) 109 C.L.R. 210, at p. 218.

fortnightly payment from Brodribb determined by the volume of timber they had been involved in delivering to its sawmill. Brodribb did not deduct income tax instalments from these payments. Stevens' profit and loss accounts for the years ended 30 June 1977 and 1978 showed the ratio of his expenses to his gross income to be approximately 71 per cent. Gray's financial records were not in evidence.

Although they were available each working day, fellers, sniggers and truck drivers were not guaranteed work and were free to seek other work if bad weather or other circumstances prevented them from working for Brodribb. When there was work, truck drivers were expected under normal circumstances to cart at least two loads of logs per day from the forest to the sawmill at Orbost. There is evidence that some truck drivers carried on business in partnership with their wives but this was not the case with either Stevens or Gray. Gray, however, employed his son to drive his truck and it appears that at least one other carter engaged by Brodribb also employed a driver. Brodribb's bush boss was responsible for the overall co-ordination of activities within the logging areas and had the task of ensuring a steady flow of timber to the sawmill. Fellers, sniggers and truck drivers were subject to his direction. He liaised with officers of the Commission, allocated individuals to particular compartments, settled disputes, issued directions as to the type of logs to be snigged, and monitored the volume and quality of production. He also decided whether work should take place in inclement weather. His allocation of individuals to compartments, at least in relation to truck drivers, could vary on a daily basis and it seems that in directing Gray's truck to various compartments he normally dealt not with Gray but with its driver, Gray's son. However, he had little to do with the manner in which fellers, sniggers and truck drivers carried out their functions. Gray's evidence indicates that, except in relation to the placement of ramps and various roads and the choosing of logs, he was left entirely to exercise his own skill and judgment.

I agree with the majority in the Full Court of the Supreme Court that neither Stevens nor Gray was an employee of Brodribb. The facts, as I have related them, do not support an inference that Brodribb retained lawful authority to command either Stevens or Gray in the performance of the work which they undertook to do. As I have said, they provided and maintained their own equipment, set their own hours of work and received payments, not in the form of fixed salary or wages, but in amounts determined by reference to the volume of timber which they had been involved in delivering, through the use of their equipment, to the sawmill. The authority of

Brodribb's bush boss seems to have been confined to the organization of activities in the forest, determining the location of roads and ramps, selecting the logs to be snigged, monitoring the volume and quality of production and deciding whether work would take place in bad weather. There is, in my opinion, no basis for inferring an intention that the bush boss should have authority to direct Stevens and Gray in the management and control of their equipment which they were using for the purpose of delivering timber to the mill. In *Humberstone* (36), Dixon J. 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. This was to be done by his own property in his own possession and control. There is no ground for imputing to the parties a common intention that in all the management and control of his own vehicle, in all the ways in which he used it for the purpose of carrying their goods, he should be subject to the commands of the respondents."

See also *Wright v. Attorney-General (Tas.)* (37).

What is more, Brodribb and the men, including Stevens and Gray, regarded their relationship as one of independent contract, not one of employment, an attitude evidenced in the case of Gray by his employment of his son as a driver. The power to delegate is an important factor in deciding whether a worker is a servant or an independent contractor: *Australian Mutual Provident Society v. Chaplin* (38).

It was in relation to the question whether Gray was an employee or an independent contractor that it was submitted on behalf of Stevens that regard should be had to the so-called "organization test". The test seems to have had its genesis in a passage of Lord Wright in *Montreal v. Montreal Locomotive Works* (39) in which his Lordship said:

> ". . . it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior."

A similar approach was adopted by Denning L.J. in *Stevenson Jordan and Harrison Ltd. v. MacDonald and Evans* (40), and *Bank Voor Handel en Scheepvaart N.V. v. Slatford* (41). Since then the

(36) (1949) 79 C.L.R., at pp. 404-405.
(37) (1954) 94 C.L.R. 409, at pp. 414, 418.
(38) (1978) 18 A.L.R. 385, at p. 391.
(39) [1947] 1 D.L.R. 161, at p. 169.
(40) [1952] 1 T.L.R. 101, at p. 111.
(41) [1953] 1 Q.B. 248, at p. 295.

organization test has been mentioned in a number of cases, but there has been no agreement as to the role it should play. Indeed, there are competing views of the purpose which it serves.

In the present case it was argued that Gray was part and parcel of Brodribb's organization in that his snigging activities were integral to the supply of timber necessary for Brodribb's sawmilling operations at Orbost. The relevance of this submission was said to be that it added weight to the inference that Gray was subject to the control of Brodribb and therefore that the relationship between them was one of employment. In short, the contention was that the organization test is relevant to the issue of control. But this is not to use the concept as a criterion for determining a legal issue or legal liability. It is merely to use the fact that A is part of B's business organization as additional material from which to infer that B has legal authority to control what A does. No doubt in some circumstances, depending on the nature of the organization and the part that A plays in its activities, it is legitimate to have regard to that fact in drawing an inference as to B's control of A in the performance of a relevant activity. However, here there are other facts which bear more cogently on the issue of control and negate the inference which is sought to be drawn.

The organization test was put to a different use by Starke J. in the present case, when he said (42):

> "The learned Judge appeared to be of the opinion that the 'control' test and the 'organization' test were alternatives. In my judgment that is not so. Both are relevant considerations in my opinion in determining whether the contract is one of service or for services."

This is to treat the element of organization simply as a further factor to be weighed, along with control, in deciding whether the relationship is one of employment or of independent contact. This seems to be what Lord Wright had in mind in *Montreal v. Montreal Locomotive Works* (43). For my part I am unable to accept that the organization test could result in an affirmative finding that the contract is one of service when the control test either on its own or with other indicia yields the conclusion that it is a contract for services. Of the two concepts, legal authority to control is the more relevant and the more cogent in determining the nature of the relationship. This comment applies with equal, if not greater, force to the competing view, expressed by Denning L.J. in *Bank Voor Handel* (44), that the test is an independent method of determining

(42) [1984] V.R., at p. 327.
(43) [1947] 1 D.L.R., at p. 169.
(44) [1953] 1 Q.B., at p. 295.

H. C. OF A. 1985-1986.

STEVENS v. BRODRIBB SAWMILLING CO. PTY. LTD.

Mason J.

who is an employee and who is an independent contractor, and in this way seeks to replace the traditional approach of balancing all the incidents of the relationship between the parties.

It has been suggested, though it was not argued in this case, that the organization test is not aimed at a determination of whether the relationship between the defendant and the tortfeasor is one of employment or independent contract, but is addressed rather to the question of who can be held vicariously liable for the wrongs of another. Thus, it is said that once a person is found to be part of an organization, that organization is vicariously liable for all the wrongs of that person committed within the scope of his responsibilities, irrespective of whether he would, according to traditional doctrine, have been an employee or independent contractor.

The advantage of the organization test, on this view of it, is that it avoids the complications associated with the employee/independent contractor test. But at what price? The test does no more than shift the focus of attention to the equally difficult question of determining when a person is part of an organization such that his wrongs may be imputed to that organization. I doubt that the suggested test moves any closer toward a clarification of the fundamental problems of vicarious liability — a view which seems to have been shared by Stephen J. in *Federal Commissioner of Taxation v. Barrett* (45) and MacKenna J. in *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* (46). Moreover, on this approach, the organization test has the effect of imposing liability on the proprietor of the organization, whether he had the capacity to control the contractor or not. Whether the Court should impose vicarious liability on a proprietor in these circumstances is a very large question on which we have not had the benefit of argument.

