

Avoiding Difficult Questions: Vicarious Liability and Independent Contractors in *Sweeney v Boylan Nominees*

JONATHAN BURNETT*

Abstract

In *Sweeney v Boylan Nominees Pty Ltd* the High Court affirmed that a principal is not vicariously liable for the negligent acts of an independent contractor. In this case a mechanic engaged by Boylan negligently performed repair work, resulting in an injury to Mrs Sweeney. Since the mechanic was a contractor rather than an employee, Mrs Sweeney was unsuccessful in her action against Boylan. While the majority refused to extend the principles of vicarious liability, in a dissenting judgment Kirby J would have allowed Mrs Sweeney to recover from Boylan based on the fact that the mechanic was a 'representative agent' of Boylan. This article examines the High Court's reasoning in this case, with a particular focus on the difficulties involved in using agency-based arguments to extend the scope of vicarious liability and the central importance of the employee-independent contractor dichotomy in this area of law. In light of the majority's unwillingness to extend the scope of vicarious liability by using agency concepts or through a more general revision of the distinction between employees and independent contractors, this article argues that the law should take a broad and flexible approach when classifying workers as employees (or independent contractors). Employers should not be able to avoid liability unreasonably for the negligent acts performed by those they engage to perform work.

1. Introduction

It is a longstanding principle of the common law that an employer will be vicariously liable for the tortious acts of an employee but not for the acts of an independent contractor.¹ This seemingly simple and longstanding distinction disguises the difficult questions of principle and policy which bedevil this area of law. As traditional patterns of work change, it appears to be increasingly difficult to maintain a bright line distinction between employees and independent contractors. A growing number of workers seem to occupy positions somewhere between these two established categories. While the number of 'self-employed contractors' has remained relatively steady over the past decade, there has been an increase in the number of contractors who rely on a single client for work,

* Final year student, Faculty of Law, University of Sydney. The author would like to thank David Rolph for his helpful comments and advice. All opinions, and any errors, are the author's own.

¹ *Quarman v Burnett* (1840) 151 ER 509 is usually cited as authority for this proposition.

sometimes called ‘dependent contractors’.² In light of this trend, the desirability of continuing to base the test for vicarious liability on a distinction between employees and independent contractors is questionable. In *Northern Sandblasting Pty Ltd v Harris* McHugh J said:

Nearly 30 years ago Professor Atiyah marshalled the arguments which would justify imposing liability on employers for the acts of independent contractors as well as employees The question whether the common law should continue to draw a distinction between liability for the acts of employees and those of independent contractors must wait for another day.³

*Sweeney v Boylan Nominees Pty Ltd*⁴ provided the High Court with an opportunity to consider this question.

2. Facts

Mrs Sweeney was injured when a refrigerator door at a service station fell off and hit her on the head. Earlier in the day on which Mrs Sweeney was injured the owners of the service station informed Boylan, who owned the refrigerator, that there was a problem with the door. A mechanic, Mr Comminos, was sent to the service station to perform repairs. The trial judge found that Mr Comminos failed to exercise reasonable care and that such negligence was the cause of Mrs Sweeney’s injuries.⁵ This finding was not questioned on appeal.

The nature of Boylan’s engagement of Mr Comminos was the central issue of the case and it is worth examining the particular character of this relationship in some detail. Boylan had six employees who worked in its service department, three ‘field service’ employees who performed repairs at the premises of Boylan’s customers and two ‘contractors’, including Mr Comminos, who performed the same work as the ‘field service’ employees. The ‘contractors’ were only asked to work when the ‘field service’ employees were fully occupied, although in practice Mr Comminos performed work for Boylan on a daily basis.⁶ Boylan’s service reports referred to Mr Comminos as ‘our mechanic’ and authorised him to collect the ‘amount due’ when repairs were completed. Boylan also referred to Mr Comminos as ‘our mechanic’ in a report to its public liability insurer.⁷

However, unlike the ‘field service’ employees, Mr Comminos was not required to accept jobs from Boylan, did not wear a Boylan uniform, was not based on Boylan’s premises and invoiced Boylan for the hours of work he performed. Although the evidence on this point was not clear, it also seems that Mr Comminos would have been entitled to work for an employer other than Boylan.⁸ In addition,

2 Productivity Commission, *The Role of Non-Traditional Work in the Australian Labour Market: Commission Research Paper* (2006) at 23.

