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Attribution of Liability for Workplace Injuries Caused by Non-Employees- Recent Developments in the Law of Non-Delegable Duty

Neil J Foster



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Attribution of Liability for Workplace Injuries Caused by Non-Employees- Recent Developments in the Law of Non-Delegable Duty

Neil Foster¹

What I want to do in this paper is to open up in a fairly preliminary way an area of the law relating to attribution of liability that, while it has been around for a long time, I think is increasingly being misunderstood by scholars and the courts. I will mostly focus on the application of this principle in relation to workplace injuries, partly because that constitutes a significant area of its past and present application. But because there have been some interesting developments in another area, schools and pupils, I will also mention that. (If need be I could justify that on the basis that most schools are also “workplaces”!)

The principle is known as that of the “non-delegable duty”.

Introduction

In general, as is well known, while an employer can be held vicariously liable for wrongs committed by an employee in the course of their employment, a “principal” is not vicariously liable for actions of independent contractor. The High Court of Australia noted in *Hollis v Vabu* [2001] HCA 44:

[32]... It has long been accepted, as a general rule², 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.³

There was an attempt by McHugh J in the High Court in the early part of the 21st century to reformulate the rules relating to liability for the actions of non-employees, where his Honour argued that “representative agents” ought to create vicarious liability.⁴ But the majority of the High Court firmly rejected this view, which remained a minority view when his Honour retired from the Court. An attempt by Kirby J to revive this theory in *Sweeney v Boylan Nominees* [2006] HCA 19 also failed.⁵

¹ Associate Professor in Law, Newcastle Law School, Newcastle, NSW; comments welcome at neil.foster@newcastle.edu.au. This is very much a draft outlining issues rather than a concluded paper- please do not cite without asking me first!

² See the observations of Brennan J in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 575.

³ *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 329-330, 366.

⁴ See *Hollis*, above, and *Scott v Davis* (2000) 175 ALR 217

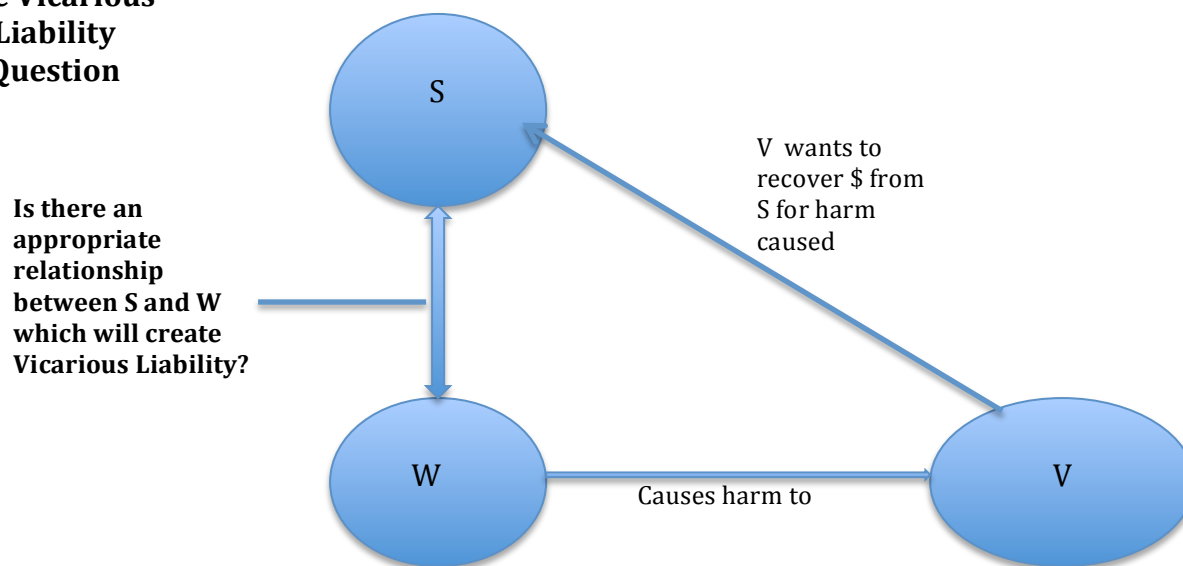
⁵ For comment on this case, see N Foster, “Vicarious liability for independent contractors revisited: *Sweeney v Boylan Nominees Pty Ltd*” (2006) 14 *Torts Law Jnl* 219-223; J Burnett, “Avoiding Difficult Questions: Vicarious Liability and Independent Contractors in *Sweeney v Boylan Nominees*” (2007) 29 *Sydney Law Review* 163-174; D Rolph, “A Carton of Milk, A Bump to the Head and One Legal

However, despite the general rule precluding vicarious liability for independent contractors, it has long been accepted that there are some specific situations where the courts have recognised what is called a “non-delegable duty of care” (herein sometimes, “NDD”). In these situations liability may be imposed on a principal for the wrongful actions of a contractor.

While the outcome of a finding of non-delegable duty is similar to vicarious liability (in that one party is being held strictly liable for harm committed by another with whom they have a contract), there is a clear conceptual difference between the two doctrines.⁶ I often explain it to my students using the following diagrams.

Assume a wrongdoer W, a victim V, and the allegedly liable "superior" party S.