The traditional formulation, though attended with some complications in its application to a diverse range of factual circumstances (*Federal Commissioner of Taxation v. Barrett* (47)), nevertheless has had a long history of judicial acceptance. True it is that criticisms have been made of it. It is said that a test which places emphasis on control is more suited to the social conditions of earlier times in which a person engaging another to perform work could and did exercise closer and more direct supervision than is possible today. And it is said that in modern post-industrial society, technological developments have meant that a person so engaged often exercises a degree of skill and expertise inconsistent with the retention of

(45) (1973) 129 C.L.R., at p. 402.
(46) [1968] 2 Q.B. 497, at p. 524.
(47) (1973) 129 C.L.R., at p. 400.

effective control by the person who engages him. All this may be readily acknowledged, but the common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, "so far as there is scope for it", even if it be "only in incidental or collateral matters": *Zuijs v. Wirth Bros. Pty. Ltd.* (48). Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered.

The finding that both Gray and Stevens were independent contractors disposes not only of the argument that Brodribb is vicariously liable for Gray's negligence by virtue of a relationship of employment, but also of the argument that Brodribb is personally liable to Stevens for breach of the duty of care owed by an employer to an employee.

The next question to consider is whether, notwithstanding the fact that the relationship between Brodribb and Gray is one of independent contract, Brodribb is liable to Stevens on the footing that his injury arose out of dangerous operations or extra-hazardous acts. Although the doctrine of extra-hazardous acts is sometimes treated as an exception to the general rule that a principal is not liable for the negligence of his independent contractor, it is in truth an instance of strict liability for breach of a duty of care which the principal personally owes to the plaintiff. The principal's liability is therefore primary, rather than vicarious: *Salsbury v. Woodland* (49); *Staveley Iron & Chemical Co. Ltd. v. Jones* (50); *Stoneman v. Lyons* (51).

The doctrine has been applied in the United States and Canada. Although it has been affirmed in a number of English decisions (*Honeywill & Stein Ltd. v. Larkin Bros. Ltd.* (52); *Matania v. National Provincial Bank* (53); *Salsbury v. Woodland* (54)), it has not achieved complete acceptance (*Hughes v. Percival* (55); *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. Ltd.* (56)). And doubt has been cast on its authenticity by the rejection in *Read v. J. Lyons & Co. Ltd.* (57) of the proposition that dangerous operations give rise to strict liability.

(48) (1955) 93 C.L.R., at p. 571.
(49) [1970] 1 Q.B. 324, at pp. 336-337, 347.
(50) [1956] A.C. 627, at pp. 639, 646-647.
(51) (1975) 133 C.L.R. 550, at p. 574.
(52) [1934] 1 K.B. 191.
(53) [1936] 2 All E.R. 633, at pp. 645-646.
(54) [1970] 1 Q.B., at pp. 338, 345, 348.
(55) (1883) 8 App. Cas. 443, at pp. 446-447.
(56) [1921] 2 A.C. 465, at pp. 476-477, 490-491.
(57) [1947] A.C. 156.

H. C. OF A. 1985-1986.

STEVENS v. BRODRIBB SAWMILLING CO. PTY. LTD.

Mason J.

The doctrine has not found favour in Australia. In *Torette House Pty. Ltd. v. Berkman* (58) the Supreme Court of New South Wales emphatically rejected the notion that a principal could be made liable for the negligence of an independent contractor on the basis that the activities he was engaged to perform were extra-hazardous. More recently, in *Stoneman v. Lyons* (59), this Court discussed the shortcomings of the doctrine, emphasizing the elusive nature of the distinction between acts that are extra-hazardous and those that are not. Furthermore, the traditional common law response to the creation of a special danger is not to impose strict liability but to insist on a higher standard of care in the performance of an existing duty: *Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle* (60); *Swinton v. China Mutual Steam Navigation Co. Ltd.* (61); *Thompson v. Bankstown Corporation* (62); *Imperial Furniture Pty. Ltd. v. Automatic Fire Sprinklers Pty. Ltd.* (63); *Todman v. Victa Ltd.* (64). For these reasons, the doctrine, in my opinion, has no place in Australian law.

The final questions are whether Brodribb was under a general common law duty of care and, if so, whether it was a personal (non-delegable) duty. In this case the first question is to be determined by reference to the elements of reasonable foreseeability and proximity discussed in the judgment of Deane J. in *Jaensch v. Coffey* (65). It is plain that Brodribb could reasonably foresee that there was a real risk that a worker carrying out Stevens' duties would sustain an injury of the kind that occurred. It is equally plain that a relationship of proximity existed between Brodribb and the individual worker sufficient to ground a common law duty of care. Subject to the ultimate control of the Commission, Brodribb had an exclusive licence to cut and take away logs from the logging areas. It allocated fellers, sniggers and truck drivers to specified parts in those logging areas; it required them to work together in teams in an intricate process of extracting timber from the forest and delivering it to the sawmill; and it monitored and co-ordinated the operations through its bush boss. While individual fellers, sniggers and truck drivers may have been responsible for their own safety with regard to carrying out their own functions, they had little choice but to rely on the care and skill of Brodribb in the arrangements which it made

(58) (1939) 39 S.R.(N.S.W.) 156.
(59) (1975) 133 C.L.R., at pp. 563-565, 574-575.
(60) (1940) 64 C.L.R. 514, at pp. 522-523, 534.
(61) (1951) 83 C.L.R. 553, at pp. 566-567.
(62) (1953) 87 C.L.R. 619, at p. 645.
(63) [1967] 1 N.S.W.R. 29, at pp. 31, 44.
(64) [1982] V.R. 849, at pp. 851-852.
(65) (1984) 155 C.L.R. 549, at pp. 586-582.

for the disposition of the work, and on the care and skill of the persons engaged by Brodribb in the execution of the work.

The interdependence of the activities carried out in the forest, the need for co-ordination by Brodribb of those activities and the distinct risk of personal injury to those engaged in the operations, called for the prescription and provision of a safe system by Brodribb. Omission to prescribe and provide such a system would expose the workers to an obvious risk of injury. 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 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. 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.

Accepting that Brodribb owed such a duty, the next question is whether it has been breached. It was suggested that the system of work devised by Brodribb was defective in various respects. First, it was said that the ramp was unsafe for loading shorter logs. However, it was found by the primary judge that Gray had constructed the ramp according to established practice and had used his best endeavours in that regard. It was not possible to reduce the distance between the two sets of skids to enable the short log to be rolled along them because the bulldozer would then be unable to move backwards and forwards between them. The small log here was only fractionally longer than the blade of the bulldozer (14 feet).

Secondly, it was submitted that there was negligence in failing to provide a forklift such as the one which was available at the sawmill for unloading logs. This was relied upon by the primary judge. But, as Brooking J. pointed out in the Full Court, there was no evidence as to the feasibility of their use in the forest or even the feasibility of transporting them to the site. Forklifts were described in evidence as "enormous pieces of machinery". In the context of logging operations in mountainous terrain, the suggestion appears to be unrealistic.

Thirdly, it was suggested that there was negligence in failing to supervise the loading operation or to ensure that safe procedures

were followed. Although the primary judge found that Brodribb was negligent in these respects, there was no evidence of any previous accident occurring during loading operations and Gray and Stevens both had considerable experience. The loading operation was dangerous but "anything in the bush is dangerous" and if the work was to be performed at all, Gray and Stevens were ideally suited to perform it. The safety precaution put forward by the appellants is no more than a suggestion that had a supervisor been present he would have warned Gray not to operate the bulldozer until Stevens had reached a position of safety. I do not think that a reasonable man in the position of Brodribb would have regarded it as reasonably necessary to guard against this type of accident or to have employed a supervisor to guard against it. For similar reasons the submission that Brodribb should have provided an extra man or men to help load the log must be rejected.

Accordingly, none of the matters suggested by the appellants amounted to a breach by Brodribb of its duty to provide a safe system of work.