3 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 366–7 (McHugh J) (footnotes omitted). See also Kirby J at 392.

4 *Sweeney v Boylan Nominees Pty Ltd t/as Quirks Refrigeration* (2006) 227 ALR 46 (‘Sweeney’).

5 *Id* at [5], [43].

6 *Id* at [56].

7 *Id* at [7], [56].

Mr Comminos had his own trade certificate and contractor's licence, took out his own public liability and workers compensation insurance, and drove his own van displaying his own company name.⁹

Mrs Sweeney sued the owners of the service station and Boylan. It is not clear why Mrs Sweeney did not also sue Mr Comminos (or his company).¹⁰ According to the majority of the High Court there was 'every reason to think' that the identity of Mr Comminos, and the fact that Boylan alleged he was an independent contractor, could have been ascertained before the trial.¹¹ The decision to pursue a claim only against Boylan and the service station, rather than against Mr Comminos, ultimately meant that Mrs Sweeney was left without a remedy.

3. *Decisional History*

In the District Court of New South Wales, Mrs Sweeney failed in her action against the owners of the service station. This claim was not pursued on appeal. However, Mrs Sweeney succeeded against Boylan on the basis that it was vicariously liable for the negligence of Mr Comminos. The trial judge found that the mechanic was 'acting as a servant or agent of [Boylan] with the authority and the approval of [Boylan] to undertake the work he did.'¹² In reaching this conclusion, the trial judge placed emphasis on the documents referring to Mr Comminos as 'our mechanic'. In argument before the New South Wales Court of Appeal, counsel for both Mrs Sweeney and Boylan accepted that the trial judge's decision was intended to be a finding that Mr Comminos was an employee of Boylan.¹³

The New South Wales Court of Appeal set aside the decision of the trial judge. It found that the relationship between Boylan and the mechanic was not one of employment because:

- Boylan did not exercise control over Mr Comminos;
- there was no 'mutuality of obligation' to provide and accept work;
- the work was carried out under Mr Comminos' own name;
- Mr Comminos provided his own equipment and tools and sometimes bought his own spare parts;
- Boylan paid Mr Comminos on a piece work basis; and
- Mr Comminos provided his own insurance and superannuation.¹⁴

8 *Boylan Nominees Pty Ltd t/as Quirks Refrigeration v Sweeney* (2005) 148 IR 123 at [37] (Ipp JA) ('*Boylan*').

9 *Sweeney* (2006) 227 ALR 46 at [31].

10 *Id* at [3]. Whether Boylan engaged Mr Comminos or his company was not considered in detail at any stage of the proceedings: *Sweeney* (2006) 227 ALR 46 at [31].

11 *Sweeney* (2006) 227 ALR 46 at [3] (Gleeson CJ, Gummow, Hayne, Heydon & Crennan JJ).

12 *Boylan* (2005) 148 IR 123 at [25].

13 *Id* at [25].

14 *Id* at [55]–[57].

Furthermore, the New South Wales Court of Appeal found that McHugh J's statements in *Scott v Davis*¹⁵ and *Hollis v Vabu Pty Ltd*¹⁶ — that a principal will be vicariously liable for the acts of an agent in circumstances where the agent acts as a 'representative' — did not presently reflect the law in Australia.¹⁷

A majority of the High Court upheld the decision of the New South Wales Court of Appeal.¹⁸ In rejecting the argument that Boylan should be held vicariously liable, the majority emphasised the central role of the distinction between employees and independent contractors in determining the bounds of vicarious liability. However, the significance of the majority's decision is not its reaffirmation of this well-established principle, but its rejection of any wider principle of vicarious liability such as that advocated by McHugh J in earlier decisions, or by Kirby J in his dissenting judgment.

