HOLLIS ..... APPELLANT;
PLAINTIFF,

AND

VABU PTY LIMITED ..... RESPONDENT.
DEFENDANT,

[2001] HCA 44

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

H C OF A
2000-2001
Dec 8
2000
Aug 9
2001
Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ

Negligence — Vicarious liability — Employee or independent contractor — Company operating courier business — Individual couriers engaged to deliver articles — Person injured by bicycle courier's negligence in course of delivery — Liability of company — Whether courier employee — Whether company liable if courier not employee — Control.

A company which operated a courier business engaged individual couriers to deliver articles. A person was injured by the negligent act of an individual bicycle courier in the course of making a delivery. The courier was unable to be identified personally but was wearing a uniform which indicated that he had been engaged by the company. The injured person sued the company. The company paid the couriers by fixed rates per job. It deducted a certain amount from their remuneration to contribute towards the cost of insurance. The couriers were required to use their own bicycles, but the company provided radio equipment and it allocated jobs by radio. It directed them to conduct their work in accordance with specific instructions concerning dress, appearance, language, delivery procedures and dealing with clients. The couriers were able to deal with the company as sole traders or members of a partnership or by means of their own companies.

Held, by Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Hayne JJ, Callinan J dissenting, that the company was vicariously liable for the negligent act of the bicycle courier: by Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, on the ground that the courier was an employee of the company; and by McHugh J, on the ground that the courier was not an employee or independent contractor of the company but was its agent acting within his authority as its representative in carrying out its contractual obligations for its benefit.

Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd (1931) 46 CLR 41; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) 33 ATR 537; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313; and *Scott v Davis* (2000) 204 CLR 333, referred to.

Per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ. In general, under contemporary Australian conditions, conduct of an enterprise in

which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise.

Per McHugh J. Rather than expanding the definition of employee or acccpting the employee and independent contractor dichotomy, the preferable course is to hold that employers can be vicariously liable for the tortious conduct of agents who are neither employees nor independent contractors.

Bazley v Curry [1999] 2 SCR 534, approved.

Decision of the Supreme Court of New South Wales (Court of Appeal): *Hollis v Vabu Pty Ltd* [1999] Aust Torts Rep ¶81-535, reversed.

APPEAL from the Supreme Court of New South Wales.

Gary John Hollis was injured when struck on a footpath in Sydney by a courier riding a bicycle, unidentified save that he wore a uniform on which appeared the words "Crisis Couriers". "Crisis Couriers" was a trading name of Vabu Pty Ltd, under which it operated a courier business. Hollis sued Vabu Pty Ltd in the District Court of New South Wales seeking damages, claiming that the respondent was vicariously liable for the negligent act of the courier it had engaged. The action was heard before Acting Judge Wright, who gave judgment for the defendant. Hollis appealed to the Court of Appeal of the Supreme Court which (Sheller and Giles JJA, Davies A-JA dissenting) dismissed the appeal (1). Hollis appealed to the High Court from the decision of the Court of Appeal by special leave to appeal granted by Gaudron and Callinan JJ.

G B Hall QC (with him *S Norton*), for the appellant. The courier was an employee and the respondent is vicariously liable for his negligence. The courier had insignificant capital investment and minimal scope for management. The respondent controlled the nature and performance of his work and constricted his ability to make independent decisions. It imposed non-negotiable rates of remuneration and an obligation that he obtain insurance at his cost. It allocated his work. It required that he wear a uniform and maintain a neat appearance and be conscious that he was a "direct representation" of the respondent. The contractual documents referred to annual and sick leave. In the circumstances it does not matter that the courier was paid by reference to deliveries made and not a salary. *Vabu Pty Ltd v Federal Commissioner of Taxation* (2) did not decide that the courier in the present case was not an employee. If the courier was an employee, vicarious liability is not precluded because his tortious act was not directly authorised, as it was so connected with his authorised acts that it would be categorised as an improper mode of carrying out

(1) *Hollis v Vabu Pty Ltd* [1999] Aust Torts Rep ¶81-535.
(2) (1996) 33 ATR 537.

those authorised acts (3). The appellant is not prevented from challenging the finding at the trial, which he accepted in the Court of Appeal that the courier was an independent contractor and not an employee. The issue arises on undisputed findings. No further evidence would bear upon it. It is in the interests of justice that the appellant be able to argue the point (4). The grounds of appeal include it. If the courier was not an employee but an independent contractor, the respondent should nevertheless be found vicariously liable, as the courier was carrying out the respondent's business even if in form he was an independent contractor. He was acting as agent of the respondent. A principal may be vicariously liable for its agent's acts. That the negligent act was not authorised does not matter (5): it occurred within the scope of the agency. Labels such as "agent", "independent contractor" and "employee" should not determine vicarious liability. The actual relationship between the parties and the economic purposes for which it came into being should be decisive. The courier was controlled by the respondent to an extent sufficient to give rise to vicarious liability (6). He was working for and in its business, not as an "independent functionary" (7). He was performing work similar to that of an employee which was exclusively for the respondent's benefit. He had no choice as to the work he undertook. His uniform effectively held him out as an employee and was required to be worn solely to advance the respondent's interests. For the respondent to avoid liability on the basis that the courier was an independent contractor would elevate contractual form over the reality of the control it exercised. The form of contractual arrangement should not be decisive. It was imposed by the respondent which was in a stronger bargaining position. It merely emphasised its control. Considerations of policy require vicarious liability to be imposed. That would give incentive to those such as the respondent to improve the manner in which they conduct business and would mean that insurance which should cover the event is made to do so (8). A person who engages others to advance its economic interests should be liable for losses incurred by third parties as a result (9). The policy considerations are the same as those which led to employers being vicariously liable for the acts of employees. The increasing use of independent contractors in place of employees requires a reconsideration of the

(3) *Bugge v Brown* (1919) 26 CLR 110.
(4) *O'Brien v Komesaroff* (1982) 150 CLR 310; *Pantorno v The Queen* (1989) 166 CLR 466 at 475-476.
(5) *Scott v Davis* (2000) 204 CLR 333 at 436; *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens' Co-operative Assurance of Australia Ltd* (1931) 46 CLR 41.
(6) *Scott v Davis* (2000) 204 CLR 333 at 436.
(7) *Scott v Davis* (2000) 204 CLR 333 at 370-371.
(8) *Scott v Davis* (2000) 204 CLR 333 at 370-371.
(9) *Scott v Davis* (2000) 204 CLR 333 at 418-419.

circumstances in which vicarious liability will be imposed. [He also referred to *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens' Co-operative Assurance Co of Australia Ltd* (10); *Stevens v Brodribb Sawmilling Co Pty Ltd* (11); *Scott v Davis* (12); *PP Consultants Pty Ltd v Finance Sector Union of Australia* (13); and *Burnie Port Authority v General Jones Pty Ltd* (14).]

D F Jackson QC (with him *W S Reynolds* and *J J Ryan*), for the respondent. It is not open to the appellant to challenge the finding that the courier was an independent contractor. The grant of special leave to appeal was limited to a number of grounds, of which this was not one, and the point was conceded in the Court of Appeal. The courier was not an employee but an independent contractor (15). He was required to provide his own bicycle and most of his equipment. He was able to work as a sole trader or as a partnership or as a company. He was remunerated by reference to performance and not by salary or wages. It is irrelevant that he was required to wear a uniform. *Vabu Pty Ltd v Federal Commissioner of Taxation* (16) determined the issue in the present case or was correct and here also the courier was not an employee. If he was not an employee, the respondent is not vicariously liable. [He referred to *Torette House Pty Ltd v Berkman* (17); *Stevens v Brodribb Sawmilling Co Pty Ltd* (18); and *Northern Sandblasting Pty Ltd v Harris* (19).] Although he was an agent of the respondent for the delivery of items, it does not follow that the respondent is liable for all acts done by him in the course of making deliveries. The respondent had not "directly authorised" the courier to do the negligent act (20). It was not within his express or apparent authority (21). It should not be accepted that an independent contractor may not be treated as such for the purposes of vicarious liability because the manner of performance of the relevant work is subject to some measure of control by the principal or because in some fashion the contractor represents the principal. It is not relevant that the independent contractor was performing a task for the principal. This is merely a prerequisite for any possible issue of vicarious liability. It is not

(10) (1931) 46 CLR 41.
(11) (1986) 160 CLR 16.
(12) (2000) 204 CLR 333.
(13) (2000) 201 CLR 648.
(14) (1994) 179 CLR 520.
(15) *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) 33 ATR 537.
(16) (1996) 33 ATR 537.
(17) (1939) 39 SR (NSW) 156.
(18) (1986) 160 CLR 16 at 30, 37, 40-41, 42-43.
(19) (1997) 188 CLR 313.
(20) *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens' Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 48.
(21) cf *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens' Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41.

sufficient. Vicarious liability attaches to employers for reasons, including considerations of policy, which do not apply to independent contractors, and there are exceptions where employers are not vicariously liable for acts of employees. [He referred to *Bazley v Curry* (22); *Jacobi v Griffiths* (23); *Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Department* (24); and *Warren v Henlys Ltd* (25).] There is no reason to adopt any new principle for the liability of principals for the negligence of independent contractors and there are significant considerations militating against that. The position for which the appellant contends would be difficult to apply. The principal of an independent contractor does not have the requisite control over the manner in which the contractor carries out his work. In many cases contractors will have as much financial substance and as much ability to insure as those who engage them. The principles presently applicable to liability for the torts of contractors are well established (26).

G B Hall QC, in reply.

Cur adv vult

9 August 2001

The following written judgments were delivered:—

1 GLEESON CJ, GAUDRON, GUMMOW, KIRBY AND HAYNE JJ. This appeal involves issues respecting the nature of the relationship of employment and the scope of the doctrine of vicarious liability. The appellant, Mr Hollis, appeals against the decision of the New South Wales Court of Appeal (Sheller and Giles JJA, Davies A-JA dissenting) (27). That Court dismissed his appeal from the decision at trial in the District Court (Acting Judge Wright) returning a verdict for the defendant, the present respondent (Vabu), in the action by Mr Hollis for damages for personal injury.

The facts

2 Vabu at all material times conducted in the Sydney area and under the business name "Crisis Couriers" a business of delivering parcels and documents. In December 1994, it had about twenty-five to thirty persons as bicycle couriers, and a number of others as motorcycle and motor vehicle couriers. Mr Hollis was a courier, but not a bicycle courier, with a firm styled "Team Couriers". On 22 December 1994,

(22) [1999] 2 SCR 534.
(23) [1999] 2 SCR 570.
(24) [2000] 1 AC 486.
(25) [1948] 2 All ER 935.
(26) *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550-552, 574, 592-593.
(27) *Hollis v Vabu Pty Ltd* [1999] Aust Torts Rep ¶81-535.

Mr Hollis was leaving a building in Ultimo where he had attended to pick up a parcel. He had taken two steps on the footpath when he was struck by a cyclist and knocked to the ground. The cyclist went over the handlebars and landed in front of Mr Hollis. The cyclist stood up, said "Sorry mate" and left the scene pushing his bicycle; he ignored Mr Hollis' calls. The cyclist remains unidentified. However, he was wearing a green jacket, on the front and back of which, in gold lettering, there appeared the words "Crisis Couriers". Mr Hollis suffered personal injury in the accident, principally to his knee. This required surgery, caused a period of unfitness for work and has resulted in a 25 per cent permanent deficit in the knee.

The decision at first instance

3 The trial judge found that the cyclist was a bicycle courier employed by Vabu; that he was on Vabu's business at the time of the accident; and that he was wearing a uniform issued to him by Vabu but had no other obvious means of personal identification on him. His Honour also made the further important findings that Vabu had known for some time prior to the accident that a significant number of couriers disobeyed traffic rules and posed a danger to pedestrians; that means of personal identification for each courier were available; and that Vabu at various times had been party to schemes which involved to some extent effective means of personal identification but that these fell into disuse partly by reason of Vabu's failure to compel its riders to adopt such means. He held that the accident was caused by the bicycle courier's negligent — and illegal (28) — riding and that no defence of contributory negligence was made out. His Honour assessed the quantum of Mr Hollis' damages at $176,313.

4 The trial judge found that Vabu set the rates of remuneration of its bicycle couriers and that there was no scope for negotiation of those rates between the parties and that Vabu allocated the work, with no scope for bidding for individual jobs by the riders. The evidence was that work was allocated to the couriers by a radio operator at Vabu's base who was known as the fleet controller. Couriers would call in each morning with their call signs and indicate readiness for work. The fleet controller would allocate jobs for the couriers. In doing so, the fleet controller would take into account various matters including the time at which couriers had first called in on that day and their location.

5 His Honour also made findings that Vabu assumed all responsibility as to the direction, training (if any), discipline and attire of its bicycle

(28) Section 11(1)(b) of the General Traffic Regulations (NSW) provided that "the rider of a ... bicycle ... shall not ... ride the ... bicycle upon any such footpath unless the ... bicycle is ridden directly across the footpath, as slowly as practicable, to or from a gateway or entrance and adequate precautions are taken to avoid collision with any person or thing upon the footpath or upon any portion of any public street adjacent to the footpath". Nothing for present purposes turns on the illegality.

couriers; that Vabu provided its bicycle couriers with numerous items of equipment, which remained Vabu's property and which included the only means of communication between Vabu and its bicycle couriers; that the bicycle couriers were required to wear Vabu's livery at all times, partly due to Vabu's desire to advertise its services; and that requirements such as insurance and deductions from pay therefor were imposed by Vabu on the bicycle couriers without opportunity for negotiation.

6 The trial judge observed that the "bicycle couriers were pretty much in a 'take it or leave it' situation and this is highlighted and exemplified by the fact that the rates for the courier jobs had not been altered for some years". He also found that provisions for an insurance excess of $500 to $1,000 which bicycle couriers were required to pay provided a substantial disincentive for them to report accidents.