Finally, it remains to consider whether the duty which Brodribb owed to Stevens was non-delegable. In *Kondis v. State Transport Authority* (66) I considered that the law sometimes imposes on people a duty higher than the usual common law duty to take reasonable care. This higher duty is a duty to ensure that reasonable care is taken and it is said to be non-delegable because a principal who engages another to perform work will be liable for the negligence of the person so engaged, notwithstanding that he exercised reasonable care in the selection of the contractor. I also stated (67) 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". If Brodribb's duty in the present case is non-delegable, it necessarily follows that it is liable for the admitted negligence of Gray. However, the facts in the present case are essentially different from those in *Kondis* in that there is not the requisite relationship between the parties such as would be required to impute liability to Brodribb for the casual negligence of Gray in freeing the log without satisfying himself that Stevens was in a safe position. In *Kondis* the crane driver assumed the control or supervision of the labourer who was injured, control or supervision

(66) (1984) 154 C.L.R. 672.

(67) (1984) 154 C.L.R., at p. 687.

which was ordinarily exercised by the employer (68). Here, Gray had not in any sense assumed control or supervision of Stevens during the loading operation. And, as I have found, Brodribb did not exercise control of, or retain a right to control or supervise, the loading operation. In these circumstances it can scarcely be suggested that Stevens could reasonably expect that Brodribb would see to it that due care was exercised in the loading operation by Gray. Indeed he probably would have been surprised at the suggestion that Brodribb should have done so.

I would dismiss the appeals.

WILSON AND DAWSON JJ. The respondent in both of these appeals is Brodribb Sawmilling Company Pty. Ltd. ("Brodribb"), a company which operates a large sawmill at Brodribb River near Orbost in the State of Victoria. At the relevant time it obtained timber for its sawmill under licence from the Forests Commission of Victoria pursuant to the *Forests Act* 1958 (Vict.). The licence designated a forest area from which Brodribb had the exclusive right to get timber and, together with certain regulations, it laid down the conditions which Brodribb was required to observe. In particular, Brodribb was required to ensure that all operations were conducted in the locations specified from time to time by a forest officer, to fell only trees branded for the purpose and to obey the directions of the forest officer with regard to the removal of the forest produce of any tree or timber.

For its own purposes, Brodribb divided its licence area into compartments. In relation to each compartment it engaged a tree feller, a snigger and trucks to remove the timber from the logging area to the mill. The feller felled the trees and the snigger snigged the logs, either by pushing or pulling them with a tractor fitted with a blade, to a landing from which he loaded them onto a truck. The snigger also constructed the landing which consisted of a sloping ramp upon which were two pairs of logs laid longitudinally to act as skids for logs being pushed up the ramp by the tractor. The feller, the snigger and the truck driver were all paid according to the cubic measurements of the timber delivered to the mill, but at different rates.

Brodribb engaged Stevens, the appellant in the first appeal and the plaintiff in the action, to cart logs to the mill from a logging area on the Errinundra Plateau over which its licence extended. For this purpose Stevens was to use his own truck. Brodribb also engaged

(68) (1984) 154 C.L.R., at pp. 677-678.

Gray, the appellant in the second appeal and a co-defendant with Brodribb in the action, to snig and load logs in the same area. For this purpose Gray was to use his own tractor. It so happened that Gray also owned a truck which was driven by his son and at the same time Gray was engaged by Brodribb to cart logs using the truck. Both Stevens and Gray had extensive experience in the timber industry and had worked for Brodribb during previous logging seasons.

Logging operations on the plateau were carried out under the supervision of a bush boss employed by Brodribb. It was his task to co-ordinate the work of the fellers, sniggers and truck drivers in order to ensure that there was a steady flow of timber from the plateau to the mill. It was also his task to determine the location of roads and ramps and to see that the men engaged in the logging operations complied with the requirements of the Forests Commission.

In addition, there was a mill manager, who was stationed at the mill but who from time to time visited the bush operations. His evidence was that he exercised ultimate authority and had the right to terminate the engagement of any person engaged to fell, snig or cart logs who was not carrying out his duties satisfactorily.

On 9 November 1977, Gray was loading logs on to Stevens' truck. Having loaded three logs, he was having difficulty in manoeuvring a fourth log into position. It was a somewhat shorter log than usual and fell between the two pairs of skids. It came up the ramp at an angle so that when it reached the top, one end of it dropped down between the front of the ramp and the side of the load on Stevens' truck. This happened twice and Gray retrieved the log by the use of the blade on his tractor. It happened again and Stevens stopped Gray from using the tractor blade because he thought that damage might be done to equipment on the truck. Stevens obtained a chain from his truck, placed one end around the log and the other around the arms of the tractor blade for the purpose of moving the log. He started to walk to the rear of the tractor but Gray moved the tractor and dislodged the log which rolled down the ramp and pinned Stevens against the tractor. As a result, Stevens suffered the severe injuries for which he claimed damages against both Gray and Brodribb.

The learned trial judge (Beach J.) found that both Stevens and Gray were engaged by Brodribb as its servants and were performing their duties in that capacity on the day in question. He found that Gray acted negligently in moving the tractor in the manner in which he did without giving Stevens any warning or any opportunity to get clear and that this negligence was the cause of the accident and

Stevens' injuries. The trial judge also found Brodribb negligent in failing to supervise the loading operations properly, in failing to ensure that safe procedures were adopted and in failing to provide adequate equipment. He found no contributory negligence on the part of Stevens and awarded damages in the sum of $165,000 plus interest in the sum of $15,000, apportioning the total amount between Brodribb and Gray in the proportions of two-thirds and one-third respectively.

Both Brodribb and Gray appealed to the Full Court of the Supreme Court of Victoria which held (Kaye and Brooking JJ., Starke J. dissenting) that Brodribb's appeal should be allowed. Gray's appeal was dismissed (69). It is against the judgment of the Full Court in favour of Brodribb that these appeals are now brought.

Gray's negligence was not contested before us and the first question which arises is whether Gray was acting as the servant of Brodribb at the time of the accident so as to render Brodribb liable for his negligent behaviour. That question falls to be determined upon the facts found by the learned trial judge. The classic test for determining whether the relationship of master and servant exists has been one of control, the answer depending upon whether the engagement subjects the person engaged to the command of the person engaging him, not only as to what he shall do in the course of his employment but as to how he shall do it: *Performing Right Society Ltd. v. Mitchell and Booker (Palais de Danse) Ltd.* (70). The modern approach is, however, to have regard to a variety of criteria. This approach is not without its difficulties because not all of the accepted criteria provide a relevant test in all circumstances and none is conclusive. Moreover, the relationship itself remains largely undefined as a legal concept except in terms of the various criteria, the relevance of which may vary according to the circumstances. Thus when Windeyer J. in *Marshall v. Whittaker's Building Supply Co.* (71) said that the distinction between a servant and an independent contractor "is rooted 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", he was really posing the ultimate question in a different way rather than offering a definition which could be applied for the purpose of providing an answer. So too when Denning L.J. in *Bank Voor Handel en Scheepvaart N.V. v. Slatford* (72) observed that the

(69) [1984] V.R. 321.
(70) [1924] 1 K.B. 762.
(71) (1963) 109 C.L.R. 210, at p. 217.
(72) [1953] 1 Q.B. 248, at p. 295.

H. C. OF A.
1985-1986.

STEVENS
v.
BRODRIBB
SAWMILLING
Co.
PTY. LTD.

Wilson J.
Dawson J.

test of being a servant does not rest nowadays on submission to orders but "depends on whether the person is part and parcel of the organization". As a restatement of the problem, this observation may place a different emphasis upon the tests to be applied but of itself offers no new test for the solution of the problem, although a submission to the contrary was made on behalf of Stevens in this case: see also *Stevenson Jordan and Harrison Ltd. v. MacDonald and Evans* (73), per Denning L.J.; *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* (74), per MacKenna J. We would be doing no more ourselves if we were to suggest that the question is whether the degree of independence overall is sufficient to establish that a person is working on his own behalf rather than acting as the servant of another, but putting it that way does at least indicate that the question is one of degree for which there is no exclusive measure.

