The critical distinction is to be maintained between employees (for whose conduct the employer generally will be vicariously liable) and independent contractors (for whose conduct the employer, ie the person engaging the independent contractor, generally will not be vicariously liable).

The defendant (respondent), Boylan Nominees Pty Ltd, was the owner of a commercial refrigerator which was placed in the “convenience store” area of a service station in the Sydney suburb of Pymble. At the request of the service station operator, the defendant, which was under an obligation as between itself and the service station operator to service and maintain the refrigerator, arranged for a mechanic, Mr Comninos, to repair a defect in the refrigerator door. The repairs were carried out negligently by Mr Comninos with the result that the plaintiff (appellant), Mrs Maria Sweeney, suffered personal injury when the door fell on her as she opened the refrigerator to buy a carton of milk.

The evidence established that Mr Comninos carried on his own business and was not an employee of the defendant. His van carried his own company name and the defendant did not provide him with a uniform or equipment. Mr Comninos was paid by the defendant upon submitting an invoice for the work performed and for spare parts.

The plaintiff commenced proceedings against the service station operator, as occupier of the premises, and the defendant to recover damages for personal injury. For reasons unexplained, Mr Comninos was not a party to the proceedings.

At the trial in the District Court of New South Wales the claim against the service station operator was dismissed on the ground that the service station operator had done all that could reasonably be expected in the circumstances and had not been negligent. However, the District Court entered judgment against the defendant on the ground that it was vicariously liable for the negligence of Mr Comninos.

On appeal, the New South Wales Court of Appeal set aside the judgment against the defendant on the ground that it was not vicariously liable for the negligence of Mr Comninos who was an independent contractor. An appeal by the plaintiff was dismissed by the High Court of Australia (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; Kirby J dissenting.)
development of the law in this area has not always proceeded on a correct understanding of the basis of earlier decisions.

12. Nonetheless, as the decisions in Scott, Hollis and Lepore show, there are some basic propositions that can be identified as central to this body of law. For present purposes, there are two to which it will be necessary to give principal attention. First, there is the distinction between employees (for whose conduct the employer will generally be vicariously liable) and independent contractors (for whose conduct the person engaging the contractor will generally not be vicariously liable). Secondly, there is the importance which is attached to the course of employment. …

[50] 13. Whatever may be the justification for the doctrine, it is necessary always to recall that much more often than not, questions of vicarious liability fall to be considered in a context where one person has engaged another (for whose conduct the first is said to be vicariously liable) to do something that is of advantage to, and for the purposes of, that first person. Yet it is clear that the bare fact that the second person’s actions were intended to benefit the first, or were undertaken to advance some purpose of the first person, does not suffice to demonstrate that the first is vicariously liable for the conduct of the second. The whole of the law that has developed on the distinction between employees and independent contractors denies that benefit or advantage to the one will suffice to establish vicarious liability for the conduct of the second. …

[53] 27. … Hitherto the distinction between independent contractors and employees has been critical to the definition of the ambit of vicarious liability. The view, sometimes expressed (Scott at 370 per McHugh J; Hollis at 57-8 per McHugh J) that the distinction should be abandoned in favour of a wider principle, has not commanded the assent of a majority of this court.

28. In Scott, the majority of the court rejected the contention that the owner of an aircraft was vicariously liable for the negligence of the pilot of that aircraft if the pilot operated the aircraft with the owner’s consent and for a purpose in which the owner had some concern. The argument that “a new species of actor, one who is not an employee, nor an independent contractor, but an ‘agent’ in a non-technical sense” (Scott at 423 per Gummow J) should be identified as relevant to determining vicarious liability, was rejected.

[54] 29. In Hollis, the court amplified the application of the distinction between independent contractors and employees to take account of differing ways in which some particular enterprises are now conducted. As was said in the joint reason, at 40:

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.

But neither in Scott nor in Hollis … was there established the principle 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). On the contrary, Scott rejected contentions that, at their roots, were no different from those advanced in this case under the rubric of “representation” rather than, as in Scott, under the rubric “agency”. As was said in Scott of the word “agent”, at 423, to use the word “representative” is to begin, but not to end, the inquiry.

30. It is as well to add something further about Hollis. Hollis hinged about whether the person whose conduct was negligent was to be identified as an employee of the principal. Seven considerations were identified in the facts of that case (at 42-5) as bearing upon the question. They included that the courier wore the principal’s livery, that he was subject to close direction by the principal about not only the manner of performing the work (work which required only limited skills), but also both the financial dealings generated by the work and the times at which the work was done.

31. The circumstances of the present case are very different. The mechanic [Mr Comninos] was not an employee of the respondent. He conducted his own business: Cf Hollis at 42. It may be that it could be inferred that he did that through, and as an employee of, the company whose name provided the name advertised on his vehicle. But this was not a matter to which close attention was given in evidence at trial and it is not necessary to pursue it to its conclusion. That the mechanic was engaged in a business other than that of the respondent was demonstrated by a number of circumstances, but chief among them were his invoicing the respondent for each job he did and the respondent’s concern to verify that the mechanic had proper workers’ compensation and public liability insurance. The interposition of the mechanic’s
company would, of course, give further support to the conclusion that he was engaged in a
business other than that of the respondent.

32. The mechanic or, if it were the case, his company, was engaged from time to time as
a contractor to perform maintenance work for the respondent. Unlike the principal in Hollis, the
respondent did not control the way in which the mechanic worked. The mechanic supplied his
own tools and equipment, as well as bringing his skills to bear upon the work that was to be done.
And unlike the case in Hollis, the mechanic was not presented to the public as an emanation of the
respondent. …

[55] 33. Whatever may be the logical and doctrinal imperfections and difficulties in the
origins of the law relating to vicarious liability, the two central conceptions of distinguishing
between independent contractors and employees and attaching determinative significance to
course of employment are now too deeply rooted to be pulled out. And without discarding at least
the first, and perhaps even the second, the appellant’s claim against the respondent must fail. The
mechanic was an independent contractor. He did what he did for the benefit of the respondent and
in attempted discharge of its contractual obligations. But he did what he did not as an employee of
the respondent, but as a principal pursuing his own business or as an employee of his own
company pursuing its business.

34. The conclusion that the mechanic was an independent contractor is determinative of
the issue that arises in the appeal. The appeal must be dismissed with costs.

[Kirby J dissented.]

Appeal dismissed