4. Distinguishing Between an Employee and an Independent Contractor

The difference between an employee and an independent contractor is often described as that between a contract *of* service, made between employer and employee, and a contract *for* services, made between principal and independent contractor. Historically this distinction was based on control: employees were told what to do and how to do it, whereas independent contractors were told to produce an end result but reserved a level of self-control in carrying out the work.¹⁹ An alternative or additional basis on which to make the distinction was provided by the 'organisation' test, which made an employer liable for acts performed by a worker who was an integrated part of the employer's business.²⁰ More recently in *Stevens v Brodribb Sawmilling Company Pty Ltd*²¹ and *Hollis*, the High Court has moved away from relying on either the 'control' or 'organisation' tests, preferring to consider the totality of the relationship between the parties.²² In *Sweeney*, all members of the High Court accepted that Mr Comminos was not an employee of Boylan and reaffirmed the test articulated in *Hollis*, in which a majority of the High Court found a courier company vicariously liable for the negligence of one of its bicycle couriers on the basis that the couriers were employees rather than independent contractors.

A. The Majority

The majority emphasised the 'very different' circumstances in *Sweeney* compared with *Hollis*.²³ In highlighting the differences the majority focused on the following:

15 *Scott v Davis* (2000) 204 CLR 333 ('*Scott*').

16 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 ('*Hollis*').

17 *Boylan* (2005) 148 IR 123 at [84].

18 Gleeson CJ, Gummow, Hayne, Heydon & Crennan JJ: Kirby J dissenting.

19 R P Balkin & J L R Davis, *Law of Torts* (3rd ed, 2004) at 782.

20 *Stevenson v MacDonald* [1952] 1 TLR 101 at 111.

21 *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16 ('*Stevens*').

22 *Stevens* (1986) 160 CLR 16 at 27–9 (Mason J).

23 *Sweeney* (2006) 227 ALR 46 at [31].

- (1) Mr Comminos conducted a separate business, as indicated by his invoicing of Boylan for each job and Boylan's apparent insistence that he have his own insurance. The possible interposition of Mr Comminos' company underscored this finding that Mr Comminos was running his own business.²⁴ In contrast, the bicycle couriers in *Hollis* were clearly not conducting their own business and were unable to make an independent career as free-lance couriers;²⁵
- (2) Boylan did not exercise control over the way in which Mr Comminos worked,²⁶ whereas the bicycle couriers in *Hollis* were unable to exercise any significant degree of control over their work;²⁷
- (3) Mr Comminos provided his own tools, equipment and skill.²⁸ Although the couriers in *Hollis* supplied their own bicycles, this represented a relatively small capital outlay and also provided the couriers with a form of transport and recreation outside of work;²⁹ and
- (4) Mr Comminos was not presented to the public as an 'emanation' of Boylan.³⁰ The majority held that the documents referring to Mr Comminos as 'our mechanic' did no more than indicate that Mr Comminos acted at the request of Boylan: they said nothing of the relevant relationship between Mr Comminos and Boylan.³¹ The employer in *Hollis* required the couriers to wear uniforms bearing its logo as a form of advertising and as a way of encouraging members of the public to identify the couriers as part of the employer's 'own working staff.'³²

B. Kirby J

It appears the classification of the relationship was not as clear-cut for Kirby J, who described it as 'in the borderland between an employment-like relationship and a wholly independent contract.'³³ However, in reaching a conclusion of non-employment, Kirby J also drew heavily on the factual differences with *Hollis*. His Honour emphasised Mr Comminos' use of his own van, the fact that Boylan did not provide Mr Comminos with a uniform and Boylan's relative lack of control over the way Mr Comminos worked.³⁴

Having determined that Mr Comminos was not an employee of Boylan it remained for the Court to consider whether there was any basis on which the principles of vicarious liability could be extended. The main focus of both the majority and Kirby J was whether the decision in *Colonial Mutual Life Assurance*

24 *Id* at [31].

25 *Hollis* (2001) 207 CLR 21 at [48].

26 *Sweeney* (2006) 227 ALR 46 at [32].

27 *Hollis* (2001) 207 CLR 21 at [49].

28 *Sweeney* (2006) 227 ALR 46 at [32].

29 *Hollis* (2001) 207 CLR 21 at [56].

30 *Sweeney* (2006) 227 ALR 46 at [32].

31 *Id* at [32].

32 *Hollis* (2001) 207 CLR 21 at [52].

33 *Sweeney* (2006) 227 ALR 46 at [72] (Kirby J).

34 *Id* at [73].

*Society Ltd v The Producers and Citizens Co-operative Assurance Company of Australia Ltd*³⁵ could be applied to the present facts.