In many, if not most, cases it is still appropriate to apply the control test in the first instance because it remains the surest guide to whether a person is contracting independently or serving as an employee. That is not now a sufficient or even an appropriate test in its traditional form in all cases because in modern conditions a person may exercise personal skills so as to prevent control over the manner of doing his work and yet nevertheless be a servant: *Montreal v. Montreal Locomotive Works* (75). This has led to the observation that it is the right to control rather than its actual exercise which is the important thing (*Zuijs v. Wirth Bros. Pty. Ltd.* (76)) but in some circumstances it may even be a mistake to treat as decisive a reservation of control over the manner in which work is performed for another. That was made clear in *Queensland Stations Pty. Ltd. v. Federal Commissioner of Taxation* (77), a case involving a droving contract in which Dixon J. observed that the reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract.

The other indicia of the nature of the relationship have been variously stated and have been added to from time to time. Those suggesting a contract of service rather than a contract for services include the right to have a particular person do the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like. Those which indicate a contract

(73) [1952] 1 T.L.R. 101, at p. 111.
(74) [1968] 2 Q.B. 497, at p. 524.
(75) [1947] 1 D.L.R. 161, at p. 169.
(76) (1955) 93 C.L.R. 561, at p. 571.
(77) (1945) 70 C.L.R. 539, at p. 552.

for services include work involving a profession, trade or distinct calling on the part of the person engaged, the provision by him of his own place of work or of his own equipment, the creation by him of goodwill or saleable assets in the course of his work, the payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax. None of these leads to any necessary inference, however, and the actual terms and terminology of the contract will always be of considerable importance.

Having said that, we should point out that any attempt to list the relevant matters, however incompletely, may mislead because they can be no more than a guide to the existence of the relationship of master and servant. The ultimate question will always be whether a person is acting as the servant of another or on his own behalf and the answer to that question may be indicated in ways which are not always the same and which do not always have the same significance. That is best illustrated by turning to the circumstances of this case and in particular to those circumstances which were suggested as indicating that Gray was the servant of Brodribb.

In the first place reliance was placed upon the control exercised by Brodribb, primarily through the bush boss and ultimately by the supervision of the mill manager. The evidence establishes clearly enough that the bush boss determined, together with the Forests Commission officer, where ramps were to be built although the job of constructing the ramps was left to Gray and the other sniggers. The bush boss located the access roads, but again the construction of the roads was a matter for the sniggers. Gray himself accepted that he was obliged to obey the directions of the bush boss but the occasions upon which any directions were given appear to have been limited. Upon the evidence, they were restricted to the location of the ramps and roads which we have already mentioned and to the exercise of quality control by requiring certain types of logs to be pulled out. In addition, if the weather was bad the bush boss would decide whether to suspend work. The supervision of the mill manager was even more remote and seems to have been theoretical rather than actual, being restricted to the final resolution of any dispute about the performance of duties, if necessary by ending the engagement of a feller, snigger or carter. All of this falls short, in our view, of the type of supervision or right to control which indicates the relationship of master and servant. Rather, it is consistent with the reservation of a right to direct or superintend the performance of the task which does not impair the essential independence of the person performing that task, of which Dixon J. spoke in *Queensland Stations Pty. Ltd. v. Federal Commissioner of Taxation*. Even the

H. C. of A. 1985-1986.

Stevens v. Brodribb Sawmilling Co. Pty. Ltd.

Wilson J. Dawson J.

most independent of independent contractors is subject to some direction in the performance of his work and some circumstances will justify the termination of the engagement. This leads to a consideration of the other factors which are relevant to determine the nature of the relationship.

The preponderance of those other factors points clearly to the independence of Gray and to the absence of a master-servant relationship. How he did his work, including the building of ramps and roads and the loading of logs, was a matter for his decision. He used his own tractor and paid his own expenses. Since the performance of the work by Gray was as much dependent upon the provision of mechanized power as it was upon the provision of his own labour, the case resembles that of *Humberstone v. Northern Timber Mills* (78) where the most important part of the work to be performed consisted in the operation of a motor truck supplied by the person engaged to do the work. That was held to establish an independent contract. Gray was paid by reference to the volume of timber which he snigged and loaded and it does not appear that any deductions were made for income tax. He was engaged to snig and load a fixed quantity of timber for the relevant season, but his hours were his own.

In addition to the tractor which he used for snigging and loading, Gray's truck, driven by his son, was used by Brodribb to cart logs. Payment for the logs hauled was made to Gray and the inference is that he paid his son. The truck was not necessarily employed to haul logs snigged and loaded by Gray, but could be deployed by Brodribb to other landings. Payment for logs snigged and loaded and for logs carted, the rate for each operation being different, was made by single cheque to Gray. Whether or not Gray had one contract with Brodribb or two separate contracts, one for snigging and loading and one for carting, is a question which does not seem to have arisen and it is enough, we think, to say that there does not appear to have been any sharp contrast between the position of Gray as a carter and his position as a snigger and loader. There is some significance in this because there does not seem to be much doubt that in his carting operation Gray was acting as an independent contractor. Apart from anything else, Gray was able to employ his son in the actual performance of his cartage operations. An unlimited power of delegation of this kind was viewed as being almost conclusive against the contract being a contract of service in *A.M.P. Society v. Chaplin* (79). It is, we think, unnecessary to decide whether the same

(78) (1949) 79 C.L.R. 389.

(79) (1978) 18 A.L.R. 385, at p. 391.

power of delegation existed so far as snigging and loading were concerned, but the evidence does disclose that on Saturdays the appellant Stevens used to operate Gray's tractor for him whilst he, Gray, was having a day off. On these days Stevens loaded his own truck, Gray's truck and that of another carter. It is sufficient to point to the fact, as we have already done, that no one seems to have thought that there was any significant difference in the relationship between Gray and Brodribb according to whether Gray was engaged in carting or in snigging or loading.

The whole of the circumstances in our view point to the fact that, as a snigger and loader, Gray was acting as an independent contractor.

It is convenient at this point to deal also with the relationship between Brodribb and Stevens. Little needs to be added because the operation of carting the logs appears to have been carried out upon similar terms. The evidence in relation to control presents no different picture. Carters might be directed to a particular landing and sometimes they might be told which type of log should be brought to the mill first. Otherwise a carter could select the logs he was to carry and he would determine for himself the size of the load to be carried. There was no guarantee of work carting logs. If work was not available, carters could work for another mill. Disputes would be settled by the bush boss with ultimate authority being exercised by the mill manager if necessary. Carters were paid by the volume of timber hauled and no deductions for income tax were made. They provided their own trucks and paid their own expenses. In Stevens' case, the deductions which he made each year for expenses in his profit and loss accounts amounted to some 70 per cent of his gross income: cf. *A.M.P. Society v. Chaplin* (80). Not all the carters drove their own trucks and some of them operated through husband and wife partnerships. Although the contractual arrangements do not appear to have been formalized, the carters were generally referred to as log cartage contractors and the plaintiff, Stevens, referred to himself in that way. He was, we think, clearly an independent contractor.

The conclusion that both Gray and Stevens were employed by Brodribb as independent contractors and not as servants disposes of the question of Brodribb's vicarious liability for Gray's negligence. It also disposes of any question of a breach of a duty of care on the part of Brodribb to provide its servants with proper plant and a safe place and system of work. However, Brodribb was also said to be liable for the injuries received by Stevens because they were

(80) (1978) 18 A.L.R., at p. 394.

H. C. of A. 1985-1986.
Stevens v. Brodribb Sawmilling Co. Pty. Ltd.
Wilson J. Dawson J.

sustained as the result of the extra-hazardous operations in which Stevens and Gray were engaged at the time of the accident. In these circumstances, it was said, Brodribb was under a duty to take special precautions to safeguard Stevens against injury and it was a duty which could not be delegated by the employment of independent contractors.