7 However, notwithstanding these findings, the trial judge entered a verdict for Vabu. Mr Hollis had put his case on three grounds. The first was that Vabu was vicariously liable for the negligence of its bicycle couriers as servants or agents. The trial judge held that this failed because "the bicycle couriers who worked for [Vabu] were not its servants or agents" but were independent contractors, with the result that Vabu was not liable for their negligent acts. His Honour also considered that, although a courier might in some circumstances be considered the "agent" of Vabu, there was "sufficient" evidence to show that the bicycle courier was not "the employee or agent of" Vabu.

8 The trial judge considered that he was constrained by the decision of the New South Wales Court of Appeal (Meagher, Sheller and Beazley JJA) in *Vabu Pty Ltd v Federal Commissioner of Taxation* (29) (the taxation decision) to conclude that the bicycle couriers were independent contractors and not the employees of Vabu. His Honour considered that the same conclusion was open on the evidence in this case, which was substantially similar to that earlier decided by the Court of Appeal in the taxation decision. That evidence included findings of fact that the bicycle couriers were required to provide their own bicycles and that two-thirds to three-quarters of them would have owned more than one bicycle; that the bicycle couriers had to bear the expense of providing and maintaining those vehicles; and that the bicycle couriers were required to provide their own equipment, other than a radio and uniforms.

9 The second ground asserted by Mr Hollis was a "common law estoppel" that Vabu had warranted to its couriers and to the public that it had effected policies of public liability insurance in respect of members of the public injured by its bicycle couriers. The trial judge found that Mr Hollis had not proved that Vabu had warranted to

(29) (1996) 33 ATR 537.

members of the public that bicycle couriers were covered in respect of public liability insurance as alleged.

10 The third ground was that Vabu had contravened s 52 of the *Trade Practices Act* 1974 (Cth) in representing to members of the public that they were protected by public liability insurance in respect of injuries caused by the negligence of Vabu's bicycle couriers. Mr Hollis also pleaded a breach of s 55A of that statute on the footing that Vabu had misled the public that the nature of Vabu's business was a courier service insured in respect of injury to members of the public. The trial judge also rejected this claim on the basis that Vabu had made no representation or warranty to the public.

11 The points in the second and third grounds respecting the existence of insurance policies seem to have reflected the failure of an application by Mr Hollis to join CIC Insurance Ltd (CIC) as a defendant to the proceedings pursuant to s 6 of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW). That section was considered in *Bailey v New South Wales Medical Defence Union Ltd* (30). It relevantly provides:

> "(1) If any person (hereinafter ... referred to as the insured) has ... entered into a contract of insurance by which the person is indemnified against liability to pay any damages or compensation, the amount of the person's liability shall on the happening of the event giving rise to the claim for damages or compensation, and notwithstanding that the amount of such liability may not then have been determined, be a charge on all insurance moneys that are or may become payable in respect of that liability."

12 This application was opposed by Vabu and was dismissed by the trial judge on the ground that Mr Hollis had failed to adduce evidence that the bicycle courier in question had "entered into a contract of insurance".

The taxation decision

13 Given the importance attached to it in the present litigation, it is appropriate here to say something further respecting the taxation decision. That litigation concerned the issue whether Vabu was an "employer" in respect of all of its couriers, within the meaning of the *Superannuation Guarantee (Administration) Act* 1992 (Cth) (the Superannuation Act). Section 12(1) of the Superannuation Act states that, "[s]ubject to this section, in this Act, '*employee*' and '*employer*' have their ordinary meaning" but that sub-ss (2)-(11) "(a) expand the meaning of those terms; and (b) make particular provision to avoid doubt as to the status of certain persons". In particular, s 12(3) states:

> "If a person works under a contract that is wholly or principally

(30) (1995) 184 CLR 399.

for the labour of the person, the person is an employee of the other party to the contract.''

14 The Superannuation Act required an employer to provide a prescribed minimum level of superannuation to all employees. If the employer failed to make such a contribution, or the contribution was below the prescribed level, the shortfall was collected by way of a charge levied on the employer. The Superannuation Act required an employer who had such a shortfall for any given year to lodge a superannuation guarantee statement in respect of that year. Thus, the characterisation of Vabu as employer had the consequence of exposing it to liability for the specified payments prescribed in the legislation.

15 It appears that the taxation proceedings were initiated as a result of a determination made under the auspices of the *Industrial Arbitration Act* 1940 (NSW) to the effect that Vabu was an employer in respect of all of its couriers. In the Supreme Court (Ireland J) (31), Vabu sought a declaration that it was not an employer within the meaning of the Superannuation Act and therefore was not obliged to lodge a superannuation guarantee statement for the year in question. Ireland J declined to grant this relief because he decided that at common law the relationship between Vabu and all of its couriers was properly to be characterised as one of employment.

16 It is important to note that the couriers retained by Vabu and whose classification was at stake in the taxation decision included those who might be termed motor vehicle and motorcycle couriers as well as bicycle couriers. Before Ireland J, evidence was adduced from three couriers as to the method and manner in which they operated as couriers for Vabu. In each case the witnesses had purchased their own transportation, being light commercial or alternatively domestic-type motor vehicles. No evidence was led from any of the bicycle couriers. However, Ireland J appears to have reached a decision applicable indifferently to all the couriers.

17 The evidence before Ireland J included three documents entitled ''Crisis Couriers Work Conditions'', ''General Rules for All Drivers (Document 590)'' and ''General Rules for All Drivers (Document 792)'', which employed terms such as ''whilst working for this company'' and ''termination of employment''. Documents with the same titles are in evidence in this case and we will return to consider their significance.

18 Ireland J noted of the evidence as to work practices that (32):

> ''[w]hile this is not an exhaustive list it does cumulatively lend weight to the proposition that it is not just the act of delivery but also the way in which the delivery is executed which is specified by the company. The company provides sales people who are

(31) *Vabu Pty Ltd* (1995) 30 ATR 303.
(32) *Vabu Pty Ltd* (1995) 30 ATR 303 at 305-306.

responsible for finding customers and so the sole responsibility of the operative is delivery, a factor reflected in the payment regime which operates on the basis of an initial flagfall rate plus a rate per kilometre, variable according to the weight of the package.''

Significantly, Ireland J referred to the importance of work practices, saying (33):

''it is a *system* of work which [Vabu] is providing. In the present case it is [Vabu] which presents its image through uniforms and signage and then imposes its work practices. It is the extent to which those work practices are imposed by the company upon the daily routine of the couriers that is in part determinative of an employer/employee relationship. It is distinguished ... from the company providing a system and then permitting a fully discretionary use of that system by the courier.''

He continued by referring to the general rules in the application document and concluded that (34):

''the minutia of detail therein is indicative of something more than an independent contractor. While many of the rules are statements of common sense (such as carrying radios in a plastic bag while it is raining) others cross this line into the realm of control.''

What the rules demonstrated was the reach of Vabu, with (35):

''a significant degree of constraint on the discretion and flexibility of the courier by the company in undertaking his/her task. In particular, the notion of flexibility, which forms a significant part of the underlying rationale of the relationship of principal and independent contractor, cannot be said to feature with any prominence in the relationship presently under consideration.''

Ireland J concluded that there was a common law relationship of employment between Vabu and all of its couriers.

19 The Court of Appeal allowed Vabu's appeal. Meagher JA observed that the decision of this Court in *Stevens v Brodribb Sawmilling Co Pty Ltd* (36) meant that ''[t]he old test of 'control' is now superseded by something more flexible'' (37). His Honour accepted that the cumulative effect of the conditions of work ''certainly gives [Vabu] a deal of control over its courier'' but said that ''a person may supervise others without becoming their employer'' and that several considerations supported the conclusion that the couriers were not em-

(33) *Vabu Pty Ltd* (1995) 30 ATR 303 at 308.
(34) *Vabu Pty Ltd* (1995) 30 ATR 303 at 310.
(35) *Vabu Pty Ltd* (1995) 30 ATR 303 at 310.
(36) (1986) 160 CLR 16.
(37) *Vabu Pty Ltd* (1996) 33 ATR 537 at 538.

ployees (38). One consideration was that the couriers supplied their own vehicles and had to bear the expense of providing for and maintaining those vehicles, making payments for repairs and insurance, which were "very considerable". Other considerations were the couriers had to provide themselves with their own street directories, telephone books, ropes, blankets and tarpaulins; and that the couriers received no wage or salary. Meagher JA continued (39):

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

He concluded that, "[a]lthough this part of the case is hardly without difficulty", the couriers would be classified at common law as independent contractors (40).

20 Sheller JA agreed that the matters referred to by Meagher JA indicated that "there was not between [Vabu] and the couriers it engaged a common law relationship of employer and employee" (41). His Honour also concluded that the relationship between the couriers and Vabu did not answer the description in s 12(3) of the Superannuation Act of one "wholly or principally for the labour of" a person. Beazley JA agreed with both judgments. Of course, no issue respecting s 12(3) arises in the litigation instituted by Mr Hollis out of which this appeal arises.

21 In the Court of Appeal in the present case, Sheller JA noted that the parties accepted that the way in which the bicycle couriers carried out their work was as described by the Court of Appeal in the taxation decision (42). His Honour also recorded a concession by Mr Hollis that, in light of the taxation decision, "the [bicycle] couriers were not employees of Vabu but independent contractors" (43). In the present case, both the trial judge and Sheller JA therefore proceeded on the footing that, by virtue of the taxation decision, the bicycle couriers were independent contractors.

22 It is significant to note that one of the considerations mentioned by Meagher JA in the taxation decision as indicating that the couriers were independent contractors was that they bore the "very consider-

(38) *Vabu Pty Ltd* (1996) 33 ATR 537 at 538.
(39) *Vabu Pty Ltd* (1996) 33 ATR 537 at 539.
(40) *Vabu Pty Ltd* (1996) 33 ATR 537 at 539.
(41) *Vabu Pty Ltd* (1996) 33 ATR 537 at 542.
(42) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,563.
(43) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,566.

able'' expense of providing, maintaining and insuring their own vehicles. It is apparent that Meagher JA was there concerned with expense in relation to motor vehicles and motorcycles. The purchase and maintenance of a bicycle could hardly be termed a ''very considerable'' expense. It may be that, in the taxation decision, a case that was, as his Honour put it, ''hardly without difficulty'', a different result might properly have been reached respecting Vabu's bicycle couriers from that which obtained respecting its other couriers. However, it is unnecessary to express any conclusion on this matter. It is sufficient to say that this case concerns liability arising from the activity of a bicycle courier, not a motor vehicle or motorbike courier. For the reasons that follow, the relationship between Vabu and its bicycle couriers in the present case is properly to be characterised as one of employment.

The evidence in the present litigation

23 In the present case, the trial judge appears to have felt constrained by the result in the taxation decision to characterise the relationship between the bicycle couriers and Vabu as one of principal and independent contractor and, as a result, dealt somewhat imprecisely with the terms of those contracts. However, the trial judge accepted evidence of Vabu's fleet administrator that couriers starting work with Vabu were given a modicum of instruction and filled out ''employment forms''. These seemed to have consisted of a three page document. The first page, on a Crisis Couriers letterhead, was headed ''CONTRACT FOR SERVICE'' and contained spaces for recording personal details. The second page was an inventory sheet headed ''RADIO EQUIPMENT & UNIFORMS'' and contained checkboxes for this equipment under the headings ''OUT'' and ''BACK''. At the bottom was a space for the interviewer's comments and a declaration, with space underneath for a signature and date, that read:

> ''I HAVE READ, UNDERSTOOD AND AGREE TO WORK UNDER THE CONDITIONS AS SET DOWN BY THE ABOVE COMPANY PER DOCUMENT 792.''

The third page was headed ''THESE POINTS ARE TO BE ADHERED TO AND UNDERSTOOD'' and contained 11 points that roughly summarised the content of Document 792. It included the following terms:

> ''1. DRIVERS TERMINATING CONTRACTS OF CARRIAGE WILL HAVE THEIR LAST WEEKS PAY HELD AGAINST ANY OVERCHARGES OR UNPAID CASH JOBS ETC FOR SIX (6) WEEKS FROM THE FIRST FRIDAY AFTER PAY WEEK ENDS.
> 2. THIS COMPANY DOES NOT PAY HOSPITAL BILLS FOR ANY COURIER INVOLVED IN AN ACCIDENT. ANY DRIVER OR RIDER WHO SUSTAINS AN INJURY SHOULD REPORT IN WRITING TO THE MANAGER ALL DETAILS REGARDING THE ACCIDENT AND ANY INJURIES SUSTAINED AS A RESULT.

3. A uniform with the company's logos attached must be worn at all times whilst working for this company.

. . .

5. Drivers must be *neat and tidy* at all times. Scruffy hair and dirty and ripped apparel will not be tolerated. It is your responsibility when leaving the company to return all clothing washed or dry cleaned.
6. Loss or damage to goods in transit is the responsibility of the sub-contractor.
7. Marine and public liability insurance is $7.65 per week. Please note that any claim is subject to $1,000 excess.
8. All equipment and uniforms issued by the company shall remain its property and shall be returned in full on termination of driver's last contract of carriage. Any losses or damage to equipment will be at the driver's cost.

. . .

11. Your vehicle should be clean and roadworthy. This company will in future request drivers to update their vehicle if it considers that vehicle not to be in a presentable state for our clients."

