The National Legal Eagle

Volume 12
Issue 2 *Spring 2006*

Article 6

10-1-2006

Liability for the actions of others

David Field
Bond University, David_Field@bond.edu.au

Follow this and additional works at: http://epublications.bond.edu.au/nle

Recommended Citation
Field, David (2006) "Liability for the actions of others," *The National Legal Eagle*: Vol. 12: Iss. 2, Article 6.
Available at: http://epublications.bond.edu.au/nle/vol12/iss2/6

This Journal Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in The National Legal Eagle by an authorized administrator of ePublications@bond. For more information, please contact Bond University's Repository Coordinator.

Liability for the Actions of Others

Associate Professor David Field, Moot Master Faculty of Law Bond University

A report on the 2006 Bond University High Schools' Mooting Competition

In its seventeenth consecutive year of operation, the Bond University High Schools' Mooting Competition kept up its long tradition of challenging teams of advocates from schools around Australia to debate a legal issue of topical relevance. This year it was the liability of employers and others who engage people to perform work for them for the actions of those people which turn out to be harmful.

As in previous years, the hypothetical problems set, although linked by a common theme, were different for the preliminary rounds of competition and the finals. Each team competing in the preliminary rounds argued for the same appellant or respondent in the same problem. For those teams which progressed to the finals, there was a brand-new hypothetical for them to get their brains around, although it involved the same legal issues.

Preliminary rounds

For 2006, the preliminary scenario involved the activities of a security guard (Albert Thug) 'employed' by a security firm (We're Tuff Security Pty Ltd) who over-reacted to racist taunts hurled at him by a rejected customer outside a nightclub where he was on duty as a bouncer, breaking the customer's nose and causing him other injuries. The customer (Imbrus Saffron) sued We're Tuff for damages, based on the alternative assertions that We're Tuff was 'vicariously' liable for the actions of Albert Thug or that the company owed a 'non-delegable duty of care' to those who could foreseeably be injured by its activities.

This in turn raised important issues of employment law and tortious liability which in recent years have been the subject of several decisions by the High Court of Australia. In particular, in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 it was held that whether one person is the employee of another depends upon a whole range of factors, including whether or not the so-called 'employee' is required to wear a uniform whilst on duty, whether he or she is free to seek the same sort of 'employment' with other firms, and how much control is exercised over the operative by the person 'employing' them.

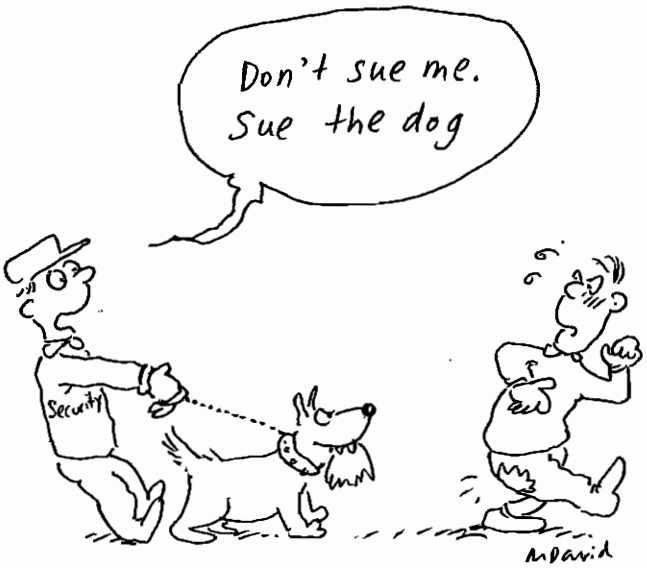
If they *are* held to be employees, then the employer will indeed be vicariously liable for their actions, since in the eyes of the law the actions of an employee are the actions of the employer. Another way of explaining this is to say that the person employing them must accept responsibility for injuries suffered by others as part of the 'enterprise risk' of the business which they run.

Even if they are only independent contractors, however, this is not necessarily the end of the matter, provided the court is prepared to hold that the duty which was breached was not one which in law may be delegated to someone else (that is,

Published by ePublications@bond, 2006

what lawyers call a non-delegable duty). In this regard, students were referred to the High Court decision in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, in which it was recognised that parties owing a non-delegable duty of care do not discharge that duty merely by the engagement of an apparently qualified and competent independent contractor. Students were also referred to the more recent High Court decision in *New South Wales v Lepore* (2003) 195 ALR 412, in which it was held that the non-delegable duty of care owed by school authorities to school students is not breached by the deliberate criminal acts of teachers (in that case, sexual assaults) which are totally outside the teachers' authorised activities.