We should say immediately that whatever activities might be regarded as extra-hazardous, we doubt whether logging operations can be so categorized. It is, of course, one of the difficulties with the notion that there is some sort of strict liability for extra-hazardous acts that it is practically impossible to define them in any satisfactory way. Clearly enough they cannot be activities which inevitably result in harm; it must be possible to avoid harm by taking proper precautions because it would otherwise be wrong to undertake them at all: see *Matania v. National Provincial Bank* (81), per Slesser L.J. But that, of course, involves the proposition that the activities are not hazardous if the proper precautions are taken. However, it is convenient to regard logging operations as being extra-hazardous for the purposes of argument.

The proposition that the employer of an independent contractor will be liable for damage caused by extra-hazardous acts on the part of the latter during the course of carrying out the work which he is engaged to do has its recent origin in the case of *Honeywill and Stein Ltd. v. Larkin Bros. Ltd.* (82). In that case the plaintiff was held to have been liable for the act of an independent contractor engaged by it to take photographs of the interior of a cinema owned by someone else. The act consisted of using flashlight created by the ignition of magnesium powder in a metal tray. This ignited the stage curtain and the consequent fire damaged the cinema. The principle was expressed to be that "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" (83). The principle was said to arise from cases such as *Bower v. Peate* (84), *Black v. Christchurch Finance Co.* (85), *Hughes v. Percival* (86) and *Hardaker v. Idle District Council* (87). But as was pointed out by Jordan C.J. in *Torette House Pty. Ltd. v. Berkman* (88), none of

(81) [1936] 2 All E.R. 633, at p. 646.
(82) [1934] 1 K.B. 191.
(83) [1934] 1 K.B., at pp. 199-200.
(84) (1876) 1 Q.B.D. 321.
(85) [1894] A.C. 48.
(86) (1883) 8 App. Cas. 443.
(87) [1896] 1 Q.B. 335.
(88) (1939) 39 S.R. (N.S.W.) 156, at pp. 166-167.

those cases supports a proposition of such width or, indeed, is inconsistent with the ordinary principles regarding vicarious liability and liability for the acts of independent contractors. Those principles were expounded by Jordan C.J. (89) where, in delivering a judgment with which the rest of the court agreed, he said:

> "A person who procures the doing of an act is liable for its actual consequences and for anything necessarily involved in its being done whomsoever he may have procured to do it. He is liable for the acts of any agent of his acting within the scope of his employment. For the actual breach of any duty owed by himself he is responsible whatever steps he may have taken or agency he may have employed to endeavour to prevent a breach. In certain special circumstances, if he causes an act to be done he incurs a liability to see that care is used to prevent injury from being caused by methods incidentally used to produce the result, whomsoever he may employ to produce it."

Jordan C.J. went on to express the view:

> "But there is no general rule that if a person employs an independent contractor to do an inherently lawful act, he incurs liability for injury to others occasioned by the methods incidentally employed by the contractor in the course of its performance (these not being methods necessarily involved in the doing of the act and necessarily injurious), by reason only of the fact that the act is 'dangerous,' 'hazardous,' or 'extra hazardous'."

The principle laid down in *Honeywill and Stein Ltd. v. Larkin Bros. Ltd.* has, however, obtained some foothold in England: *Matania v. National Provincial Bank*; *Brooke v. Bool* (90); *The Pass of Ballater* (91); *Salsbury v. Woodland* (92). It seems to be established in the United States where the *Restatement* replaces the word "ultrahazardous", which was initially used, with the term "abnormally dangerous": *Restatement*, (2d), *Torts*, vol. 3 (1977), s. 519. It is also accepted in Scotland and in Canada: *Stewart v. Adams* (93); *City of St. John v. Donald* (94); *Peters v. North Star Oil Ltd.* (95).

On the other hand, support for the view taken by Jordan C.J. is to be found in *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co.* (96), where Lord Buckmaster (97) and Lord Parmoor (98), rejected the notion advanced by Atkin L.J. in the Court of Appeal that a person employing an independent contractor

(89) (1939) 39 S.R. (N.S.W.), at p. 170.
(90) [1928] 2 K.B. 578.
(91) [1942] P. 112.
(92) [1970] 1 Q.B. 324, at pp. 336-337, 338, 347-348.
(93) [1920] S.C. 129.
(94) [1926] 2 D.L.R. 185.
(95) (1965) 54 D.L.R. (2d) 364.
(96) [1921] 2 A.C. 465.
(97) [1921] 2 A.C., at pp. 476-477.
(98) [1921] 2 A.C., at pp. 490-491.

H. C. of A.
1985-1986.
Stevens
v.
Brodribb
Sawmilling
Co.
Pty. Ltd.
Wilson J.
Dawson J.

to do works of a kind likely to cause danger to others is under a duty to take all reasonable precautions against such danger and that he does not escape from liability for the discharge of that duty by employing the contractor if the latter does not take precautions. Moreover, some time previously in *Hughes v. Percival* (99), Lord Blackburn restricted liability for the acts of an independent contractor to circumstances where a duty exists on the part of the person employing the contractor which cannot be discharged by the employment of someone else. Clearly he did not regard the dangerous nature of the work to be done as of itself giving rise to such a duty. Then there is the decision in *Daniel v. Directors &c. of Metropolitan Railway Co.* (100) where the House of Lords accepted that the respondents were not liable for the negligence of their independent contractor in the performance of what, on any view, was an inherently dangerous operation of slinging iron girders over a railway line. Lord Westbury, in pointing out that the duty to take care fell upon the contractor and not his employer, who had a right to rely upon the contractor for the performance of that duty, said (1):

> ". . . the ordinary business of life could not go on if we had not a right to rely upon things being properly done when we have committed and entrusted them to persons whose duty it is to do things of that nature, and who are selected for the purpose with prudence and care, as being experienced in the matter, and are held responsible for the execution of the work."

And in *Read v. J. Lyons & Co. Ltd.* (2), the House of Lords decisively rejected any general doctrine of strict liability for hazardous activities. As Lord Simonds said (3):

> ". . . I would reject the idea that, if a man carries on a so-called ultra-hazardous activity on his premises, the line must be drawn so as to bring him within the limit of strict liability for its consequences to all men everywhere. On the contrary I would say that his obligation to those lawfully upon his premises is to be ultra-cautious in carrying on his ultra-hazardous activity, but that it will still be the task of the injured person to show that the defendant owed to him a duty of care and did not fulfil it."

The direction taken in this Court has also been away from strict liability for tortious behaviour. There is a preference for a view which is more in harmony with the ordinary principles governing liability for negligence, namely, that the extent of a duty of care will depend upon the magnitude of the risk involved and its degree of

(99) (1883) 8 App. Cas., at pp. 446-447.
(100) (1871) L.R. 5 H.L. 45.
(1) (1871) L.R. 5 H.L., at p. 61.
(2) [1947] A.C. 156.
(3) [1947] A.C., at pp. 181-182.

probability: *Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle* (4); *Swinton v. China Mutual Steam Navigation Co. Ltd.* (5); *Thompson v. Bankstown Corporation* (6). Thus the standard of response required is that of a reasonable man placed in the relevant circumstances: see *Wyong Shire Council v. Shirt* (7). If that means, in the words of Lord Simonds, an ultra-cautious response to an ultra-hazardous operation, it nevertheless falls short of the imposition of strict liability. In our view it would be inconsistent with this approach to follow the decision in *Honeywill and Stein Ltd. v. Larkin Bros. Ltd.* (8) and the view of Jordan C.J. in *Torette House Pty. Ltd. v. Berkman* (9) is to be preferred.

It is possible then to start with the general proposition laid down in 1840 in *Quarman v. Burnett* (10) that a person will not be liable for the acts or omissions of another unless that other is his servant acting in the course of his employment. He will not, therefore, be liable for the acts or omissions of a competent independent contractor employed by him. To that general proposition there are certain exceptions or qualifications.