5. *The Colonial Mutual Life Exception*

In *Colonial Mutual Life*, an insurance company was found vicariously liable for slanders made by an insurance salesman while soliciting business for the company. The applicable principle was stated quite broadly by Duffy CJ and Starke J, who held that a person will be liable for the tortious acts of an agent provided the act complained of is within the scope of the agent's authority.³⁶ Dixon J's judgment, which is commonly cited in discussions of this area of law, did not state the principle quite so broadly. His Honour affirmed that a person will generally not be vicariously liable for another's torts unless the other person is his servant, or the act was directly authorised.³⁷ However, according to Dixon J, a different circumstance arises when the function to be performed is that of *representing* the person requesting performance in a transaction with a third party. In this case, there is vicarious liability because the person performing the function 'does not act independently, but as a representative of the Company, which accordingly must be considered as itself conducting the negotiation in his [sic] person.'³⁸

A. *The Majority*

In *Sweeney* the majority gave an extremely narrow operation to *Colonial Mutual Life*, holding that the decision stands only for the proposition that a principal will be held liable for slanders made by an independent contractor 'engaged to solicit the bringing about of legal relations between the principal and third parties', and even then only when those slanders are made in order to persuade the third party to enter legal relations with the principal.³⁹ This interpretation of *Colonial Mutual Life* is based on the concept of agency: the insurance salesman was the principal's agent ('properly so called') and the tortious conduct occurred during the execution of that agency.⁴⁰ According to the majority it is the close connection between the principal's business and the independent contractor's conduct as agent which results in vicarious liability in this case. The majority refused to accept that *Colonial Mutual Life* stood for the wider proposition that 'A is vicariously liable for the conduct of B if B "represents" A (in the sense of B acting for the benefit or advantage of A).'⁴¹

35 (1931) 46 CLR 41 ('*Colonial Mutual Life*').

36 *Id* at 46.

37 *Id* at 48.

38 *Id* at 49.

39 *Sweeney* (2006) 227 ALR 46 at [22].

40 *Id* at [22].

41 *Id* at [29].

B. Kirby J

Kirby J was prepared to accept a much wider application for *Colonial Mutual Life*. His Honour held that the principle to be derived from *Colonial Mutual Life* is that a principal will be vicariously liable for the acts of a 'representative agent'. According to Kirby J, the relationship between Boylan and Mr Comminos satisfied this description:

Boylan represented to others that Mr Comminos was its employee or agent. Moreover, Boylan armed Mr Comminos with the means by which he could make that representation convincingly to those with whom he was dealing on behalf of Boylan.⁴²

Kirby J rejected the suggestion that *Colonial Mutual Life* should be confined to cases in which the 'representative' is authorised to make 'representations'. Although conceding that this was the factual situation in *Colonial Mutual Life*, Kirby J held there was no reason in either the language of the judgment or the underlying principle to justify confining the decision in this way. Adopting such a narrow interpretation would create 'a very confined and peculiar rule.'⁴³ Kirby J also rejected Boylan's argument that applying *Colonial Mutual Life* in these circumstances would undermine the rule in *Quarman v Burnett*⁴⁴ which states that a person is generally not liable for the negligence of an independent contractor. Kirby J pointed to a number of circumstances which indicate that this rule is not absolute, such as non-delegable duties and torts that do not require proof of fault.⁴⁵

Finally, Kirby J considered three policy considerations which favoured allowing recovery in this case:

- (1) the need for the principles of vicarious liability to respond to changing social conditions in which independent contractors are more prevalent, so that those 'responsible' for causing injury are held liable;⁴⁶
- (2) the likelihood that the proliferation of independent contractors in the workplace will lead to increasing situations in which the contractor is either uninsured or unidentifiable;⁴⁷ and
- (3) the potential to promote 'greater rationality' in litigation. If employers are vicariously liable for independent contractors they have an incentive to disclose the existence of an independent contractor in any proceedings. If vicarious liability is not extended it encourages 'evidentiary ambush.'⁴⁸

42 Id at [80].

43 Id at [89].

44 Productivity Commission, above n2.

45 *Sweeney* (2006) 227 ALR 46 at [92].