24 It would thus appear that the contractual relationship between Vabu and its bicycle couriers, upon whom, as Ireland J correctly observed in the taxation decision, Vabu imposed its work practices, was partly oral and partly in writing, as evidenced by the third page of the employment form and Documents 590 and 792. Document 590 was produced in May 1990, while Document 792 was produced in July 1992. The latter appeared to supersede the former but both were given to new drivers after July 1992. Some important aspects of the contract, such as the rate of remuneration for deliveries, were not recorded in the written documents. Further, although Documents 590 and 792 both referred to annual and sick leave, Vabu's fleet administrator gave evidence that no payments of annual leave or sick leave were given, and no superannuation deductions were made by Vabu in respect of bicycle couriers in 1994. It should be added that the relationship between the parties, for the purposes of this litigation, is to be found not merely from these contractual terms. The system which was operated thereunder and the work practices imposed by Vabu go to establishing "the totality of the relationship" between the parties; it is this which is to be considered (44).

The present litigation — the decision of the Court of Appeal

25 The second and third grounds of Mr Hollis' claim ("common law estoppel" and the *Trade Practices Act* issues) were expressly abandoned before the Court of Appeal (45). Sheller JA (with whom

(44) *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29.
(45) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,565.

Giles JA agreed) dismissed Mr Hollis' appeal in respect of the refusal of the application to join CIC as a defendant. Submissions for Mr Hollis in respect of the first ground were put on two heads. It was submitted that Vabu was vicariously liable for the negligence of the bicycle courier as its servant or agent; and, secondly, that Vabu was directly liable to Mr Hollis by way of a non-delegable duty of care owed to him as the user of a public thoroughfare (46).

26 As previously mentioned, Sheller JA addressed the vicarious liability issue on the footing that the bicycle couriers were independent contractors. His Honour rejected the claims that Vabu was vicariously liable for the acts of its bicycle couriers. He rejected Mr Hollis' submission that the activity in which the bicycle couriers were engaged on behalf of Vabu was "itself a hazardous one or dangerous because of [Vabu's] emphasis on speedy delivery and the recognition that a significant number of couriers disobeyed traffic rules and posed a danger to pedestrians" (47). He also held that "[t]here was not and could not be any finding that Vabu directly authorised the offending courier to drive his bicycle in an illegal or negligent manner" (48), thus (it was said) invoking an "agency" exception to the usual rule of non-liability of a principal. This matter was discussed recently in *Scott v Davis* (49).

27 Sheller JA also rejected the claim based upon a non-delegable duty of care. After correctly noting that "[i]n order that there be a non-delegable duty of care there must first be a duty of care" (50), he considered that submissions for Mr Hollis had elided the step of finding a duty with that of determining its delegability. His Honour said that "[a]lthough it was never stated with this precision I understand [Mr Hollis'] submission to be that the business conducted by Vabu was so hazardous to other users of public streets in the vicinity, that such conduct gave rise to a duty to such users to ensure that reasonable care and skill was taken for their safety" (51). He held that the business conducted by Vabu was not inherently dangerous to other street users, and that as a result no special relationship importing a non-delegable duty of care existed between Vabu and those street users (52).

(46) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,566.
(47) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,566.
(48) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,568.
(49) (2000) 204 CLR 333 at 388 [168]. See also *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 575. *Morley v Gaisford* (1795) 2 H Bl 441 [126 ER 639] and *Chandler v Broughton* (1832) 1 C & M 29 [149 ER 301] are authority for the proposition that a master was directly liable for the trespasses of his servant where the acts comprising it were done "at [the master's] command".
(50) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,568. See *Kondis v State Transport Authority* (1984) 154 CLR 672 at 684-685; *Jones v Bartlett* (2000) 205 CLR 166 at 228 [217].
(51) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,569.
(52) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,570.

28 Davies A-JA dissented on this issue. Referring in particular to the transcript of evidence given before the Parliamentary Joint Standing Committee Upon Road Safety (Staysafe) (53), he held that Vabu did owe a duty of care to street users due to the nature of its business. This was because (54):

> ''[t]he nature of [Vabu's] business required couriers to use the streets and footpaths for the delivery of parcels. The couriers were obliged to accept and perform work in respect of which time limits for delivery had been imposed by [Vabu]. It could be reasonably foreseen that, unless reasonable care was taken, pedestrians in the city would be likely to suffer injury to their person or property. It was known that the couriers 'posed danger to pedestrians'. And it was known that pedestrians were vulnerable because of the difficulty of identifying and recovering damages from the couriers.''

Davies A-JA concluded that this duty was non-delegable, so that engagement of an independent contractor to undertake the business of Vabu was not sufficient to avoid liability (55). Although Vabu did not directly authorise the doing of the precise act of negligence complained of, he held that ''[i]t was inevitable, as a result of the way in which the business of [Vabu] was structured, that people going about their ordinary business in the streets of Sydney would be injured'' (56).

The grounds of appeal open in this Court

29 The special leave application to this Court was drawn and argued in terms of ''vicarious liability''. One ground of grant of special leave was whether the Court of Appeal was in error in finding that Vabu ''was not vicariously liable for torts committed during the course of work being performed at its request, and on its behalf by bicycle couriers retained by it''. This was not limited to a relationship of principal and independent contractor. Vicarious liability may also flow (and indeed more usually flows) from a relationship of employment. In written submissions on the appeal, counsel for Mr Hollis submitted that this vicarious liability also arose from a relationship of employer and employee. Counsel for Vabu contended that, given the concession in the Court of Appeal, it was no longer open to the appellant to challenge the finding that the bicycle courier was an independent contractor.

30 Nevertheless, this Court heard full oral argument on this matter, and we would treat the employee/independent contractor issue as open in this Court.

(53) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,571.
(54) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,574.
(55) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,576.
(56) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,576.

31 The concession in the Court of Appeal was one as to a proposition (more accurately, a conclusion) of law alone, and not as to the facts on which that proposition rested (57). In *Zuijs v Wirth Brothers Pty Ltd* (58), the same concession had been made in the New South Wales Supreme Court but was held not to stand in the way of this Court hearing argument and, indeed, holding to the contrary on appeal. Moreover, it has not been demonstrated that any substantial prejudice would result to Vabu in allowing Mr Hollis now to argue this point. All the facts necessary for determination of the question were adduced and proved at trial and no new fact is sought to be or needs to be raised (59). Further, one might have thought that, as a practical matter, there would have been considerable obstacles in the path of any challenge to the finding of a relationship of principal and independent contractor at trial or in the Court of Appeal because it would have been contrary to the prior holding of the Court of Appeal in the taxation decision.

Vicarious liability

32 In *Northern Sandblasting Pty Ltd v Harris* (60), McHugh J referred to the force of arguments which would justify the imposition of liability on employers for the acts of independent contractors. It has long been accepted, as a general rule (61), that an employer is vicariously liable for the tortious acts of an employee but that a principal is not liable for the tortious acts of an independent contractor (62). That general rule was not challenged in this appeal. This fact and the availability of a full answer to the appeal within current doctrine makes this an unsuitable case in which to explore the larger question reserved by McHugh J and Kirby J in *Northern Sandblasting*. The foundation case for the present authorities is considered to have been *Quarman v Burnett* (63). In that case, Parke B, speaking for the Court of Exchequer in banc, settled the difference of

(57) *Bowes v Chaleyer* (1923) 32 CLR 159 at 172.
(58) (1955) 93 CLR 561 at 563, 568-569.
(59) *Sydney Harbour Trust Commissioners v Wailes* (1908) 5 CLR 879 at 889; *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413 at 426; *Adams v Chas S Watson Pty Ltd* (1938) 60 CLR 545 at 548; *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319; *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8; *Crampton v The Queen* (2000) 206 CLR 161 at 172 [13], 183-184 [50], 202-203 [111]; *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at 314 [12]; 176 ALR 693 at 696.
(60) (1997) 188 CLR 313 at 366-367. See also at 392, per Kirby J.
(61) See the observations of Brennan J in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 575.
(62) *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 329-330, 366.
(63) (1840) 6 M & W 499 [151 ER 509].

opinion in *Laugher v Pointer* (64) in favour of the views of Lord Tenterden and Littledale J (65).

33 The tokens — ''employer'', ''employee'', ''principal'' and ''independent contractor'' — which provide the currency in this field of discourse have survived for a very long time and have been adapted to very different social conditions. As was pointed out in *Scott v Davis* (66), vicarious liability derived originally from mediaeval notions of headship of a household, including wives and servants; their status in law was absorbed into that of the master (67).

34 The nature of employment relationships has changed greatly since the age of feudal status. This particularly is true over the course of the last century, in which not only the character of employment but also the common law of negligence developed apace. In *Darling Island Stevedoring and Lighterage Co Ltd v Long* (68), Fullagar J expressed the view, surely correctly, that the modern doctrine respecting the liability of an employer for the torts of an employee was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy.

35 A fully satisfactory rationale for the imposition of vicarious liability in the employment relationship has been slow to appear in the case law. Dean Prosser and Professor Keeton observe (69):

> ''A multitude of very ingenious reasons have been offered for the vicarious liability of a master: he has a more or less fictitious 'control' over the behavior of the servant; he has 'set the whole thing in motion,' and is therefore responsible for what has happened; he has selected the servant and trusted him, and so should suffer for his wrongs, rather than an innocent stranger who has had no opportunity to protect himself; it is a great concession that any man should be permitted to employ another at all, and there should be a corresponding responsibility as the price to be paid for it — or, more frankly and cynically, 'In hard fact, the [real] reason for [ ] employers' liability is [...] the damages are taken from a deep pocket.' (70)'' (Footnote omitted.)

Each of these particular reasons is persuasive to some degree but,

(64) (1826) 5 B & C 547 [108 ER 204].
(65) As Abbott CJ, Lord Tenterden had been the trial judge who entered a nonsuit and he then sat on the application for a new trial.
(66) (2000) 204 CLR 333 at 409-410 [230].
(67) Holmes, ''Agency'', *Harvard Law Review*, vol 4 (1891) 345, at p 364; Wigmore, ''Responsibility for Tortious Acts: Its History'', *Harvard Law Review*, vol 7 (1894) 315 (Pt 1); 383 (Pt 2).
(68) (1957) 97 CLR 36 at 56-57.
(69) *Prosser and Keeton on the Law of Torts*, 5th ed (1984), §69, p 500.
(70) Baty, *Vicarious Liability* (1916), p 154.

given the diversity of conduct involved, probably none can be accepted, by itself, as completely satisfactory for all cases (71).

36 Two further points should be made. The first is that it is one thing to appreciate the considerations which in modern times support the doctrine of vicarious liability; it is another to select particular terms which provide the criterion of liability in a given case. Secondly, examination is required of the content of those terms. That content will reflect, from the facts of case to case, the particular force given to the considerations supporting the doctrine of vicarious liability. Terms such as "employee" and "independent contractor", and the dichotomy which is seen as existing between them, do not necessarily display their legal content purely by virtue of their semantic meaning.

37 Observations by Windeyer J in *Brooks v Burns Philp Trustee Co Ltd* (72) are in point here. His Honour was dealing with the different ways in which the terms "void" and "unenforceable" had been used with respect to illegality and said (73):

> "The words used do not matter if the actual legal result they are used to express be not in doubt or debate. But it has always seemed to me likely to lead to error, in matters such as this, to adopt first one of the familiar legal adjectives ... and then having given an act a label, to deduce from that its results in law. That is to invert the order of inquiry, and by so doing to beg the question, and allow linguistics to determine legal rights."

38 Earlier, in *Bugge v Brown* (74), Isaacs J said that the phrases "the course of his employment", "scope of employment" and "sphere of employment" are used "to indicate the just limits of a master's responsibility for the wrongdoing of his servant", and that this is why "the law recognises that it is equally unjust to make the master responsible for every act which the servant chooses to do".

39 In *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia* (75), Dixon J explained the dichotomy between the relationships of employer and employee, and principal and independent contractor, in a passage

(71) The imperfections of the various rationales are discussed in Note, "An Efficiency Analysis of Vicarious Liability Under the Law of Agency", *Yale Law Journal*, vol 91 (1981) 168, at pp 169-173; Flannigan, "Enterprise Control: The Servant-Independent Contractor Distinction", *University of Toronto Law Journal*, vol 37 (1987) 25, at pp 26-37; Davis, "Vicarious Liability, Judgment Proofing, and Non-Profits", *University of Toronto Law Journal*, vol 50 (2000) 407, at pp 409-412.

(72) (1969) 121 CLR 432.

(73) *Brooks* (1969) 121 CLR 432 at 458.

(74) (1919) 26 CLR 110 at 117-118.

(75) (1931) 46 CLR 41.

which has frequently been referred to in this Court (76). His Honour explained that, in the case of an independent contractor (77):

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

40 This statement merits close attention. It indicates that employees and independent contractors perform work for the benefit of their employers and principals respectively. Thus, by itself, the circumstance that the business enterprise of a party said to be an employer is benefited by the activities of the person in question cannot be a sufficient indication that this person is an employee. However, Dixon J fixed upon the absence of representation and of identification with the alleged employer as indicative of a relationship of principal and independent contractor. These notions later were expressed positively by Windeyer J in *Marshall v Whittaker's Building Supply Co* (78). His Honour said that the distinction between an employee 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''. In *Northern Sandblasting* (79), McHugh J said:

> ''The rationale for excluding liability for independent contractors is that the work which the contractor has agreed to do is not done as the representative of the employer.''

41 In *Bazley v Curry* (80), the Supreme Court of Canada saw two fundamental or major concerns as underlying the imposition of vicarious liability. The first is the provision of a just and practical remedy for the harm suffered as a result of the wrongs committed in the course of the conduct of the defendant's enterprise. The second is the deterrence of future harm (81), by the incentive given to employers to reduce the risk of accident, even where there has been no negligence in the legal sense in the particular case giving rise to the claim.

(76) *Kondis v State Transport Authority* (1984) 154 CLR 672 at 691-692; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 574; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 329-330, 366.
(77) *Colonial Mutual* (1931) 46 CLR 41 at 48.
(78) (1963) 109 CLR 210 at 217.
(79) (1997) 188 CLR 313 at 366.
(80) [1999] 2 SCR 534 at 552-555.
(81) A matter discussed in 1934 by Seavey in his essay, ''Speculations as to 'Respondeat Superior''' [1934] *Harvard Legal Essays* 433, at p 448.