Where an independent contractor is employed to do the very thing which, if done by the employer himself, would constitute a breach of duty on his part, then the employer will nevertheless be liable for any consequent loss or damage. Moreover, where precautions can be taken against loss or damage and the failure of an employer to ensure that his independent contractor takes those precautions amounts to an authorization of the act or omission causing the harm, then the employer will also be liable. That is the explanation of cases such as *Bower v. Peate* (11) and *Dalton v. Angus* (12). With them may be contrasted a case such as *Stoneman v. Lyons* (13). In that case an owner of land employed a builder to carry out work which required the wall of an adjoining building to be underpinned. The builder, without consulting the owner or his architect, dug a trench along the whole of the wall and excavated pockets under the wall so that when rain fell the wall collapsed. The owner was held to be not liable for the damage but the result would have been different if the owner had required the builder to do what he did or had countenanced it by failing to require underpinning. As it was, the builder was guilty of what Lord Blackburn in *Dalton v.*

(4) (1940) 64 C.L.R. 514, at pp. 522-523.
(5) (1951) 83 C.L.R. 553, at pp. 566-567.
(6) (1953) 87 C.L.R. 619, at p. 645.
(7) (1980) 146 C.L.R. 40, at pp. 47-48.
(8) [1934] 1 K.B. 191.
(9) (1939) 39 S.R. (N.S.W.) 156.
(10) (1840) 6 M. & W. 499 [151 E.R. 509].
(11) (1876) 1 Q.B.D. 321.
(12) (1881) 6 App. Cas. 740.
(13) (1975) 133 C.L.R. 550.

H. C. of A. 1985-1986.

Stevens v. Brodribb Sawmilling Co. Pty. Ltd.

Wilson J. Dawson J.

Angus (14), called "collateral negligence", for which the owner was not liable.

Then again, a duty may be of such a kind that it is not possible to discharge it or transfer it by the employment of a competent contractor. The origin of this qualification to the general principle that an employer is not liable for the acts or omissions of his independent contractor is to be seen in cases such as *Pickard v. Smith* (15), although it is said (per Williams J. delivering the judgment of the Court (16)) to be derived "by a parity of reasoning" from those cases "in which the act which occasions the injury is one which the contractor was employed to do". This explanation may not be wholly satisfactory, but it is clear that the qualification does exist. The most obvious example is where a duty is imposed by statute which cannot be met by the employment of someone else. In that case there is an analogy with a duty imposed by contract which cannot be discharged by entry into a subcontract. But the qualification goes beyond duties statutorily imposed and extends to some duties at common law. The difficulty is in identifying those cases in which such a non-delegable duty arises. An effort was made to do so by Mason J. in *Kondis v. State Transport Authority* (17), where he said that such a duty arose from "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". The most important example is probably the duty of care of an employer at common law to provide adequate plant and equipment, a safe place of work and a safe system of work for his employees. That is a duty which cannot be delegated to an independent contractor and the duty to take care becomes a duty to ensure that reasonable care is taken. Other examples are the duty of care owed by a hospital to its patients or by a school authority to its pupils. In such cases at least it would seem that liability for the acts or omissions of a contractor is personal rather than vicarious, but that aspect of the matter is not beyond debate: see Atiyah, *Vicarious Liability in the Law of Torts* (1967), pp. 338-339.

Apart from a submission based upon the hazardous nature of the logging operations, a submission was also made on behalf of Stevens that there was a non-delegable duty of care owed by Brodribb to Stevens arising from the general supervisory functions exercised by Brodribb in its licence area. There were, of course, other teams of

(14) (1881) 6 App. Cas., at p. 829.
(15) (1861) 10 C.B. (N.S.) 470 [142 E.R. 535].
(16) (1861) 10 C.B., at p. 480; [142 E.R., at p. 539].
(17) (1984) 154 C.L.R. 672, at p. 687.

fellers, sniggers and loaders and carters operating within the area and the co-ordination of all their functions was said to be the responsibility of Brodribb and to involve a duty on its part to take reasonable steps to see that the whole operation was safely carried out. The obligation said to be imposed upon Brodribb, which in the case of servants would be part of its duty to provide a proper place of work, proper plant and equipment and a safe system of work, was said to arise upon the ordinary principle that in the absence of such provision it was foreseeable that harm would be done to persons, such as the plaintiff Stevens, working in the area where the logging operations were being carried on. Reliance was placed upon the decision in *McArdle v. Andmac Roofing Co.* (18) which held that the employment of a contractor to do certain roofing work did not displace the overriding responsibility of the employer to take precautions for the safety of subcontractors working together in close proximity in circumstances of obvious danger. It is true that the decision in that case resulted from the application of the familiar concepts of proximity and foreseeability in the law of negligence and may be said to support the appellants' submissions in these cases. There is no reason why those same concepts should not provide a basis upon which it might be found that Brodribb was under a duty of care towards Stevens and we are prepared to assume that it was under such a duty of care, although it seems to us that 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. For reasons which will appear, it is unnecessary to pursue that aspect of the matter to finality.

Such as the alleged duty was, it is said, apparently in reliance upon the analogy with the duty of care owed by an employer to his employees, that it was non-delegable. We think that such a duty in this case was non-delegable, although for reasons which can be expressed more simply and in a different way. Any such duty was, in effect, a duty to exercise care in the co-ordination of the activities of the various contractors. No question arises of the delegation of that function to any separate contractor and it can hardly have been delegated to them all merely by reason of their having been engaged as independent contractors. In that event the duty would have been negated and have ceased to exist. Put another way, the duty of co-

(18) [1967] 1 W.L.R. 356; [1967] 1 All E.R. 583.

H. C. OF A.
1985-1986.

STEVENS
v.
BRODRIBB
SAWMILLING
Co.
PTY. LTD.

Wilson J.
Dawson J.

ordinating the activities of the contractors can hardly have been performed by returning that responsibility to them. In our view, it is for this reason, rather than any special element in the relationship between Brodribb and its contractors, that no question arises of the delegation of any duty which it might have owed to them.

Assuming the existence of a duty of care on the part of Brodribb towards Stevens, we nevertheless do not think that want of due care on the part of Brodbribb can be made out on the evidence. The breach of duty which is alleged is three-fold: the use of an unsafe ramp and the failure to require the use of a forklift carrier or a tractor equipped with a grab to load logs, failure to give instructions that no log was to be moved on the ramp whilst anyone was on it, and failure to supervise the loading operation.

The ramp was, however, constructed according to established practice and, although the distance between the skids made it difficult to load shorter logs, the space was necessary to enable the tractor to move between the skids. The evidence concerning the use of a forklift or a tractor with mechanical grabs was scanty and it would, in our view, provide an insufficient basis upon which to conclude that such equipment constituted a reasonable alternative for the loading of logs in the bush. It is plain enough that such equipment was not in use and had never been in use in Brodribb's logging operations in the bush, nor, for that matter, does the evidence show that it had ever been used in similar operations by others. However effective it might have been in loading logs (and the evidence merely suggests that it would have been more effective to prevent the skidding or rolling of logs), there is no evidence of its feasibility in other respects. In the case of the forklift, the very size of the machine required would suggest its impracticability. Assuming a duty of care on the part of Brodribb, we are unable to conclude that there was any breach of that duty by reason of its failure to use machinery of the type suggested.

Nor does the evidence suggest to us that due care required Brodribb to give instructions that no log was to be moved during loading operations whilst a man was on the ramp. Gray was, as the other sniggers and loaders also appear to have been, an experienced operator of his equipment, skilled in the task which he was performing. Stevens was, upon the evidence, no less skilled. There was no evidence of any previous accident of the kind which happened to Stevens. The danger to which he was exposed was an obvious danger and it is unlikely that any instruction of the kind suggested would have avoided the accident.