46 Id at [102]–[105].

47 Id at [106].

48 Id at [107].

C. *Explaining the Differences in Interpretation*

The very different interpretations of *Colonial Mutual Life* provided by the majority and Kirby J may be at least partly explained by the ambiguous use of the term ‘agent’. Despite Dixon J’s complaint in *Colonial Mutual Life* that much of the difficulty in this area of law can be traced to the ‘many senses in which the word “agent” is employed’,⁴⁹ it is not entirely clear in which sense Dixon J, or the other judges in *Colonial Mutual Life*, intended to use the term. In *Colonial Mutual Life* the independent contractor was an agent in a relatively narrow sense: that is, a person with the capacity to create legal relations between the principal and third parties. However, it is not clear whether the High Court in *Colonial Mutual Life* intended to confine the principle to agents of this kind.

In his work on agency, Dal Pont recognises three different categories of agent:

- (1) those with the capacity to *create* legal relations between a principal and third parties;
- (2) those that can *affect* legal rights and duties between the principal and third parties; and
- (3) those that have authority *to act* on behalf of the principal.⁵⁰

The majority in *Sweeney* restricted the application of *Colonial Mutual Life* to agents ‘properly so called’, presumably a reference to agents in the first category identified by Dal Pont. At least one member of the majority had previously stated that the term ‘agency’ is most appropriately used to describe relationships of this type.⁵¹ Mr Comminos was clearly not an agent with the capacity to create legal relations between Boylan and third parties. Kirby J’s use of the term ‘agent’ is not confined in this way and appears to encompass persons in the second and third categories identified by Dal Pont. Mr Comminos could be classified as an ‘agent’ in this broader sense, and Kirby J in fact refers to him as a ‘true agent’ of Boylan.⁵²

6. *Vicarious Liability for Independent Contractors Following Sweeney*

The decision in *Sweeney* is significant for at least two reasons. First, it highlights the difficulties in using agency concepts to extend employer liability to the tortious acts of independent contractors. Second, it reinforces the centrality of the independent contractor-employee distinction to this area of law. Unfortunately the majority judgment in *Sweeney* does not address in any detail the broader question of whether this remains an appropriate or justifiable point at which to mark the boundary of vicarious liability.

49 *Colonial Mutual Life* (1931) 46 CLR 41 at 50.

50 Gino Dal Pont, *Law of Agency* (2001) at 5.

51 *Scott* (2000) 204 CLR 333 at [227] (Gummow J).

52 *Sweeney* (2006) 227 ALR 46 at [90].

A. *The Limits of Agency*

While the principle that an employer will be vicariously liable for the acts of an employee is firmly established, the circumstances in which a principal will be liable for the acts of an agent are much less clear.⁵³ In the words of Atiyah, ‘there is no more controverted proposition than that a principal is generally liable for the torts of an agent committed within the scope of his [sic] authority.’⁵⁴

In *Scott and Hollis*, McHugh J used the concept of agency to expand the boundaries of vicarious liability. For example McHugh J found that the bicycle couriers in *Hollis* were neither employees nor independent contractors, but ‘agents’.⁵⁵ While it is clear that a person can be an agent *and* an employee or independent contractor, McHugh J appeared to use ‘agent’ as a third and mutually exclusive category. Dal Pont points out that using the concept of agency in this way goes against accepted principles and introduces uncertainty into the law.⁵⁶

In *Sweeney*, Kirby J also used agency — albeit a broader conception of agency than the majority — in a slightly more conventional way: his Honour considered Mr Comninos an independent contractor *and* a ‘representative agent’.⁵⁷ According to this line of reasoning, Boylan’s liability would not depend on the classification of Mr Comninos as an employee or independent contractor, but on a completely separate inquiry into whether Mr Comninos was a ‘representative agent’. This type of analysis is potentially more consistent with the existing law on both vicarious liability and agency than McHugh J’s conception of ‘representative agent’ as a distinct category occupying a position somewhere between employee and independent contractor.

However, the majority’s narrow interpretation of *Colonial Mutual Life* and clear preference for using ‘agent’ in a strict and technical sense suggest that any further attempts to use the agency concept to expand the boundaries of vicarious liability are likely to be abortive.