42 In general, under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise. In delivering the judgment of the Supreme Court of Canada in *Bazley v Curry* (82), McLachlin J said of such cases that "the employer's enterprise [has] created the risk that produced the tortious act" and the employer must bear responsibility for it. McLachlin J termed this risk "enterprise risk" and said that "where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong" (83). Earlier, in *Ira S Bushey & Sons, Inc v United States* (84), Judge Friendly had said that the doctrine of respondeat superior rests "in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities".

"Control"

43 These notions also influence the meaning to be given today to "control" as a discrimen between employees and independent contractors. In *Stevens v Brodribb Sawmilling Co Pty Ltd* (85), the Court was adjusting the notion of "control" to circumstances of contemporary life and, in doing so, continued the developments in *Zuijs v Wirth Brothers Pty Ltd* (86) and *Humberstone v Northern Timber Mills* (87). In *Humberstone* (88), Dixon J observed that the regulation of industrial conditions and other statutes had made more difficult of application the classic test, whether the contract placed the supposed employee subject to the command of the employer. Moreover, as has been pointed out (89):

> "The control test was the product of a predominantly agricultural society. It was first devised in an age untroubled by the complexities of a modern industrial society placing its accent on the division of functions and extreme specialisation. At the time when the courts first formulated the distinction between employees and independent contractors by reference to the test of control, an employer could be expected to know as much about the job as his employee. Moreover,

(82) [1999] 2 SCR 534 at 548.
(83) *Bazley v Curry* [1999] 2 SCR 534 at 548-549.
(84) (1968) 398 F 2d 167 at 171; cf Dobbs, *The Law of Torts* (2001), vol 2, §§334, 338.
(85) (1986) 160 CLR 16.
(86) (1955) 93 CLR 561.
(87) (1949) 79 CLR 389.
(88) (1949) 79 CLR 389 at 404.
(89) Glass, McHugh and Douglas, *The Liability of Employers in Damages for Personal Injury*, 2nd ed (1979), pp 72-73.

the employer would usually work with the employee and the test of control and supervision was then a real one to distinguish between the employee and the independent contractor. With the invention and growth of the limited liability company and the great advances of science and technology, the conditions which gave rise to the control test largely disappeared. Moreover, with the advent into industry of professional men and other occupations performing services which by their nature could not be subject to supervision, the distinction between employees and independent contractors often seemed a vague one."

44 It was against that background that in *Brodribb* (90) Mason J said that, whilst these criticisms might readily be acknowledged:

> "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 Brothers Pty Ltd* (91). 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."

45 So it is that, in the present case, guidance for the outcome is provided by various matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability. These include, but are not confined to, what now is considered "control".

The facts of this case

46 The matters of policy which Callinan J mentions in his reasons might be significant in evidentiary circumstances which differed from those of this case, and which might disclose a different relationship between the parties in respect of whom vicarious liability is postulated. However, considerations respecting economic independence and freedom of contract are not, with respect, determinative of the legal character of the relationship between the bicycle courier and Vabu as disclosed by the evidence.

47 In classifying the bicycle couriers as independent contractors, the Court of Appeal fell into error in making too much of the circumstances that the bicycle couriers owned their own bicycles, bore the expenses of running them and supplied many of their own accessories. Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations. A different conclusion might, for example, be appropriate where the investment in capital equipment was more significant, and greater skill and training were

(90) (1986) 160 CLR 16 at 29.
(91) (1955) 93 CLR 561 at 571.

required to operate it. The case does not deal with situations of that character. The concern here is with the bicycle couriers engaged on Vabu's business. A consideration of the nature of their engagement, as evidenced by the documents to which reference has been made and by the work practices imposed by Vabu, indicates that they were employees.

48 First, these couriers were not providing skilled labour or labour which required special qualifications. A bicycle courier is unable to make an independent career as a free-lancer or to generate any "goodwill" as a bicycle courier. The notion that the couriers somehow were running their own enterprise is intuitively unsound, and denied by the facts disclosed in the record.

49 Secondly, the evidence shows that the couriers had little control over the manner of performing their work. They were required to be at work by 9 am (92) and were assigned in a work roster according to the order in which they signed on. If they signed on after this time, they would not necessarily work on their normal "channel". Couriers were not able to refuse work. It was stated in Document 590 that "ANY DRIVER WHO DOES SO WILL NO LONGER WORK FOR THIS FIRM". The evidence does not disclose whether the couriers were able to delegate any of their tasks or whether they could have worked for another courier operator in addition to Vabu during the day. It may be thought unlikely that the couriers would have been permitted by Vabu to engage in either activity.

50 Thirdly, the facts show that couriers were presented to the public and to those using the courier service as emanations of Vabu. They were to wear uniforms bearing Vabu's logo. Vabu stated in Document 792 that "DRIVERS SHOULD ALWAYS BE AWARE THAT THEY ARE A DIRECT REPRESENTATION OF THE COMPANY. THEIR ATTITUDE AND APPEARANCE CAN ONLY BE SEEN AS A DIRECT REFLECTION OF OUR ORGANISATION". Certain attire (thongs, singlets, swim shorts, torn jeans and other unclean or torn attire) was not permitted. Further, Vabu required that all couriers "should be clean shaven unless that person is bearded".

51 The question of the significance of livery in cases where the issue is whether the individual wearing it is an employee or an independent contractor is not a new one. In *Quarman v Burnett* (93) itself, Parke B said that the wearing by the coachman, with the consent of the defendants, of their livery was a "matter of evidence only of the man being their servant, which the fact at once answers". Here, there is rather more to the facts.

52 Couriers were required to wear Vabu livery partly from Vabu's wish to advertise its business. Mr Hollis was unable to identify the cyclist who struck him down other than by the Vabu livery. Vabu knew that a

(92) Vabu's fleet administrator gave evidence that, in 1994, the starting time was 8 am.
(93) (1840) 6 M & W 499 at 509 [151 ER 509 at 513].

significant number of its couriers rode in a dangerous manner but had failed to compel its couriers to adopt an effective means of personal identification. Rather, the effect of Vabu's system of business was to encourage pedestrians to identify the couriers "as a part of [Vabu's] own working staff"; the phrase is that of Dean Prosser and Professor Keeton (94), used by them as a guide to classification of a person as an employee.

53 Fourthly, there is the matter of deterrence. Reference has been made to the findings of fact in this case respecting the knowledge of Vabu as to the dangers to pedestrians presented by its bicycle couriers and the failure to adopt effective means for the personal identification of those couriers by the public. One of the major policy considerations said by the Supreme Court of Canada in *Bazley v Curry* (95) to support vicarious liability was deterrence of future harm. McLachlin J said (96):

> "Fixing the employer with responsibility for the employee's wrongful act, even where the employer is not negligent, may have a deterrent effect. Employers are often in a position to reduce accidents and intentional wrongs by efficient organisation and supervision. Failure to take such measures may not suffice to establish a case of tortious negligence directly against the employer . . .
>
> Beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community. Holding the employer vicariously liable for the wrongs of its employee may encourage the employer to take such steps, and hence, reduce the risk of future harm. A related consideration raised by Fleming is that by holding the employer liable, 'the law furnishes an incentive to discipline servants guilty of wrongdoing' (97)."

54 Fifthly, Vabu superintended the couriers' finances: Vabu produced pay summaries and couriers were required to dispute errors by 6 pm Friday of the same week. "Unjustified or unsubstantiated" claims for additional charges, such as due to waiting time, wrong address or excess weight, could result in total deduction of that particular job payment. There was no scope for the couriers to bargain for the rate of their remuneration. Evidence in chief was given by Vabu's fleet administrator that the rate of remuneration to the bicycle couriers had remained unchanged between 1994 and 1998. Vabu was authorised to

(94) *Prosser and Keeton on the Law of Torts*, 5th ed (1984), §70, p 501. See also Dobbs, *The Law of Torts* (2001), vol 2, §338.
(95) [1999] 2 SCR 534.
(96) *Bazley v Curry* [1999] 2 SCR 534 at 554-555.
(97) Fleming, *The Law of Torts*, 9th ed (1998), p 410.

hold for six weeks the last week's pay of a courier against any overcharges, unpaid cash jobs or outstanding insurance claims. Final cheques would not be processed until all of Vabu's property had been returned. Failure to return Vabu's equipment, including the uniforms, or the return of damaged equipment or unwashed uniforms resulted in replacement or washing costs being deducted from this amount. Vabu undertook the provision of insurance for the couriers and deducted the amounts from their wages and, as discussed above, passed on an excess to all bicycle couriers and did not pay medical or hospital costs (98). The method of payment, per delivery and not per time period engaged, is a natural means to remunerate employees whose sole duty is to perform deliveries, not least for ease of calculation and to provide an incentive more efficiently to make deliveries.

55 Moreover, Vabu stipulated in Document 590 that "[n]o annual leave will be considered for the period November to Christmas Eve, nor for the week prior to Easter. Leave requests will be considered in accordance with other applications and should be submitted to the manager in writing at least 14 days prior". This suggests that their engagement by Vabu left the couriers with limited scope for the pursuit of any real business enterprise on their own account.

56 Sixthly, the situation in respect of tools and equipment also favours, if anything, a finding that the bicycle couriers were employees. Apart from providing bicycles and being responsible for the cost of repairs, couriers were required to bear the cost of replacing or repairing any equipment of Vabu that was lost or damaged, including radios and uniforms. Although a more beneficent employer might have provided bicycles for its employees and undertaken the cost of their repairs, there is nothing contrary to a relationship of employment in the fact that employees were here required to do so. This is all the more so because the capital outlay was relatively small and because bicycles are not tools that are inherently capable of use only for courier work but provide a means of personal transport or even a means of recreation out of work time. The fact that the couriers were responsible for their own bicycles reflects only that they were in a situation of employment more favourable than not to the employer; it does not indicate the existence of a relationship of independent contractor and principal.

57 Finally, and as a corollary to the second point mentioned above, this is not a case where there was only the right to exercise control in incidental or collateral matters. Rather, there was considerable scope for the actual exercise of control (99). Vabu's whole business consisted of the delivery of documents and parcels by means of couriers. Vabu retained control of the allocation and direction of the various

(98) In Document 792, Vabu informed its couriers that "[t]his company does not pay hospital or medical bills for any courier involved in an accident".

(99) *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29.

deliveries. The couriers had little latitude. Their work was allocated by Vabu's fleet controller. They were to deliver goods in the manner in which Vabu directed. In this way, Vabu's business involved the marshalling and direction of the labour of the couriers, whose efforts comprised the very essence of the public manifestation of Vabu's business. It was not the case that the couriers supplemented or performed part of the work undertaken by Vabu or aided from time to time; rather, as the two documents relating to work practices suggest, to its customers they *were* Vabu and effectively performed all of Vabu's operations in the outside world. It would be unrealistic to describe the couriers other than as employees.

58 It should be observed that this conclusion is different from a decision of the Court of Appeal of New Zealand upon somewhat similar facts in *TNT Worldwide Express (NZ) Ltd v Cunningham* (100). There, an "owner-driver" vehicle courier employed under a standard form contract was held to be an independent contractor. One term of the contract stated that "THE relationship between the Contractors and the Company is and shall be for all purposes that of independent Contractor and neither this Agreement nor anything herein contained or implied shall constitute the relationship of employer and employee between the parties" (101). Although such terms are not of themselves determinative, as parties cannot deem the relationship between themselves to be something it is not (102), this term was held to summarise the relationship between the parties accurately. Casey J pointed out that the contract contained terms which suggested that "each party was genuinely trading off benefits under one relationship for perceived advantages under the other" (103). Thus, for example, although the courier company controlled the appearance of the courier's vehicle, the courier was given control of his own chosen area of territory, was responsible for employing relief drivers, and "could certainly profit from sound management and performance of his task. Indeed, it seems obvious that this was the principal attraction of the arrangement" (104). The courier was required to hold a continuous goods service licence under the *Transport Act* 1962 (NZ), was assured a guaranteed minimum payment per month and was subject to a twelve month restraint of trade clause from the date of termination of the

(100) [1993] 3 NZLR 681.
(101) *TNT Worldwide Express* [1993] 3 NZLR 681 at 692.
(102) See *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138 at 150-151; *Adam v Newbigging* (1888) 13 App Cas 308 at 315; *Ex parte Delhasse; In re Megevand* (1878) 7 Ch D 511 at 526, 528, 532. See also *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 at 699: "The proper classification of a contractual relationship must be determined by the rights and obligations which the contract creates, and not by the label the parties put on it."
(103) *TNT Worldwide* [1993] 3 NZLR 681 at 695.
(104) *TNT Worldwide* [1993] 3 NZLR 681 at 697.

agreement (105). As a result, by reason of the terms in the contract, the courier "accepted only that degree of control and supervision necessary for the efficient and profitable conduct of the business he was running on his own account as an independent contractor" (106). This is unlike the present case where, as discussed above, the bicycle couriers could not be said to have been conducting any business of their own.

59 Reliance was placed on the fact that the New South Wales Parliament had considered the question of change to the law in relation to liability for collisions between courier cyclists and others but had not enacted any legislation on the subject. It was submitted that, in these circumstances, this Court should defer to that legislative inactivity. It is one thing to say, as was discussed in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (107), that the common law may develop by analogy to the enacted law. It is another proposition that the common law should stand still because the legislature has not moved. Nevertheless, this proposition might have some attraction if this Court were contemplating the reformulation of basic doctrine, for example to reclassify the liability of Vabu, as an independent contractor, in relation to Mr Hollis. However, no such reformulation is proposed. This decision applies existing principle in a way that is informed by a recognition of the fundamental purposes of vicarious liability and the operation of that principle in the context of one of the many particular relationships that has developed in contemporary Australian society.