Similarly, supervision of the loading operations would, in the absence of previous accidents suggesting a particular danger, have

been unlikely to have avoided the accident which occurred. Such supervision would have required a man on each loading ramp, of which there were nine, and the evidence does not reveal that it would have achieved anything more than the employment of skilled operators ought to have done. Apart from the particular incident, the evidence does not suggest that the system of loading which was in use and which had apparently been in use for years, was defective.

Accordingly, in our view, no want of care on the part of Brodribb was established on the evidence.

For all of these reasons, the appeals should be dismissed.

BRENNAN J. I am in general agreement with the reasons prepared by Mason J. for dismissing these appeals, but I should state my own reasons for agreeing that Brodribb did not breach any personal duty of care owed to Stevens.

Brodribb organized the felling, snigging, loading and trucking operations which brought the forest logs to the mill. All of those operations involve some risk of injury to those engaged in them. We are concerned with the loading operation. The movement of bulldozers as they manoeuvre heavy logs on loading ramps involves some risk of injury to those engaged in the loading operations. An entrepreneur who organizes an activity involving a risk of injury to those engaged in it is under a duty to use reasonable care in organizing the activity to avoid or minimize that risk, and that duty is imposed whether or not the entrepreneur is under a further duty of care to servants employed by him to carry out that activity. The entrepreneur's duty arises simply because he is creating the risk (*Sutherland Shire Council v. Heyman* (19)) and his duty is more limited than the duty owed by an employer to an employee. The duty to use reasonable care in organizing an activity does not import a duty to avoid any risk of injury; it imports a duty to use reasonable care to avoid unnecessary risks of injury and to minimize other risks of injury. It does not import a duty to retain control of working systems if it is reasonable to engage the services of independent contractors who are competent themselves to control their system of work without supervision by the entrepreneur. 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 organized and its operation is in the hands of independent contractors, liability

(19) (1985) 157 C.L.R. 424, at p. 479.

for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur. 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 entrepreneur 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.

In the present case, Brodribb prescribed the location of loading ramps. Brodribb also retained (though it did not actively exercise) a right to prescribe the manner of their construction and, if it be a matter of additional prescription, the means by which logs were to be loaded. Logs were to be loaded by pushing them by bulldozer blade up and over the edge of the ramp onto a waiting trailer. The bulldozer would move up and down between the skids of the ramp. Perhaps forklifts could have been used, but any improvement in safety would have been speculative, and did not warrant the cost and inconvenience involved. Brodribb did not employ servants to snig, load or carry logs; it employed independent contractors who were experienced in those activities. That seems to be the extent of the organization by Brodribb of the activity of loading logs. Was it negligent in prescribing that organization? Further supervision by a Brodribb employee of the independent contractors while they were working could have been prescribed but it might have been an irritating distraction to those engaged in loading. At all events, it would have been unreasonable to prescribe supervisors of experienced contractors. Brodribb did not prohibit truck drivers from helping in the loading of logs, nor did Brodribb prohibit those engaged to load logs from helping truck drivers. Was it bound to do so? In my opinion, no such prohibition was called for; to prohibit one from helping the other might increase the risk of injury in some situations. It would have prevented the injury suffered by Stevens if truck drivers had been absolutely prohibited from getting up on the loading ramp, but that would have been an unnecessary and unreasonable prohibition to prescribe. The problem of manoeuvring logs too short to straddle the gap between the skids of a loading ramp was well known. But Brodribb was not negligent in leaving the problem of manoeuvring short logs to competent independent contractors to deal with. In my opinion, the evidence did not show that Brodribb failed to exercise reasonable care in organizing the loading of logs. Apart from its responsibility in the organizing of the loading of logs, did Brodribb have any relevant continuing responsibility in the conduct of the loading operations? I think not. If the

persons working in the vicinity of the loading ramps had been employees, Brodribb would have remained under a continuing duty to prescribe and enforce a safe system for dealing with the problem of logs jammed on or near the ramp (see *Kondis v. State Transport Authority* (20)), but Brodribb was not under such a duty to persons who were not employees. The way in which the independent contractors chose to deal with the problem of jammed logs was a matter for them. The cause of Stevens' injury was Gray's movement of the bulldozer while Stevens was still within the danger area. That was negligence on the part of an independent contractor within an area of his responsibility. Brodribb is not vicariously liable to Stevens for Gray's negligence in moving the bulldozer when and in the manner he did.

I need not address the question whether there is some special category of non-delegable duty of care other than the personal duty of care arising from particular relationships (e.g., master and servant, parent and child, school authority and pupil). I agree with Mason J. that no such duty arises from the circumstances of this case.

The appeals should be dismissed.

Deane J. The equal division of opinion between four members of the Victorian Supreme Court in the present case demonstrates how finely balanced is the question whether the injured truck driver (the appellant Roy Albert Stevens to whom I shall refer as "Stevens") and the negligent "snigger" (the appellant Stanley Gray to whom I shall refer as "Gray") were, in all the circumstances, employees of the respondent Brodribb Sawmilling Company Pty. Ltd. ("the Brodribb Company") or independent contractors. For my part, I have come to the conclusion that, on balance, the preferable view is that both Stevens and Gray were independent contractors and not employees. I agree with the reasons for that conclusion which are set out in the judgment of Mason J.

The distinction between "employee" and "independent contractor" has become an increasingly amorphous one as the single test of the presence or absence of control has been submerged in a circumfluence of competing criteria and indicia. Where that distinction is relevant, it is, nonetheless, commonly decisive of the existence of vicarious liability. It is so in the present case where the conclusion that Gray was not an employee of the Brodribb Company involves the consequence that his negligent acts were not, in law, the acts of that company. On the other hand, the general principles of the law of negligence which are applicable to determine

(20) (1984) 154 C.L.R. 672.

H. C. of A. 1985-1986.

Stevens v. Brodribb Sawmilling Co. Pty. Ltd.

Deane J.

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 characterization as an "independent contractor" or as an "employee" in a borderline case are, of themselves, unlikely to be of critical importance. Thus, the conclusion that the relationship between the Brodribb Company and Stevens should be characterized as being that between independent contractors rather than that of employer and employee is, in the present case, not of decisive significance for the purpose of the question whether that company owed a relevant common law duty of care to Stevens. What is decisive of that question is the substantive content, rather than the technical characterization, of that relationship. It is to that substantive content that regard must be had in determining whether the relationship possessed the degree of proximity necessary to give rise to a relevant duty of care.

Where a duty of care exists under the common law of negligence, it requires the taking of reasonable care to avoid a reasonably foreseeable and real risk of injury. That being so, a relevant duty of care will have existed in a particular case only if there was reasonable foreseeability of a real risk that injury of the kind sustained would be sustained by a member or members of a class which included the particular plaintiff. If the common law duty of care were an unqualified one owed to the world at large, reasonable foreseeability of injury of the kind sustained by a plaintiff would be the sole determinant of the existence of a relevant duty of care: it would be both a sufficient and the exclusive criterion of whether a particular defendant owed a relevant duty of care to a particular plaintiff. It is, however, plain that that is not, and has never been, the common law. Some effective additional limit or "control mechanism" must be recognized as applying to at least some categories of case: see *Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad"* (21); *Jaensch v. Coffey* (22); *Candlewood Navigation Corporation Ltd. v. Mitsui Osk Lines Ltd.* (23).

The test of reasonable foreseeability of injury which was explained by Lord Atkin in *Donoghue v. Stevenson* (24) was expressly derived from the celebrated passage in the judgment of Lord Esher (then Brett M.R.) in *Heaven v. Pender* (25):

"The proposition which these recognised cases suggest, and

(21) (1976) 136 C.L.R. 529, at p. 574.

(22) (1984) 155 C.L.R. 549, at pp. 552-553, 583-584.

(23) [1986] A.C. 1, at pp. 24-25.

(24) [1932] A.C. 562, at pp. 580-582.

(25) (1883) 11 Q.B.D. 503, at p. 509.