Schools from nine regions of Australia, and cities as far apart as Darwin and Adelaide, were visited by academic staff from the Bond Law Faculty acting as 'judges' in these preliminary rounds. As usual, the standard of performance was very high – so high in fact that it was decided to increase the number of finalists to 20, and to split them into two streams for the 2006 finals held on campus at Bond University on the Gold Coast on 29 July this year.



The finals

There was a new factual scenario for the finals, based on the three High Court decisions considered previously. This time, the appellant was the executor under the will of an elderly and demented patient (Maisy Dotage) who had spent the last days of her life in a nursing home (Halfway to Heaven), owned and operated by the respondent (Wrinkletown Pty Ltd). Whilst a patient in the nursing home, Maisy had been allocated a nursing assistant (Serena Todd) who had abused her position by absconding with Maisy's bank book and emptying her bank account of some $450,000.

The defence put up by the respondent (based largely on the *Lepore* case) was that it could not be held responsible for the independent criminal actions of one of its nursing assistants, partly because she was not an employee as such, but was engaged as an independent contractor, and partly because it owed no non-delegable duty to its residents. The argument for the appellant was obviously the reverse. It was based on the initial proposition that Serena Todd was an employee of the respondent company, making the company vicariously liable for her actions. Alternatively, in the event that Ms Todd was held to be an independent contractor, the appellant claimed that, due to the relative 'vulnerability' of Maisy Dotage, the respondent owed Ms Dotage a duty to ensure that the nursing staff who looked after her did not exploit her, and this was not something which they could escape by delegating their responsibilities to contractors like Ms Todd. On the contrary, the respondent had a duty to ensure that people in Ms Todd's position could not abuse the trust placed in them by residents and their families. Further to this argument, the appellant submitted that whereas the Lepore case dealt with crimes of a physical nature, it was a different story when the crime in question involved the misappropriation of property.

With the first rounds in each finals stream commencing at 10 am, the competing finalists battled it out through the day, under the eagle eyes of two teams of Bond Law Faculty judges. Shortly before 4 pm, the grand finalists were announced, and the teams from St Aloysius' College in Sydney and Somerset College on Queensland's Gold Coast took an hour or so off to relax before competing in the grand final at 5 pm in the Cerum Theatre at the heart of the Bond campus.

For the grand final, there was a fresh set of judges, led by his Honour Judge Newton, of the Queensland District Court at Southport, with able support from Bond's home-grown Administrative Appeals Tribunal Senior Member, Associate Professor Bernard McCabe, and Assistant Professor Maureen Klar, mentor of the Bond Law Faculty's Jessup Moot team which this year made it all the way to the international finals in Washington DC.

After almost an hour of intense and highly competitive mooting, the grand final winners were announced as St Aloysius' College, Sydney. The Overall Outstanding Advocate for 2006 was Harrison Grace of St Aloysius', while Outstanding Advocate awards were collected by Katherine Mansted of Somerset College on the Gold Coast, and Katherine Stodulka of St Margaret's Anglican Girls School, Brisbane – with each of these winners becoming eligible for a Law Scholarship at Bond University. Not surprisingly, everyone was in party mood by the time the formalities ended, whereupon students, teachers, parents and moot judges adjourned to dinner in Bond's magnificent Princeton Room.

Popularity of the competition

Not only does the quality of high school mooting increase every year, but so do the numbers of schools competing. From an inaugural 8 schools in 1989, the Bond University High Schools' Mooting Competition attracted 135 school teams this year, while the associated competition which is now organised by Bond for Malaysian schools has grown in one year from 17 schools to 40.

There is clearly a continuing and growing interest in this sort of activity, as with the High Schools' Mock Trial Competition which Bond's Faculty of Law now runs on the Gold Coast on behalf of the New South Wales Law Society. If your school has yet to get involved, why not register for 2007? An email to Cherie Daye (cdaye@staff.bond.edu.au), Events Manager for the Bond Law Faculty, is all it takes!

Explore:

You could research the history and traditions of mooting. When, how and why did it originate?

The contents of this publication are intended as general legal information only and should not form the basis for legal advice of any kind. © The Law Society of New South Wales1998.
Published by The Law Society of New South Wales, 170 Phillip St. Sydney NSW 2000. Telephone: 9926 0333. Co-Editor Robyn Cross, Email: rnc@lawsocnsw.asn.au Written by Bond University. October 2006.
National Legal Eagle is produced by Insight Print Services 120B Old Canterbury Road, Lewisham NSW 2049 Phone 9564 0555 Fax 9564 0516