60 In these circumstances, there is no reason for this Court to decline to exercise an essential attribute of judicial authority, namely the application of principle to the proved facts. The legislature may enact some larger or different reform. Nothing said in these reasons could prevent it from doing so. But, in the circumstances of this litigation, statutory change is not necessary; merely the application of common law doctrine to the facts. There is no occasion for deference by the judicial branch of government to the legislative branch (108).

Conclusion

61 The relationship between Vabu and the bicycle courier who struck down Mr Hollis was that of employer and employee. Vabu thus was vicariously liable for the consequences of the courier's negligent performance of his work.

62 It is unnecessary in the light of the above to address the submissions as to non-delegability of the duty of care.

(105) *TNT Worldwide Express* [1993] 3 NZLR 681 at 684, 690-691, 700.
(106) *TNT Worldwide* [1993] 3 NZLR 681 at 698.
(107) (1999) 201 CLR 49 at 60-63 [19]-[28], 86 [97].
(108) cf Peters, "Assessing the New Judicial Minimalism", *Columbia Law Review*, vol 100 (2000) 1454, at pp 1507-1510.

63 The appeal should be allowed with costs. The orders of the Court of Appeal of 5 November 1999 should be set aside. In lieu thereof the appeal to that Court should be allowed with costs, the verdict and orders of the District Court set aside and judgment entered for Mr Hollis in the sum of $176,313.

64 McHUGH J. The appellant, Gary John Hollis, was seriously injured as a result of the negligence of a courier who was unlawfully riding a bicycle on the footpath when he collided with Mr Hollis. All that is known of the courier is that he was wearing a uniform upon which were the words "Crisis Couriers", the trade name of the respondent, Vabu Pty Ltd (Vabu), a company that runs a document and parcel delivery service. At the time, Vabu employed twenty-five to thirty bicycle riders, as well as a number of motor vehicle drivers, as couriers. It provided radio equipment to the bicycle couriers and allocated delivery jobs to them by radio. The couriers were required to be available at a certain time every day and were not allowed to refuse the delivery jobs that were allocated to them. Vabu issued uniforms to the couriers and required them to wear the uniforms. It also directed the couriers to conduct their work in accordance with specific instructions concerning dress, appearance, language, delivery procedures and dealings with clients. The couriers had to provide their own motor vehicles or bicycles. They received no salaries or wages but were remunerated in accordance with the deliveries that they made. They were taxed as independent contractors. Vabu deducted a certain amount from the couriers' payments each week to contribute towards the cost of Vabu's insurance.

65 Upon these facts, is Vabu liable for the negligence of the unidentified courier? That is the ultimate issue in this appeal which is brought against an order of the New South Wales Court of Appeal dismissing an appeal from the District Court of that State holding Vabu not liable for the negligence of the courier. In my opinion, Vabu is liable because the courier was an agent of Vabu — but not an independent contractor — and was acting as Vabu's representative in carrying out a contractual obligation of Vabu.

66 The case reveals the difficulties in applying traditional rules of liability for a worker's negligence to new and evolving employment practices. The common law has long held that a master is liable for the torts of his or her servant (109). But as the terminology of master and servant suggests, the common law rule developed at a time and in a context far removed from today's modern workforce (110).

(109) *Quarman v Burnett* (1840) 6 M & W 499 [151 ER 509]; *Barwick v English Joint Stock Bank* (1867) LR 2 Ex 259 at 265; *Lloyd v Grace, Smith & Co* [1912] AC 716; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

(110) *Scott v Davis* (2000) 204 CLR 333 at 409-410 [230], per Gummow J, citing Holmes, "Agency", *Harvard Law Review*, vol 4 (1891) 345, at p 364; Wigmore, "Responsibility for Tortious Acts: Its History", *Harvard Law Review*, vol 7

67 Because the Court of Appeal had held in an earlier decision (the taxation decision (111)) that all couriers (including motor vehicle drivers and bicycle riders) who worked for Vabu were independent contractors for the purpose of superannuation deductions, the issue of employee was not litigated in that Court. Indeed, counsel for Mr Hollis conceded that the courier was not an employee of Vabu. Despite the concession, I agree with Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ that in this Court Mr Hollis is entitled to argue that the courier was an employee for whose negligence the employer was vicariously liable. He is not raising "a new argument" (112). The issue was litigated at first instance. All the necessary facts were adduced at trial. The respondent has demonstrated no substantial prejudice and this Court had the benefit of oral and written submissions of the parties on the issue. Because that is so, it is beside the point that Mr Hollis may have conceded the point in the Court of Appeal (113).

68 I also agree with their Honours that the courier was not an independent contractor in the sense of someone who acts as an independent principal, exercising an independent discretion in carrying out a task for his own business interest and who is retained simply to produce a result. The couriers in this case were far removed from the paradigm case of an independent contractor — the person who has a business enterprise and deals with any member of the public or a section of it upon terms and conditions that the contractor sets or negotiates. Moreover, I agree that certain aspects of the work relationship between Vabu and the couriers suggest an employer/employee relationship, according to the classical tests (114). But while the couriers were subject to extensive direction and control by Vabu, were Vabu's representatives and worked for Vabu's business interests, there were features of the relationship which are not typical of a traditional employment relationship. They include the provision by employees of their own equipment — in some cases, motor vehicles — the capacity to incorporate or form their own business

(110) *cont*
(1894) 315 (Pt 1); 383 (Pt 2). See generally Holmes, *The Common Law* (1882), p 17; Glass, McHugh and Douglas, *The Liability of Employers in Damages for Personal Injury*, 2nd ed (1979), pp 72-73; McKendrick, "Vicarious Liability and Independent Contractors — A Re-examination", *Modern Law Review*, vol 53 (1990) 770; Phegan, "Employers' Liability for Independent Contractors in Tort Law", *Judicial Review*, vol 4 (2000) 395.

(111) *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) 33 ATR 537.

(112) cf *University of Wollongong v Metwally [No 2]* (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71.

(113) *Adams v Chas S Watson Pty Ltd* (1938) 60 CLR 545 at 547-548.

(114) (1) the employer's power of selection of his or her worker, (2) the payment of wages or other remuneration, (3) the employer's right to control the method of doing the work, and (4) the employer's right of suspension or dismissal: *Short v J & W Henderson Ltd* [1946] SC(HL) 24 at 33-34.

structure, the tax and superannuation arrangements, and the lack of actual provision for annual leave and sick pay benefits (115).

69 I am not in favour of extending the classical tests or their application to make the couriers employees of Vabu. To do so would be likely to unsettle many established business arrangements and have far-reaching consequences for industrial relations (116), for workers' compensation law (117), for working conditions (118), for the obligations of employers to make superannuation contributions (119) and group tax deductions (120) and for the payment of annual (121) and long service (122) leave and taxes such as payroll tax (123). It would be likely to make employers retrospectively guilty of a number of statutory offences. It is also arguable that departing from the classical tests or their ordinary application might bring within s 51(xxxv) of the Constitution workers who have traditionally been regarded as outside that power. One view of that constitutional power is that it is confined to matters pertaining to the relationship of employer and employee and does not extend to industrial type disputes between employers and independent contractors (124).

70 To hold that the couriers were employees would also require overruling the taxation decision of the Court of Appeal (125) which classified all couriers (including motor vehicle drivers and bicycle riders) who worked for Vabu as independent contractors. The effect of that decision was to relieve Vabu of having to make superannuation contributions for the couriers. This Court refused special leave to appeal from that decision (126).

71 If the couriers were confined to bicycle riders, there would be much force in the contention that, on the classical tests, they were employees. That is because the couriers were subject to extensive control and direction — always a strong indication that the worker is

(115) Although the contract referred to annual leave, in practice there was no annual leave.

(116) *Workplace Relations Act* 1996 (Cth); *Industrial Relations Act* 1996 (NSW).

(117) *Workers Compensation Act* 1987 (NSW), ss 4, 9, 155.

(118) *Employment Protection Act* 1982 (NSW), s 4, Pt 2; *Occupational Health and Safety Act* 2000 (NSW), ss 4, 8, 12.

(119) *Superannuation Guarantee (Administration) Act* 1992 (Cth).

(120) *Taxation Administration Act* 1953 (Cth).

(121) *Annual Holidays Act* 1944 (NSW), ss 2, 3, 12.

(122) *Long Service Leave Act* 1955 (NSW), ss 3, 4, 10.

(123) *Pay-roll Tax Act* 1971 (NSW); *Taxation Administration Act* 1996 (NSW).

(124) *R v Commonwealth Industrial Court Judges; Ex parte Cocks* (1968) 121 CLR 313 at 317, 325 and 327. More recent cases leave open the question whether the constitutional power goes beyond matters pertaining to the relationship of employer and employee. See *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297 at 312-313; *Re Finance Sector Union of Australia; Ex parte Financial Clinic (Vic) Pty Ltd* (1992) 178 CLR 352 at 373.

(125) *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) 33 ATR 537.

(126) *Federal Commissioner of Taxation v Vabu Pty Ltd* (1997) 35 ATR 340.

an employee (127). But the couriers included those who provided their own motor vehicles. Given the course of authority in this Court concerning workers who provide their own equipment, it seems impossible to say that those couriers who provided their own motor vehicles were employees (128). The right to supervise or direct the performance of a task cannot transform into a contract of service what is in substance an independent contract (129) and, when a person has to provide equipment such as a motor vehicle, the conventional view is that the person is not an employee. In principle, there can be no distinction between those couriers working for Vabu who provide their own bicycles and those couriers who provide their own motor vehicles.

72 Rather than attempting to force new types of work arrangements into the so-called employee/independent contractor "dichotomy" based on medieval concepts of servitude, it seems a better approach to develop the principles concerning vicarious liability in a way that gives effect to modern social conditions. As I pointed out in *Burnie Port Authority v General Jones Pty Ltd* (130) and reiterated in *Scott v Davis* (131), the genius of the common law is that the first statement of a common law rule or principle is not its final statement. The contours of rules and principles expand and contract with experience and changes in social conditions. The law in this area has been and should continue to be "sufficiently flexible to adapt to changing social conditions" (132).

73 Accordingly, I think that the Court of Appeal was correct in holding that the courier was not an employee having regard to the classical tests for determining whether the agent of an employer is an employee. Nevertheless, in my opinion, the trial judge and the Court of Appeal erred in holding that the company was not liable for the courier's negligence. That is because:

- Vabu had delegated to the courier a task that Vabu had agreed to perform;
- the courier was not acting as an independent functionary but was carrying out the task as Vabu's representative;
- the courier was subject to Vabu's general direction and control; and

(127) *Performing Right Society Ltd v Mitchell & Booker (Palais de Danse) Ltd* [1924] 1 KB 762 at 767.

(128) *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539; *Humberstone v Northern Timber Mills* (1949) 79 CLR 389; *Wright v Attorney-General (Tas)* (1954) 94 CLR 409.

(129) *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539 at 552.

(130) (1994) 179 CLR 520 at 585.

(131) *Scott v Davis* (2000) 204 CLR 333 at 370 [109].

(132) *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 28-29, per Mason J.

- the courier was acting within the scope of the authority conferred on him by Vabu.

74 In *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (133) (*CML*), this Court held that a principal may be liable for the careless conduct of an agent causing damage to a third party even if the agent is not an employee. The principal will be liable when the conduct occurs while the agent is carrying out a task for the benefit of the principal as his or her representative. In my view, it is the agency principle recognised by this Court in *CML* that provides the appropriate solution for this important case. Applying that principle, the courier was an agent for whose negligence Vabu was responsible.

The accident

75 On 22 December 1994, Mr Hollis, who was also working as a courier but with another firm, picked up a parcel from a building in Harris Street, Ultimo. On leaving the building, he took two steps onto the footpath and was struck by a bicycle courier. The courier was wearing a green jacket with gold writing across the front and back of it, which said "Crisis Couriers". The collision knocked Mr Hollis to the ground. He suffered serious injury to his knee. The courier fell off his bicycle and landed near Mr Hollis, but got up, "dusted himself off, picked up his bike and said 'Sorry mate' and left the scene", ignoring pleas for help from Mr Hollis.

76 Mr Hollis sued Vabu in negligence (and other grounds which have since been abandoned) for the injuries that he suffered as a result of the accident. By his statement of claim and throughout the trial, he contended that the courier was the agent or servant of Vabu and that Vabu was vicariously liable for his negligence. Alternatively, Mr Hollis argued that, in respect of the activities of the couriers, Vabu owed a "non-delegable" duty of care to users of public thoroughfares and was liable for any injury resulting from the negligent conduct of the couriers. If this argument were accepted, Vabu would be liable for the negligence of the unidentified courier even if the couriers were independent contractors (134).

The findings of the trial judge

77 The trial judge, Acting Judge Wright, found that "the negligence of the bike rider was the cause or continuing cause of the accident ... the

(133) (1931) 46 CLR 41 at 46, per Gavan Duffy CJ and Starke J; at 49-50, per Dixon J. See also *Scott v Davis* (2000) 204 CLR 333 at 342-343 [19], per Gleeson CJ; at 370-371 [110], per McHugh J.

(134) *Kondis v State Transport Authority* (1984) 154 CLR 672; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

risk of injury caused by the negligence and illegal (135) act of the bike rider riding his bike on the footpath was plainly foreseeable''. His Honour assessed damages at $176,313, but he held that the courier was not an employee or agent for whose negligence Vabu was liable.

78 Acting Judge Wright made the following findings that are relevant to the issue of whether the courier was an independent contractor or employee or merely the agent of Vabu: 1. Vabu set the rates of remuneration. There was no scope for negotiation of those rates between Vabu and the bicycle couriers. 2. Vabu allocated the work. There was no scope for bidding for individual jobs by the riders. 3. Vabu assumed all responsibility as to the direction, training (if any), disciplinc, job allocation and attire of the couriers. 4. Vabu provided the couriers with numerous items of equipment including the only means of communication for the purposes of job allocation and control. The items remained Vabu's property. 5. The riders were required to wear Vabu's livery at all times, partly due to the desire by Vabu to advertise its services. 6. Vabu imposed requirements such as insurance and the deductions on the riders and without any opportunity for negotiation.