> which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that *every one* of ordinary sense who did think *would at once* recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger". (Emphasis added.)

The reference to "every one . . . would" and "at once" made Lord Esher's formulation at least as demanding as Lord Atkin's test of reasonable foreseeability: it is scarcely feasible that Lord Atkin, whose dislike of Humpty Dumpty's approach to words is well documented, used the words "can reasonably foresee would be likely to injure" (*Donoghue v. Stevenson* (26)) in a sense which would not include a case where "every one of ordinary sense who did think would at once recognise" the danger of injury. Yet Lord Atkin was at pains to emphasize that even Lord Esher's formulation would be "expressed in too general terms" unless it was limited by the "necessary qualification" of proximity of relationship: see *Donoghue v. Stevenson* (27). That being so, his Lordship recognized (*Donoghue v. Stevenson* (28)) that the duty to "take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely" to cause injury must necessarily be restricted by some overriding control. The overriding control which he recognized was that the duty was owed only to a "neighbour" in the sense of a person who was, for relevant purposes, in a relationship of proximity.

The requirement of a relationship of proximity as a general overriding control of the test of reasonable foreseeability has been expressly or impliedly recognized in a series of recent judgments in this Court including, it would seem, the judgments of four of the five members of the Court in *Sutherland Shire Council v. Heyman* (29) per Gibbs C.J., (30) per Mason J., (31) per Wilson J., and (32) per Deane J. The notion of such a general and distinct requirement has been subjected to criticism by some eminent authorities: see *Candlewood* (33); *Leigh and Sillivan Ltd. v. Aliakmon Ltd.* (34); Sir Robert Goff, "The Search for Principle", *Proceedings of the British Academy*, vol. 69 (1983), pp. 178-179. It must be acknowledged that such criticism would have undoubted force if the requirement of proximity of relationship had been

(26) [1932] A.C., at p. 580.
(27) [1932] A.C., at p. 582.
(28) [1932] A.C., at pp. 580-582.
(29) (1985) 157 C.L.R. 424, at p. 441.
(30) (1985) 157 C.L.R., at p. 461.
(31) (1985) 157 C.L.R., at p. 471.
(32) (1985) 157 C.L.R., at pp. 495-497.
(33) [1986] A.C., at pp. 24-25.
(34) [1985] 2 W.L.R. 289, at pp. 326-327.

H. C. of A. 1985-1986.

Stevens v. Brodribb Sawmilling Co. Pty. Ltd.

Deane J.

propounded as some rigid formula which could be automatically applied as part of the syllogism of formal logic to determine whether a duty of care arises under the common law of negligence in a particular category of case. The "general conception" of proximity of relationship was, however, neither propounded by Lord Atkin nor accepted in judgments in this Court in that sense. Its acceptance involved neither question-begging nor the introduction of undesirable uncertainty into the common law. To the contrary, it flowed from the perception of a consistent jurisprudence of common law negligence in which the notion of proximity can be discerned as a unifying theme explaining why a duty to take reasonable care to avoid a reasonably foreseeable risk of injury has been recognized as arising in particular categories of case and assisting in the determination, by the ordinary legal processes of analogy, induction and deduction, of the question whether the common law should adjudge that such a duty of care is owed in a new category of case. In that regard, recognition of the requirement of proximity as a general prerequisite of a duty of care neither precludes nor dispenses with the need, in the interests of certainty, for particular rules or tests for determining whether the requirement is satisfied in the circumstances of a particular category of case: see, e.g., the judgment of Gibbs C.J., in *Jaensch v. Coffey* (35) and the judgment of Mason J. in *Heyman* (36). Indeed, once one accepts — as I think one must — that, under the law of this country, reasonable foreseeability of injury is not of itself a sufficient determinant of the existence of a duty of care in all categories of case, there would seem to be but two alternatives to acceptance of Lord Atkin's overriding requirement of neighbourhood or proximity. The first alternative is to distort the notion of reasonable foreseeability so as to exclude, in some categories of case, injury to another which is obviously foreseeable by "every one of ordinary sense". The second is to reduce the common law of negligence to a miscellany of disparate and largely unrelated rules under which a duty to take reasonable care to avoid a reasonably foreseeable risk of injury may or may not arise: cf. *Candlewood* (37). I find both equally unacceptable.

I have, in *Jaensch v. Coffey* (38) and *Heyman* (39), endeavoured to explain what I see as the essential content of the requirement of neighbourhood or proximity which Lord Atkin formulated as an overriding control of the test of reasonable foreseeability. So understood, the requirement can, as Lord Atkin pointed out

(35) (1984) 155 C.L.R., at pp. 553-555.
(36) (1985) 157 C.L.R., at pp. 461ff.
(37) [1986] A.C., at pp. 24-25.
(38) (1984) 155 C.L.R., at pp. 583-586.
(39) (1985) 157 C.L.R., at pp. 495-496.

(*Donoghue v. Stevenson* (40)), be traced to the judgments of Lord Esher M.R. and A.L. Smith L.J. in *Le Lievre v. Gould* (41). In my view, that requirement remains the general conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognizes the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another. In Lord Atkin's own words, it is the "general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances": *Donoghue v. Stevenson* (42); and see per Fullagar J. *Commissioner for Railways (N.S.W.) v. Cardy* (43). As such, that requirement of proximity of relationship sustains the underlying unity of principle and lack of chaos in the common law of negligence of this country.

I agree with Mason J. that, for the reasons which he gives, there existed in the relationship between the Brodribb Company and Stevens the requisite element of proximity to give rise to a relevant duty of care. With due respect to those who see the matter differently, however, it appears to me that the Brodribb Company failed to discharge that duty. At its heart, there lay the obligation to take reasonable care to provide a safe system of work at least in those fields of operation in which the Brodribb Company required interaction between the activities of the various "fellers", "sniggers" and truck drivers whom it retained and assigned and whose activities it organized for the felling, loading and carrying of timber from its licensed areas of forest for cutting and treatment in its Orbost sawmill. One such field of operation was that involving the loading of logs on the trucks. There, the truck driver's functions and the snigger's functions necessarily overlapped to an extent that obviously required co-ordination and co-operation between the two. This was particularly so in the cases where the length of timber being loaded was shorter than the distance between the two pairs of skids on the ramp and where the ordinarily obvious method of pushing the logs up the two pairs of skids was plainly inappropriate. It may well be that the approach which was finally adopted by Gray in the present case — manipulation by bulldozer combined with the use of a supporting chain — was capable of providing the basis of an acceptable solution to one of the problems involved in loading the shorter logs in that way. To be acceptable, however, the method would have to have been adopted as part of some rational system under which the respective roles and responsibilities of truck driver

(40) [1932] A.C., at p. 581.
(41) [1893] 1 Q.B. 491, at pp. 497, 504.
(42) [1932] A.C., at p. 580.
(43) (1960) 104 C.L.R. 274, at p. 294.

and snigger were identified and integrated. In fact, the evidence leads to the conclusion that the Brodribb Company provided no system at all to deal with the problem of loading the shorter logs. It simply left the problem which they posed to be dealt with on an ad hoc basis. The consequence was that a truck driver was unnecessarily exposed to any danger involved in the unplanned and unexpected. It was this absence of any settled system for the loading of the shorter logs which led to the lack of co-ordination between Gray and Stevens in the present case. In failing to provide such a system, the Brodribb Company was in breach of the duty to take reasonable care which it owed to Stevens. The injuries which Stevens sustained were of a kind which was reasonably foreseeable and were caused by that breach of duty.

I would allow both appeals and restore the judgment of the learned trial judge.

Appeals dismissed with costs.

Solicitors for the appellant Stevens, *Warren, Graham & Murphy.*
Solicitors for the appellant Gray, *Engel Loadman.*
Solicitors for the respondent, *Blake & Riggall.*

R.A.S.