In light of these difficulties, counsel for Mrs Sweeney used the term ‘representative’ rather than ‘agent’ in order to ‘avoid carrying the baggage of agency.’⁵⁸ However, according to the majority this did not assist Mrs Sweeney: adopting different labels did not ‘obscure the need to examine what exactly are the relationships between the various actors.’⁵⁹ Presumably this brings us back to the starting point: that is, a consideration of whether the relationship in question is that between employer and employee, or principal and independent contractor. In this sense, the majority judgment in *Sweeney* is disappointing in that it does not even consider whether this is an appropriate way to delimit vicarious liability, stating

53 Luke McCarthy, ‘Vicarious Liability in the Agency Context’ (2004) 4(2) *Queensland University of Technology Law and Justice Journal* 1 at 9–12.

54 P S Atiyah, *Vicarious Liability in the Law of Torts* (1967) at 99.

55 *Hollis* (2001) 207 CLR 21 at [65].

56 Gino Dal Pont, ‘Agency: Definitional challenges through the law of tort’ (2003) 11 *Torts Law Journal* 68 at 79–80. See also McCarthy, above n53 at 19.

57 *Sweeney* (2006) 227 ALR 46 at [79].

58 *Sweeney v Boylan Nominees Pty Ltd* [2006] HCATrans 78 (3 March 2006) at 590.

59 *Sweeney* (2006) 227 ALR 46 at [13]. See also [29].

simply that the distinction between employees and independent contractors is ‘too deeply rooted to be pulled out.’⁶⁰ In *Hollis* a majority said that was an ‘unsuitable case’ in which to address the question reserved by McHugh J in *Northern Sandblasting Pty Ltd v Harris* — and quoted in the introduction to this paper — because there was a full answer to that appeal within current doctrine.⁶¹ The same could hardly be said for *Sweeney*.

Before considering the employee-independent contractor distinction in more detail, it is worth making one final point about the ‘representative’ argument. The majority’s characterisation of Mrs Sweeney’s argument — ‘A is vicariously liable for the conduct of B if B “represents” A (in the sense of B acting for the benefit or advantage of A)’⁶² — suggests that ‘representative’ was a term with little substantive content. However, Mr Comminos was not just a representative of Boylan in the sense of acting in its interests, but was a representative in the sense that Boylan held out Mr Comminos as part of its business.⁶³ In this respect, the argument in favour of extending vicarious liability to the acts of ‘representatives’ resonates with aspects of the ‘organisation’ test. In light of this it is worth highlighting a comment made by Kirby J in *Sweeney*:

Mrs Sweeney did not seek to revive Lord Denning’s attempt to explain the ambit of vicarious liability for persons working for and within the organisation of the defendant’s business. This court rejected the organisation test in *Stevens*. Whilst there may be more to the notion than some critics have suggested, it was not revived in argument in this appeal. Any reconsideration of the organisation test must therefore await another day.⁶⁴

A return to determining the existence of an employment relationship by reference exclusively to the ‘organisation’ test is both unlikely and undesirable. However, a more appropriate response to the policy concerns behind making employers vicariously liable for ‘representatives’ may be to give greater weight to ‘organisation’-type factors in considering whether there is an employment relationship, rather than unsettle established legal classifications by extending vicarious liability to a third category (whether mutually exclusive or overlapping) labelled ‘representatives’.

B. Reaffirming the Importance of the Independent Contractor- Employee Distinction

In *Sweeney*, the majority of the High Court referred to the ‘logical and doctrinal imperfections and difficulties in the law relating to vicarious liability.’⁶⁵ In short, it seems the rule that makes an employer liable for the torts of employees, which has its origins in Roman master-slave relations and medieval notions of headship

60 Id at [33].

61 *Hollis* (2001) 207 CLR 21 at [32].

62 *Sweeney* (2006) 227 ALR 46 at [29].

63 Id at [99].

64 Id at [61] (footnotes excluded).

65 Id at [33].

of a household, was adopted 'not by way of an exercise in analytical jurisprudence but as a matter of policy.'⁶⁶ A variety of rationales have been put forward to justify this imposition of vicarious liability in the employment relationship, although usually none are regarded as entirely satisfactory in all cases.⁶⁷ These include that fairness requires an employer who uses others to advance business interests to also bear the risks and losses associated with the business (the enterprise liability argument); that since employers control the activities of employees they are in a better position to take steps to avoid workplace accidents (the deterrence argument); and that employers are more likely than employees to be able to afford to make compensation payments (the 'deep pockets' argument).⁶⁸ Recently, Neyers has suggested that the most cogent justification for imposing vicarious liability is found in the employer's implied promise in an employment contract to indemnify an employee for any losses incurred while conducting the employer's business.⁶⁹ In *Sweeney*, the majority indicated some interest in this particular theory without deciding the question.⁷⁰

Accepting that these considerations, whether individually or in combination, provide a sound basis for imposing vicarious liability on an employer for its employees, the concern is that employers may escape liability by using independent contractors in circumstances where they should bear at least some of the cost.