79 His Honour added that it was clear from the evidence that the drivers were in a ''take it or leave it'' situation and that Vabu wielded a ''significant measure of practical authority'' over the bicycle couriers.

80 Although acknowledging that the evidence supported the inference that the courier was an agent or employee, his Honour said:

> ''There [was] evidence ... sufficient to justify a different conclusion and when that evidence is considered in the light of the conclusions of the Court of Appeal in *Vabu* (136), I do not consider that it is open to me to find that the bicycle rider in question was the employee or agent of [Vabu].''

81 Mr Hollis appealed to the New South Wales Court of Appeal on several grounds. One of them was that ''the Trial Judge erred in failing to find that the negligent rider was the servant or agent of the Respondent''.

The decision of the Court of Appeal

82 By majority the Court of Appeal dismissed the appeal (137). Sheller JA (with whom Giles JA agreed) concluded that the bicycle couriers were independent contractors, not employees. He said that, because of the taxation decision, Mr Hollis had accepted that conclusion (138). His Honour also said that ''while no doubt the

(135) The courier, in riding his bicycle on the footpath, was breaching s 11(1)(b) of the General Traffic Regulations (NSW) which were then in force.
(136) *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) 33 ATR 537.
(137) *Hollis v Vabu Pty Ltd* [1999] Aust Torts Rep ¶81-535.
(138) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,566 [19].

couriers were agents of Vabu at least to perform the business of fast delivery by bicycle of parcels and documents in the inner city area, Vabu was not vicariously responsible for a tort occasioned by the performance of that function which Vabu had not directly authorised'' (139). His Honour acknowledged that Vabu imposed conditions of urgency and speedy riding on its drivers but he held that it did not amount to an express or implied authorisation for the courier's tortious act. He distinguished *CML* on the ground that it applied only in the context of statements made during the course of negotiations (140). Sheller JA also rejected Mr Hollis's submission on non-delegable duty. After reviewing the authorities (141), his Honour said (142):

> ''[O]n no basis, in my opinion, on the facts of this case, can there be set up some general duty of care owed by Vabu to other users of public streets derived from the way in which the parcels and documents are carried. Even less can such duty be elevated to one described as a non-delegable duty.''

83 Davies A-JA dissented. He found that Vabu, by employing the couriers, owed a duty of care towards pedestrians such as Mr Hollis and had breached that duty (143). He accepted that the bicycle couriers were independent contractors but held that the couriers functioned as part of the respondent's organisation and that Vabu was liable for their negligent conduct (144).

Changing social conditions and new work practices

84 The practice of employers contracting out work that, in former times was done by their employees, is nowadays a common practice (145). Of this practice, Phegan J has written (146):

> ''In tort law it creates the prospect of a decreasing number of cases in which the injured plaintiff can assume that an employer, in the traditional master-servant sense, will be available to be held liable

(139) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,568 [25].
(140) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,567 [22].
(141) *Kondis v State Transport Authority* (1984) 154 CLR 672; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.
(142) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,570 [33].
(143) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,574 [50].
(144) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,573 [46].
(145) *Scott v Davis* (2000) 204 CLR 333 at 366-367 [101].
(146) Phegan, ''Employers' Liability for Independent Contractors in Tort Law'', *Judicial Review*, vol 4 (2000) 395, at p 395. At 420 he said that this case brings into sharp relief the ''ramifications for vicarious liability law of the progressive vertical disintegration of employment''. See also McKendrick, ''Vicarious Liability and Independent Contractors — A Re-examination'', *Modern Law Review*, vol 53 (1990) 770 and Collins, ''Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws'', *Oxford Journal of Legal Studies*, vol 10 (1990) 353.

for the negligence of an employee in the course of employment. As more work is contracted out by employers, the typical employment relationship becomes one of employer-independent contractor rather than employer-employee. This trend requires re-examination of the principles which govern the liability of employers for independent contractors."

85 If the law of vicarious liability is to remain relevant in the contemporary world, it needs to be developed and applied in a way that will accommodate the changing nature of employment relationships. But any such developments or applications must be done consistently with the principles that have shaped the development of vicarious liability and the rationales of those principles. They should also be done in a way that has the least impact on the settled expectations of employers and those with whom they contract.

Rationales for vicarious liability

86 In *Darling Island Stevedoring and Lighterage Co Ltd v Long* (147), Fullagar J said that the common law rule for an employer's liability for his or her employee was "adopted not by way of an exercise in analytical jurisprudence but as a matter of policy, which did not really need to be juristically rationalised, but might perhaps be justified (however illogically) as an extension of the notion of agency as a ground of liability". Similarly, Professor Fleming said that "the modern doctrine of vicarious liability cannot parade as a deduction from legalistic premises, but should be frankly recognised as having its basis in a combination of policy considerations" (148). He proceeded to articulate those policy considerations (149) that have traditionally formed the basis of the doctrine (150):

"Most important of these is the belief that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise; that the master is a more promising source of recompense than his servant who is apt to be a man of straw without insurance; and that the rule promotes wide distribution of tort losses, the employer being a most suitable channel for passing them on through liability insurance and higher prices. The principle gains additional support for its admonitory value in accident

(147) (1957) 97 CLR 36 at 56-57.

(148) Fleming, *The Law of Torts*, 9th ed (1998), p 410.

(149) See also Atiyah, *Vicarious Liability in the Law of Torts* (1967), Ch 2; Laski, "The Basis of Vicarious Liability", *Yale Law Journal*, vol 26 (1916) 105; Douglas, "Vicarious Liability and Administration of Risk", *Yale Law Journal*, vol 38 (1929) 584; Baty, *Vicarious Liability* (1916), p 154; *Prosser and Keeton on the Law of Torts*, 5th ed (1984) §69, p 500; *Scott v Davis* (2000) 204 CLR 333 at 370-371 [110].

(150) Fleming, *The Law of Torts*, 9th ed (1998), p 410.

prevention. In the first place, deterrent pressures are most effectively brought to bear on larger units like employers who are in a strategic position to reduce accidents by efficient organisation and supervision of their staff. Secondly, the fact that employees are, as a rule, not worth suing because they are rarely financially responsible, removes from them the spectre of tort liability as a deterrent of wrongful conduct. By holding the master liable, the law furnishes an incentive to discipline servants guilty of wrongdoing, if necessary by insisting on an indemnity or contribution." (Footnotes omitted.)

87 Not only does the doctrine of vicarious liability have its basis in policy considerations, but common law courts acknowledge that the evolution of the doctrine continues to be guided by policy. When the Supreme Court of Canada was recently presented with the opportunity to consider and restate the principles underlying an employer's vicarious liability for the torts of its workers, McLachlin J, delivering the judgment of the Court, acknowledged that (151):

> "Increasingly, courts confronted by issues of vicarious liability where no clear precedent exists are turning to policy for guidance, examining the purposes that vicarious liability serves and asking whether imposition of liability in the new case before them would serve those purposes."

88 Her Honour said that the two fundamental policy concerns that underlie vicarious liability are (1) the provision of a just and practical remedy for harm; and (2) the deterrence of future harm (152):

> "First and foremost is the concern to provide a just and practical remedy to people who suffer as a consequence of wrongs perpetrated by an employee ... The idea that the person who introduces a risk incurs a duty to those who may be injured lies at the heart of tort law ... This principle of fairness applies to the employment enterprise and hence to the issue of vicarious liability ... This policy interest embraces a number of subsidiary goals. The first is the goal of effective compensation ...
>
> However, effective compensation must also be fair, in the sense that it must seem just to place liability for the wrong on the employer. Vicarious liability is arguably fair in this sense. The employer puts in the community an enterprise which carries with it certain risks. When those risks materialise and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organisation that creates the enterprise and hence the risk should bear the loss ...

(151) *Bazley v Curry* [1999] 2 SCR 534 at 545 [14], citing *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 SCR 299 and the above cited passage from Fleming, *The Law of Torts*, 9th ed (1998), p 410 (footnotes omitted).

(152) *Bazley v Curry* [1999] 2 SCR 534 at 552-555 [29]-[33].

> The second major policy consideration underlying vicarious liability is deterrence of future harm. Fixing the employer with responsibility for the employee's wrongful act, even where the employer is not negligent, may have a deterrent effect. Employers are often in a position to reduce accidents and intentional wrongs by efficient organisation and supervision. Failure to take such measures may not suffice to establish a case of tortious negligence directly against the employer ... Beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community. Holding the employer vicariously liable for the wrongs of its employee may encourage the employer to take such steps, and hence, reduce the risk of future harm.''

89 Upon the facts of this case, these policy considerations call for the imposition of liability on Vabu. First, holding Vabu liable obviously provides people in Mr Hollis's position with *effective* compensation. In this case, the individual courier escaped identification. It is not possible to seek a remedy from him personally. But even if he could be identified, it is likely that he and other couriers would be unable to provide adequate compensation for their victims. Because that is so, the company is likely to be a ''more promising source of recompense'' than the individual couriers.

90 It is also *fair* to make Vabu compensate Mr Hollis for the negligence of its courier in the same way as it is fair to hold an employer liable for the negligence of its employees. This notion of fairness stems from Vabu's control of the couriers and the fact that the couriers were acting for the economic benefit of Vabu. It was Vabu who introduced into the community a business activity that carried with it the risk of injury to users of public thoroughfares. When the accident occurred, the courier was ''on the business'' of Vabu. He was also serving its economic interests in other respects. He was carrying out its core business activity — the delivery of documents. He was wearing a Crisis Couriers uniform. The trial judge held that the obligation of couriers to wear the uniform was ''partly due to the desire by [Vabu] to advertise its services''. The contract with the couriers also reminded them that their performance and conduct in public and towards clients resulted in ''more business and more income for all''. The contract described sales efforts of the company as being a benefit to the couriers and expected the couriers to expand Vabu's client base when the opportunity arose. Finally, Vabu deducted moneys from the couriers for insurance, and Vabu's insurance included cover for liability incurred by ''sub contractors in respect of work done on behalf of Crisis Couriers''. The situation in this case then is one where ''a person who employs others to advance his own

economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise'' (153).

91 Secondly, this is a case where imposing liability may be justified as a means of deterring future harm to users of public thoroughfares. The trial judge found:

> ''...
> 8. That [Vabu] had known for some time prior to the plaintiff's accident that personal identification would lessen the risk of couriers riding contrary to road rules.
> 9. That for the same period [Vabu] knew that injured pedestrians would find it difficult to identify particular couriers without means of personal identification.
> 10. That [Vabu] had been at various times party to voluntary schemes which involved to some extent effective means of personal identification.
> 11. That these fell into disuse and part of the reason for this was [Vabu's] failure to compel its riders to adopt the means of further personal identification suggested.
> ...''

92 These findings indicate that by efficient supervision Vabu could reduce the risk of injury that arose from its business activities. The ''deterrence of future harm'' justification for imposing vicarious liability is therefore applicable to Vabu and its couriers, in the sense that it encourages accident reduction and provides incentive for the discipline of workers guilty of wrongdoing.

93 It is true that the couriers employed by Vabu are neither employees nor independent contractors in the strict sense. But there is no reason in policy for upholding the strict classification of employees and non-employees in the law of vicarious liability and depriving Mr Hollis of compensation. Rather than expanding the definition of employee or accepting the employee/independent contractor dichotomy, the preferable course is to hold that employers can be vicariously liable for the tortious conduct of agents who are neither employees nor independent contractors. As McLachlin J pointed out in *Bazley v Curry* ''a meaningful articulation of when vicarious liability should follow in new situations ought to be animated by the twin policy goals of fair compensation and deterrence that underlie the doctrine, rather than by artificial or semantic distinctions'' (154). To hold that an employer is vicariously liable for the conduct of a worker who is not an employee or independent contractor does not affect their relationship in other areas of the law or their freedom to contract between themselves or to arrange their business affairs. And it has the great advantage of

(153) See Atiyah, *Vicarious Liability in the Law of Torts* (1967), pp 17-18, citing Baty, *Vicarious Liability* (1916).
(154) *Bazley v Curry* [1999] 2 SCR 534 at 556 [36].

ensuring that the doctrine of vicarious liability remains relevant in a world of rapidly changing work practices.

Formulation of a principle consistent with precedent and policy

94 Moreover, it is not only sound policy but precedent which suggests that Vabu should bear responsibility for the negligence of its courier even though the courier was not an employee. In *Scott v Davis*, I reviewed the relevant authorities (155) and said that (156):

> "a principal is also liable for the wrongful acts of an agent where the agent is performing a task which the principal has agreed to perform or a duty which the principal is obliged to perform and the principal has delegated that task or duty to the agent, provided that the agent is not an independent contractor. The principal is also liable for the wrongful acts of a person who is acting on the principal's behalf as a representative and not as an independent principal."

95 This view is consistent with numerous statements by eminent common lawyers over the centuries since agents became known to the common law. I referred to many of these statements in my judgment in *Scott v Davis* (157). It is unnecessary to do so again. It is enough to refer to the statement of Willes J in *Barwick v English Joint Stock Bank* (158):

> "In all these cases it may be said, as it was said here, that the master has not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

96 This Court applied that principle in *CML* (159). *CML* concerned an agent of an assurance company who was not an employee, though he represented the company and was subject to a degree of direction and control. The agent (acting against his principal's express prohibition) defamed the plaintiff while attempting to obtain assurance business. Gavan Duffy CJ and Starke J cited *Barwick* in holding that (160):

(155) *Laugher v Pointer* (1826) 5 B & C 547 [108 ER 204]; *Quarman v Burnett* (1840) 6 M & W 499 [151 ER 509]; *Barwick v English Joint Stock Bank* (1867) LR 2 Ex 259; *Mackay v Commercial Bank of New Brunswick* (1874) LR 5 PC 394; *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317; *Lloyd v Grace, Smith & Co* [1912] AC 716; *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41.

(156) *Scott v Davis* (2000) 204 CLR 333 at 346 [34].

(157) (2000) 204 CLR 333 at 348-359 [40]-[72].

(158) (1867) LR 2 Ex 259 at 266.

(159) (1931) 46 CLR 41.

(160) *CML* (1931) 46 CLR 41 at 46.

"... one is liable for another's tortious act 'if he expressly directs him to do it or if he employs that other person as his agent and the act complained of is within the scope of the agent's authority'. It is not necessary that the particular act should have been authorised: it is enough that the agent should have been put in a position to do the class of acts complained of."

97 Dixon J, with whom Rich J agreed, did not deny this general proposition. He did note that "[i]n most cases in which a tort is committed in the course of the performance of work for the benefit of another person, he cannot be vicariously responsible if the actual tortfeasor is not his servant and he has not directly authorised the doing of the act which amounts to a tort" (161). But in that passage Dixon J was distinguishing work done by contractors who are exercising an "independent function" and work "which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance". In holding the employer liable, Dixon J focused on the aspect of *representation* (the element which Littledale J in *Laugher v Pointer* (162) said justified the imposition of vicarious liability on an employer). Dixon J said (163):

"The independent contractor carries out his work, not as a representative but as a principal. But a difficulty arises when the function entrusted is that of representing the person who requests its performance in a transaction with others, so that the very service to be performed consists in standing in his place and assuming to act in his right and not in an independent capacity ... [I]n performing these services for the Company, he does not act independently, but as a representative of the Company ..."

98 Dixon J thought that there was no extension of principle in holding the insurer liable for the tort of its agent in that case.

99 *CML* decides, therefore, that a principal is liable for the wrongful act of an agent causing damage to a third party when that act occurred while the agent was carrying out some activity as the principal's authorised representative in a dealing with a third party. This principle is not limited to any particular types of wrongful acts. There is no reason in precedent, principle or policy to suggest that it is not as applicable to tortious acts as it is to tortious statements (164). Further, *CML* clearly demonstrates that it is not necessary for the principal "specifically" to "instigate, authorise or ratify" the agent's wrongful

(161) *CML* (1931) 46 CLR 41 at 48.
(162) (1826) 5 B & C 547 at 554 [108 ER 204 at 207].
(163) *CML* (1931) 46 CLR 41 at 48-49.
(164) cf Sheller JA in *Hollis v Vabu Pty Ltd* [1999] Aust Torts Rep ¶81-535 at 66,567 [22]; Atiyah, *Vicarious Liability in the Law of Torts* (1967), p 113; *Scott v Davis* (2000) 204 CLR 333 at 366-367 [101].

act. In fact, the principal will be liable even when there is an express prohibition against the tortious conduct involved (165). Gavan Duffy CJ and Starke J said that "if an unlawful act done by an agent be within the scope of his authority, it is immaterial that the principal directed the agent not to do it" (166). Dixon J said (167):

> "The wrong committed arose from the mistaken or erroneous manner in which the actual authority committed to him was exercised when acting as a true agent representing his principal in dealing with third persons."

100 Finally, the application of the principle is not confined to harm done to a third party in the course of dealing with that party. As I said in *Scott v Davis* (168), it would be "illogical and anomalous to hold a principal liable for the intentional torts of an agent, such as fraud, while acting as a representative in the course of dealing with a third party but not liable for the careless conduct of an agent occurring in the course of carrying out a task for the principal as his or her representative". In *CML* (169), Dixon J said:

> "I do not think a distinction can be maintained between breaches of duty towards third persons with whom the agent is authorised to deal and breaches of duty towards strangers, committed in exercising that authority. If what he does is done as the representative of his principal, it cannot matter ... whether the injury which it inflicts is a wrong to one rather than another person."

The principle applied

101 Applying the principles laid down in *CML* to the present case, Vabu is liable for the negligence of the courier. (1) The courier was performing for Vabu its duty to make deliveries to or on behalf of its clients. (2) The courier performed the duty for the economic benefit of Vabu. (3) The courier was the representative of Vabu. So much was apparent to the public and clear as between Vabu and the couriers. Vabu issued all bicycle couriers with several documents when they commenced work. One was entitled "Contract for Service" which incorporated a "Document 792". Document 792 was headed "General Rules for All Drivers" (this covered bicycle couriers). At the top appeared the following emphatic passage:

(165) *Limpus v London General Omnibus Co* (1862) 1 H&C 526 [158 ER 993]; *CML* (1931) 46 CLR 41.
(166) *CML* (1931) 46 CLR 41 at 47.
(167) *CML* (1931) 46 CLR 41 at 50.
(168) *Scott v Davis* (2000) 204 CLR 333 at 357 [68].
(169) (1931) 46 CLR 41 at 50.

"DRIVERS SHOULD ALWAYS BE AWARE THAT THEY ARE A DIRECT REPRESENTATION OF THE COMPANY. THEIR ATTITUDE AND APPEARANCE CAN ONLY BE SEEN AS A DIRECT REFLECTION OF OUR ORGANISATION."

102 This "direct representation of the company" described in its internal documents also manifested itself to customers and the public. The uniform bearing the Crisis Couriers name and logo across front and back was readily identifiable and served to promote Vabu's business interests. In the present case, it was the only means by which Mr Hollis could identify the courier. "The Crisis Bike Couriers" were also promoted in a brochure advertising Vabu's services to the public. (4) The courier was not acting as an independent functionary who ordinarily contracted with members of the public or a section of it. He was contracted to work for Vabu and was subject to Vabu's general direction and control. Document 792 spelt out dress regulations, which required couriers to wear uniforms and to be presentable at all times. It informed the couriers that the maintenance and repair costs of vehicles were their responsibility. It reminded the couriers of deadlines and the priorities for deliveries. There were general and specific instructions about dealings with clients. There were also detailed directions setting out the procedures to be followed when using the radio communication system. The couriers were also required to contribute a certain amount each week for marine and public liability insurance. They were also required to keep their vehicles in a clean and roadworthy condition. Vabu allocated the work, and a courier could not refuse to do what was allocated to him or her. In emphatic terms, Document 792 declared that "NO DRIVER IS TO REFUSE WORK. ANY DRIVER WHO DOES SO WILL NO LONGER WORK FOR THIS FIRM". (5) When the accident to Mr Hollis occurred, the courier was acting within the scope of the authority conferred on him by Vabu. The trial judge found that at the time of the accident the courier was "on the business" of Vabu. If it matters, and I do not think it does, Vabu was well aware that the bicycle couriers contravened traffic regulations and were likely to cause injury to persons using public thoroughfares.

Order

103 The appeal must be allowed.

104 CALLINAN J. The respondent, Vabu Pty Ltd, conducted a business of delivering and collecting parcels and documents in Sydney, as "Crisis Couriers". Some of the deliveries and collections were made by couriers on bicycles. The respondent regarded these couriers as independent contractors for whose negligence it was not liable. When they began their work the couriers were handed three documents, one of which was referable, in part at least, to couriers on bicycles and contained the following paragraphs:

"THESE POINTS ARE TO BE ADHERED TO AND UNDERSTOOD.

1. DRIVERS TERMINATING CONTRACTS OF CARRIAGE WILL HAVE THEIR LAST WEEKS PAY HELD AGAINST ANY OVERCHARGES OR UNPAID CASH JOBS ETC FOR SIX (6) WEEKS FROM THE FIRST FRIDAY AFTER PAY WEEK ENDS.
2. THIS COMPANY DOES NOT PAY HOSPITAL BILLS FOR ANY COURIER INVOLVED IN AN ACCIDENT. ANY DRIVER OR RIDER WHO SUSTAINS AN INJURY SHOULD REPORT IN WRITING TO THE MANAGER ALL DETAILS REGARDING THE ACCIDENT AND ANY INJURIES SUSTAINED AS A RESULT.
3. A uniform with the company's logos attached must be worn at all times whilst working for this company.
4. Signs (at least 2) are to be worn on your vehicle at all times whilst working for this company. *They are not to be altered.*
5. Drivers must be *neat and tidy* at all times. Scruffy hair and dirty and ripped apparel will not be tolerated. It is your responsibility when leaving the company to return all clothing washed or dry cleaned.
6. Loss or damage to goods in transit is the responsibility of the sub-contractor.
7. Marine and public liability insurance is $7.65 per week. Please note that any claim is subject to $1,000 excess.
8. All equipment and uniforms issued by the company shall remain its property and shall be returned in full on termination of driver's last contract of carriage. Any losses or damage to equipment will be at the driver's cost.
9. Swearing or foul language on the radio will not be tolerated.
10. Push bikers are required to wear helmets whilst working.
11. Your vehicle should be clean and roadworthy. This company will in future request drivers to update their vehicle if it considers that vehicle not to be in a presentable state for our clients."

105 Training provided by the respondent to couriers was rudimentary and consisted of supervision over one to two days by an experienced courier. Couriers, after engagement by the respondent, worked generally in accordance with the arrangements set out in the document I have quoted. In addition to a uniform the respondent supplied each courier with a two-way radio. Couriers provided and maintained their own bicycles and other articles necessary for their work, such as directories, ropes, blankets and tarpaulins (170). One reason for the respondent's insistence upon the wearing of a uniform by each courier was the advertisement of its business. There were no obvious means by which couriers could separately be personally identified. A scheme

(170) *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) 33 ATR 537. Sheller JA in the instant case noted that both parties accepted the description of the working relationship in the taxation case. See [1999] Aust Torts Rep ¶81-535 at 66,566.

to facilitate identification was introduced but had ceased to be promoted before December 1994. The respondent was the sole arbiter of the work to be done by the respective couriers although in practice it allocated work in the order in which couriers called in to the respondent daily to seek work. In that respect, the couriers were, unlike ordinary employees, in direct competition with one another. Couriers were not paid wages. They were paid for, and in respect of the collections and deliveries made by them.

106 The respondent effected insurance, the premium for which was funded by deductions from the couriers' remuneration, against liability to pay compensation for personal injury or property damage caused by an occurrence in connexion with the respondent's business. By an extension of the policy in force at the material time the definition of the insured was expanded to include "sub-contractors in respect of work done on behalf of Crisis Couriers". There were no contracts between couriers and the people to whom and from whom they delivered and collected parcels and documents.

107 On 22 December 1994 the appellant was struck while walking on a footpath at Ultimo in Sydney by a courier on a bicycle wearing the livery of Crisis Couriers. In riding a bicycle on the footpath the courier infringed s 11(1)(b) of the General Traffic Regulations (NSW) which were then in force. The appellant suffered personal injuries. The identity of the courier could not be established. The appellant brought proceedings against the respondent in negligence (and upon other bases) in the District Court of New South Wales. The appellant's action was tried by Acting Judge Wright. The appellant contended that the respondent was liable for the cyclist's negligence on one of three bases: that the cyclist was the respondent's servant or agent; that at common law the respondent was estopped from denying liability for its cyclist courier's negligence; and that the respondent was in breach of ss 52 and 55A of the *Trade Practices Act* 1974 (Cth) by misrepresenting to the public that its courier service carried insurance of utility to injured members of the public. Well before the conclusion of the trial but after the appellant had closed his case he indicated that he would seek to join the respondent's insurer as a party. In foreshadowing that course, counsel for the appellant made this submission:

> "I've just been talking to my friend and just raising with him a couple of the issues that are concerning me at the moment about this hearing. It would seem very straight forward. *The relationship for the moment as my understanding of the case is that the courier and the company are not an employer/employee relationship.* They may or may not be principal and agent. If they're principal and agent then it would seem the plaintiff must succeed. If they are not principal and agent it would seem the plaintiff would fail. There is another possibility which has occurred to me this morning and that is — actually prior to this talking with Mr Lidden and that is that

the insurer itself ought [to] be brought in as a defendant. If that is right that the insurer ought to be defendant. The question would be ought the insurer be brought in now before the matter goes any further or whether the matter ought to finish and can the insurer then be sued after that. And that's the position I'm in at the moment your Honour. It's a late time to consider it I appreciate that but best considered late than never I would think.'' (Emphasis added.)

108 His Honour found against the appellant, and in view of the submission that I have quoted, not surprisingly held that the courier was not an employee of the respondent or its agent, on the basis, essentially, that he was bound to do so, because, relevantly, on very similar facts the Court of Appeal of New South Wales in litigation between the respondent and the Federal Commissioner of Taxation (171) directed to a different issue (obligations that the respondent might owe under the *Superannuation Guarantee (Administration) Act* 1992 (Cth) if its couriers were employees for the purposes of the Act) had concluded that the couriers were independent contractors, a holding that the appellant accepted to be correct in the Court of Appeal in this case.

109 The appellant's appeal to the Court of Appeal (Sheller and Giles JJA, Davies A-JA dissenting) was dismissed (172). Sheller JA, with whom Giles JA agreed, rejected a submission that the couriers were engaged in hazardous activities. As his Honour pointed out, hazards, if any, derived not from the nature of the respondent's business but from the way in which the courier rode his or her bicycle while carrying out work for the respondent. His Honour said this (173):

''There was not and could not be any finding that Vabu directly authorised the offending courier to drive his bicycle in an illegal or negligent manner. The trial Judge said that in his view there was no basis to find that Vabu had expressly or impliedly authorised the commission by the courier who collided with Mr Hollis of his tortious act or acts in that regard. His Honour did find that there was a requirement on the couriers as part of their contractual terms of engagement with Vabu to do their work under conditions of urgency, which would require speedy riding as required from time to time, and that the couriers were under pressure to work to deadlines or within time constraints required by Vabu. But the case is not one of the class exemplified by Brennan J in *Kondis* (174) when his Honour said:

'If I prevail upon the driver of a taxi to drive dangerously, I

(171) *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) 33 ATR 537.
(172) *Hollis v Vabu Pty Ltd* [1999] Aust Torts Rep ¶81-535.
(173) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,568.
(174) *Kondis v State Transport Authority* (1984) 154 CLR 672 at 692.

cannot escape liability for the consequences by pointing to the general employment of the driver by the owner of the taxi.'