There is much to be said for the argument in favour of extending liability to the acts of independent contractors *in general*, and this question certainly deserved more thorough consideration by the majority in *Sweeney*. It seems that each of the rationales outlined above would in many circumstances also apply to the relationship between principal and independent contractor. Foremost among these is the fact that the principal engaging the independent contractor is the one gaining the benefit and so could reasonably be expected to bear the cost.⁷¹ However, it is fair to say that the arguments in favour of extending vicarious liability to independent contractors are strongest when the independent contractor in question works only (or predominantly) for one client and has a minimal level of independence.

In these circumstances, the main issue is the extent to which the common law is able to press these 'hybrid' relationships into the employee-independent contractor dichotomy. Given the High Court's unwillingness to reconsider the employee-independent contractor distinction as the basis for determining vicarious liability, the indicia test adopted by the High Court in *Stevens*, *Hollis* and *Sweeney* appears to provide an acceptable way of dealing with this issue. The essential nature of an indicia test is that no one factor will be decisive: some indicators will

66 *Hollis* (2001) 207 CLR 21 at [34].

67 *Id* at [35].

68 See John Fleming, *The Law of Torts* (9th ed, 1998) at 410; J W Neyers, 'A Theory of Vicarious Liability' (2005) 43 *Alberta Law Review* 287.

69 Neyers, above n68 at 301; cited in *Sweeney* (2006) 227 ALR 46 at [12].

70 *Sweeney* (2006) 227 ALR 46 at [12].

71 Atiyah, above n14 at 333.

suggest classification as an employee, whereas others will point to classification as an employee. This will inevitably result in some uncertainty. However, ensuring a reasonable level of flexibility seems desirable given the potential for rapid changes in the nature of workplace relations.

C. ‘Not a Proud Moment in Our Administration of Justice’⁷²

It is impossible not to feel sorry for Mrs Sweeney: she suffered an injury caused by another person’s negligence, but was ultimately left without a remedy. If the negligent repairs had been performed by one of Boylan’s ‘field service’ employees, rather than Mr Comminos, it is likely that Mrs Sweeney would have been successful in her action against Boylan. On the other hand, had Mrs Sweeney sued Mr Comminos rather than Boylan, it is possible that her fortunes would have been completely different. The facts indicate that Mr Comminos had his own public liability insurance and, in these circumstances, it is perhaps reasonable to assume that any judgment in favour of Mrs Sweeney would have been satisfied.

In the conclusion to his judgment, Kirby J sounds a warning against the danger of ‘trial by ambush’. In this case, the true nature of Boylan’s defence – that the negligent repairs were performed by an independent contractor rather than an employee — was not revealed until the trial.⁷³ The injustice suffered by Mrs Sweeney in this case flows more from this failure of pre-trial processes than from any inadequacies in the law regarding vicarious liability.

7. Conclusion

In *Sweeney*, the High Court reaffirmed the indicia test as the proper way of distinguishing an employee from an independent contractor, emphasised the central role of this distinction in determining vicarious liability and confined the ‘exception’ in *Colonial Mutual Life* to a narrow range of circumstances. However, the decision is more noteworthy for its failure to consider the broader question of whether an employer *should* be vicariously liable for the acts of independent contractors. Given the majority’s clear statement that this principle is ‘too deeply rooted to be pulled out’, it seems unlikely that there will be a litigant brave enough to provide the High Court with another opportunity to consider this question in the near future. In the meantime, a broad and flexible approach to distinguishing between employees and independent contractors, informed by the policy rationales for imposing vicarious liability, is the best way of ensuring that employers are not able to escape liability when they are the most appropriate person to bear the cost.

⁷² *Sweeney* (2006) 227 ALR 46 at [117] (Kirby J).

⁷³ *Id* at [114].