In the present case Vabu can point to the fact that the courier owned the bicycle and used it as an independent contractor.

In my opinion, while no doubt the couriers were agents of Vabu at least to perform the business of fast delivery by bicycle of parcels and documents in the inner city area, Vabu was not vicariously responsible for a tort occasioned by the performance of that function which Vabu had not directly authorised.''

110 Sheller JA then dealt with the submission that the respondent owed a non-delegable duty of care to the appellant (175):

''Vabu engaged the couriers as independent contractors to carry by bicycle, parcels and documents on its behalf and in fulfilment of engagements it had with third parties. As I have said there is nothing inherently dangerous to other users of public streets in such an activity. If anything the activity is less inherently dangerous to other street users than using motor vehicles or motor bicycles to carry parcels and documents. In either case the activity carries no inherent risk of injury unless it is negligently performed (176). The fact that Vabu conducts such a business gives rise to no general duty of care to other street users and creates no special relationship between Vabu and such users.

To the extent to which parcels and documents are carried on a particular vehicle or a particular bicycle, the driver or rider owes the ordinary duty of care to other users of public streets. If that driver or rider is an employee of Vabu, Vabu is vicariously responsible for any breach by the driver or rider of that duty. If the driver or rider is an independent contractor, the application of the principles enunciated by Dixon J in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (177) means that Vabu is not vicariously liable for such a breach. On no basis, in my opinion, on the facts of this case, can there be set up some general duty of care owed by Vabu to other users of public streets derived from the way in which the parcels and documents are carried. Even less can such duty be elevated to one described as a non-delegable duty.''

111 In reaching a different conclusion Davies A-JA was impressed by a transcript of proceedings before a Parliamentary Joint Standing Committee upon road safety which took evidence about collisions between courier cyclists and others, and which found its way into evidence in this case (178). His Honour said that this and other

(175) *Hollis v Vabu Pty Ltd* [1999] Aust Torts Rep ¶81-535 at 66,570.
(176) *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 333.
(177) (1931) 46 CLR 41 at 48.
(178) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,571-66,572.

evidence before the Court brought this case within a category of cases involving ''inherently dangerous'' conduct in respect of which the respondent was obliged to take, but had failed to take, appropriate precautions. Precautions not taken by the respondent were, for example, a failure to engage couriers who would be careful, a failure to train them properly, and a failure to devise a system of work that would enable the couriers to make deliveries safely for a reasonable remuneration for a day's work (179). His Honour was of the opinion that the circumstances and terms of the couriers' engagement with the respondent, taken with the vulnerability of pedestrians, meant that the respondent should be held personally liable for the acts of its couriers done in the course of its business.

The appeal to this Court

112 The appellant appeals to this Court on the following grounds:

That the Court of Appeal was in error:

(a) When it found that the respondent was not vicariously liable for torts committed during the course of work being performed at its request, and on its behalf by bicycle couriers retained by it.

(b) When it failed to find that within the neighbourhood of the respondent's delivery area, it owed a duty of care to pedestrians, because of the inherent risk of injury to them created by its system of work, including its system of remunerating couriers retained by it.

(c) When it failed to find that the respondent owed a general duty of care to pedestrians lawfully using footpaths and roads within the respondent's delivery area.

(d) When it failed to find that the respondent was subject to a duty to devise a system of work which would ensure that the bicycle couriers whom it employed to deliver and pick up articles would do so safely.

113 The appellant also seeks to argue that notwithstanding the concurrent findings of fact at first instance, and by the majority in the Court of Appeal on the basis of his concession there (180), he should be permitted to argue that the relationship between the respondent and the cyclist who collided with him was of employer and employee and not one between principal and independent contractor. In my opinion the appellant should not now be permitted to retract the concession that was made in the Court of Appeal. It was generally consistent with the submission made on his behalf during the trial and which I have quoted. I cannot be satisfied that the respondent's conduct of the trial was uninfluenced by that submission. And although the concession in the Court of Appeal was made by reference to the earlier case in which the respondent was a party, in terms it was unqualified. The appellant

(179) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,576.
(180) *Hollis* [1999] Aust Torts Rep ¶81-535 at 66,566.

did not contend on the application for special leave that he would wish to withdraw his concession and litigate this issue on appeal. The relevant ground of appeal eschewed agency or employment and made reference to "bicycle couriers retained by it". The appellant is bound therefore to argue his case in this Court upon the basis that the courier was an independent contractor (181). The appellant still contended, however, that the relationship between the courier and the respondent, however it might be described, was in the circumstances one which rendered the respondent liable for the courier's negligence in colliding with him.

114 In substance, what the appellant sought was to create a new category of vicarious liability of which the predominant characteristic would be the financial imbalance between the contracting parties for the services provided. In argument, he placed heavy reliance on the disparity in bargaining power between the respondent and its couriers, and other assumed economic relationships and consequences. The appellant contended that to treat the relationship between the courier and the respondent as an arm's length relationship between independent contractors was to elevate form above substance. One submission was put in these terms:

> "The economic advantages accruing to an employer by avoiding statutory provisions governing employment, (such as Long Service Leave, and Superannuation etc) and the Federal Government's push for individualised, rather than industry wide awards, will lead to increasing variation in the terms and conditions under which persons are engaged. But the classification of an agreement as one creating a relationship of employment, or of independent contract, whilst highly relevant, should not be the sole determinant of the issue of whether a vicarious duty of care is owed by one party to the agreement in respect of the tortious conduct of the other."

The principal submission of the appellant focused upon the extent of the respondent's control over its couriers but still referred to matters of economics:

> "Where, as in this case, the form of the agreement is dictated by one party, and the economic power of one party so preponderates that it can dictate the financial provisions of the agreement, and the subservient party is wholly engaged in the business of the dominant party, performing tasks of a type normally performed by a servant, and there is no evidence that the subservient party was, at the relevant time, in fact carrying on any truly independent business, or had any real opportunity to do so, and where the subservient party is required by the dominant party to wear its uniform, so that the dominant party is effectively holding the subservient party out to the

(181) cf *University of Wollongong v Metwally* (1984) 158 CLR 447.

world as its servant, the relationship is really one of servitude, and where, in the course of carrying out a task for the dominant party, the subservient party commits a tort, and his tortious conduct can be regarded as an improper mode of carrying out an authorised act, vicarious liability should be imposed on the dominant party, however the contractual relationship between the parties may be categorised.''

115 It was also submitted by the appellant that the imposition of liability upon the respondent would provide an efficient means of passing on losses to insurers, and the fixing of higher prices for goods and services by the ''respondent's enterprise'', a legal personality better able to assess the risks, and pay the insurance necessary to cover them.

116 This last submission reflects assumptions about the equitable distribution of losses and economic efficiencies often made by authors of textbooks, and, on occasion, judges, and others, of the kind discussed in *Scott v Davis* (182) and which may tend to lead to distortions in the law of tortious liability and the assessment of damages, and to invite the intrusion of the courts into quasi-legislative activity (183).

117 There are further difficulties about these sorts of assumptions. They are only assumptions. They may, I suspect, have been made without access to all of the relevant information, and not always after rigorous scrutiny by people adequately qualified to process and evaluate that information. Take this case. No doubt there are attractions in imposing an effectively unqualified liability upon the respondent for its courier's negligence. The respondent can, indeed has, insured against it. An injured plaintiff would have recourse, indirectly at least, to the insurer if he could sheet home liability to the respondent. And, as the appellant submits, the respondent may be able to pass on the cost of any increased premiums to its customers. The theory is that the insurer and the respondent would then have a financial incentive to ensure that any couriers are properly trained and safety standards rigidly enforced. I say ''theory'' because there is no material before the Court, and I suspect, detailed and reliable material available anyway, to demonstrate a sufficient correlation between increases in insurance premiums and improvements in safety regimes in the somewhat unusual sorts of circumstances with which this case is concerned. In this case the respondent was relevantly insured, albeit at the expense of the couriers. It may therefore be an equally valid assumption that couriers have an incentive themselves to be careful, and that in any event their remuneration is fixed at a sum sufficient to enable them to meet the cost of the premiums paid on their behalf by the respondent. One likely consequence, as Davies A-JA in the Court of Appeal

(182) (2000) 204 CLR 333 at 448-454 [341]-[345].
(183) *Scott v Davis* (2000) 204 CLR 333 at 454 [346].

suggested of different arrangements, might be slower and fewer deliveries by couriers for the same daily remuneration. Who is to say, however, whether the same remuneration could then be paid? And there may be other consequences of economic significance. It might be to the overall economic advantage of the community that couriers operate as independent contractors efficiently, quickly and competitively, that they continue to provide a service that in the past large, centralised organisations were unable or unwilling to provide, or provided less efficiently. It might also be in the interests of the community, the respondent, its customers and the couriers that the last have a direct financial incentive to deliver articles quickly under the present arrangements. The imposition of liability upon the respondent for their courier's negligence and the changes which that might bring to the relationship between them might lead to the creation, in both form and substance, of a relationship of employer and employee, a relationship that neither may want. It should not be too readily assumed that all, or indeed most, couriers would wish for it. The provider of a bicycle and his or her services may wish to retain his or her freedom to work or not to work and a measure of independence just as keenly as a computer programmer whose resources are a computer, learning, experience and skills. The modesty of the means of doing the work, a bicycle and other minor equipment, and the relatively unskilled capacity to ride it are not to be denigrated on those accounts. Opportunities to do remunerative and useful work for unskilled people may shrink as the cost of directly employing people increases. To impose upon the respondent and couriers the rigidities of a contract of service might perhaps be to destroy an avenue of work for people who might find it difficult to gain remunerative employment otherwise. How to strike the right balance, where the public interest truly lies, what is the most efficient way of dealing with the rights and obligations of the parties, and to what extent economic efficiency should influence legal principles are not questions which I can, or, in my opinion, the Court, should seek to answer here.

118 One thing is clear, however. Although Parliament has looked at some of the matters upon which the appellant relies (184), and has legislated to cover the aspect of workers' compensation, it has not chosen to intervene by legislation to create a liability of the kind for which the appellant contends. The questions that I have posed are ones for Parliament rather than the courts. In short, in my respectful

(184) The New South Wales Parliament's Joint Standing Committee Upon Road Safety held an "Inquiry into bicycle courier activities in the Sydney CBD" on 23 October 1995. At the hearing of the Inquiry, one of the witnesses was Mr A J Pearce, the General Manager of Crisis Couriers. Under questioning from a member of the committee, Mr Pearce stated that "[f]or the purposes of workers' compensation, they [bicycle couriers] are deemed to be employees". He stated that the workers' compensation premiums were or are paid by the courier business, rather than by the individual bicycle courier.

opinion, the existence of the Parliamentary committee and its inquiries upon which Davies A-JA relied for his conclusions, provide reason for judicial restraint rather than intervention by the courts.

119 The appellant's submission puts heavy emphasis upon the disparity in bargaining power between the respondent and its couriers. Indeed, the submission suggests that it should be a decisive factor, and is indicative of both a capacity and actuality of control by the financially stronger party over the other. But disparity in this respect cannot of itself provide reason to hold the former liable for the negligence of the latter in carrying out a contract for services. Otherwise, the courts might be required, as a matter of course, to assess the respective wealths of contracting parties, in the course of and as an aid to, deciding upon whom liability should be imposed. Where then would the line be drawn: would it follow that a listed corporation with a large market capitalisation should be held liable for the negligence of a small private company with which it has contracted for services because, taken with other matters, the former happens to be much richer than the latter and insists upon very strict contractual arrangements for performance and quality control between it and its contractors?

120 The remaining question is whether there is any basis within any of the established categories of non-delegable duties for holding that the respondent should be responsible for the courier's negligence.

121 The appellant contended that the respondent was engaged in an activity that was hazardous to pedestrians. Sheller JA in the Court of Appeal said that this was to distort the nature of the respondent's business: that the hazard to pedestrians, of which the unfortunate appellant's accident was an example, derived not from the nature of the respondent's business but from the manner in which the courier chose to perform the contract with the respondent, by riding his bicycle illegally on the footpath. To the extent that what the courier did was unlawful, it was not an unlawful act that the respondent employed him to do (185). I agree with his Honour that the case calls for the application of the principles stated by Jordan CJ in *Torette House Pty Ltd v Berkman* (186):

> "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'."

(185) *Hollis v Vabu Pty Ltd* [1999] Aust Torts Rep ¶81-535 at 66,566-66,567.
(186) (1939) 39 SR (NSW) 156 at 170.

122 The statement of Jordan CJ was approved by this Court in *Stevens v Brodribb Sawmilling Co Pty Ltd* (187).

123 Furthermore, as Sheller JA pointed out, the conduct of the respondent's business gave rise to no general duty of care to pedestrians and created no relationship of a special kind between the appellant and the respondent.

Orders

124 I would dismiss the appeal with costs.

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales of* 5 *November* 1999. *In place thereof order that the appeal to that Court be allowed with costs, the verdict and orders of the District Court of New South Wales be set aside and that judgment be entered for the appellant in the sum of* $176,313 *with costs.*

Solicitors for the appellant, *Brydens Law Office.*

Solicitors for the respondent, *Henry Davis York.*

DJB

(187) (1986) 160 CLR 16 at 30, per Mason J; at 41, per Wilson and Dawson JJ.