The Vicarious Liability Question



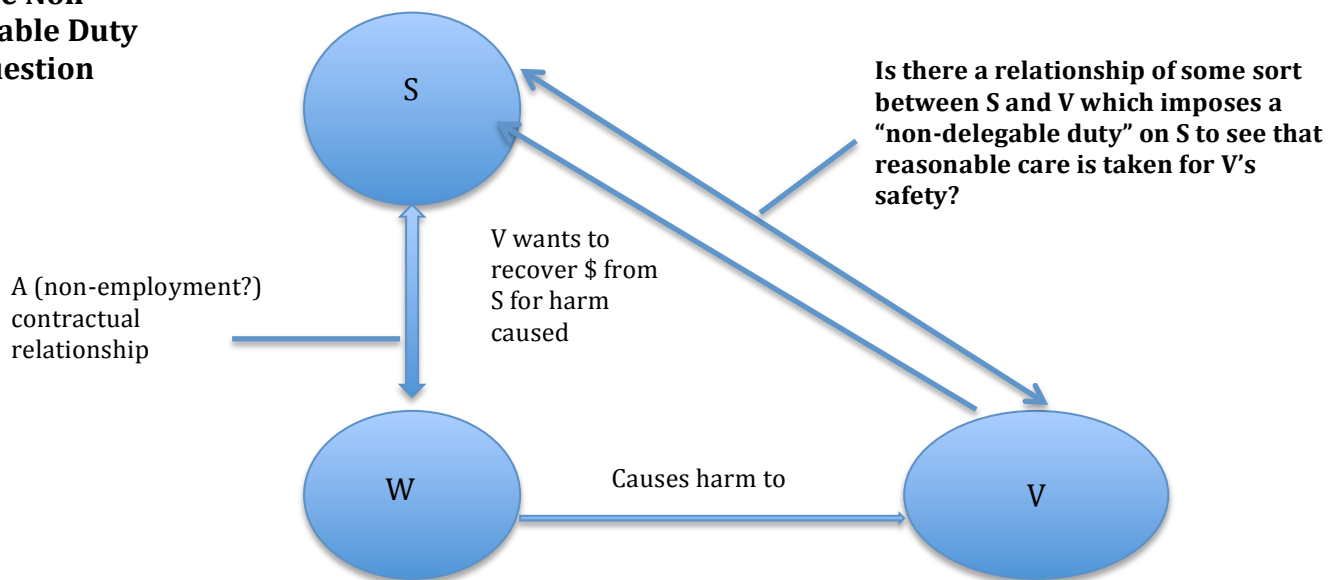
In cases of *vicarious liability*, the main question is as to relationship between **S and W**, in order to determine S's liability (eg is W an employee of S?)

However, the next diagram involves a different question.

Headache: Vicarious Liability in the High Court of Australia” (2006) 19 *Aust Jnl of Labour Law* 294-305.

⁶ For recent confirmation of this, see the comments of Lady Hale in *Woodland v Essex County Council* [2013] UKSC 66 at [33]: “They are conceptually quite different, as Laws LJ made clear in the Court of Appeal at [2012] EWCA Civ 239; [2013] 3 WLR 853, paras 5 to 7, and Lord Sumption explains at paras 3 and 4 above.”

The Non-delegable Duty Question



In cases of *non-delegable duty*, the case is conducted on the *assumption* that W is an independent contractor acting under directions from S, and the main question is as to the relationship between **S and V**, and whether S owes a duty to see that reasonable care is taken for the safety of a person in V's situation.

Recently in the UK Supreme Court decision in *Woodland v Essex County Council* [2013] UKSC 66 (discussed below) Lord Sumption at [15] noted that in a case involving a hospital Lord Denning had adopted this sort of approach:

Denning LJ considered that the critical factor was not the hospital's relationship with the doctor or surgeon, but its relationship with the patient, arising from its acceptance of the patient for treatment.⁷

With that overall background in place, let me briefly justify these propositions from the authorities.

⁷ Citing *Cassidy v Ministry of Health* [1951] 2 KB 343.

1. General principles of Non-Delegable Duty

Gleeson CJ in *NSW v Lepore* [2003] HCA 4 at [20] gave a general overview of the area:

20 In *Dalton v Angus*⁸, Lord Blackburn referred to the inability of a person subject to a certain kind of responsibility to "escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor". His Lordship's reference to a responsibility of "seeing" a duty performed has echoes in later judicial statements. The concept was taken up in relation to the duty of an employer to take reasonable care for the safety of a workman. In *Wilson and Clyde Coal Co v English*⁹, Lord Wright described the duty as "personal", and said that it required the provision of competent staff, adequate material, and a proper system of effective supervision. Lord Thankerton¹⁰ said that such duties "cannot be delegated", explaining that "the master cannot divest himself of responsibility by entrusting their performance to others". It would, perhaps, have been more accurate to say that the duties cannot be discharged by delegation. At all events, to describe a duty of care as "personal" or "non-delegable", in the sense that the person subject to the duty has a responsibility either to perform the duty, or to see it performed, and cannot discharge that responsibility by entrusting its performance to another, conveys a reasonably clear idea; but it addresses the nature of the duty, rather than its content.

The terminology of "non-delegable duty", then, comes from idea that there are certain duties owed to others, the **performance** of which cannot lawfully be passed on to someone else (in the sense that even if *in fact* there is an attempt to delegate the obligation to someone else, a court will still hold the original duty-holder liable.)

It is important, however, not to forget that the *content* of the duty will still need to be examined. In most cases (usually negligence claims) it will be a duty of "reasonable care", not one of "strict liability" from the point of view of the wrongdoer. Kirby J put it this way in *Lepore*:

290 The purpose of developing the doctrine of non-delegable duties seems to have been to ensure that, in cases in which courts have considered that liability "should", or "ought" to¹¹, be imposed, the principles of vicarious liability, specifically the restriction on an employer's vicarious liability for the conduct of an independent contractor, should not act as a barrier to such liability. Liability on the basis of non-delegable duties has therefore been described as a "disguised form of vicarious liability"¹².

291 However, the non-delegable nature of the duty was not designed, as I read the cases, to expand the *content* of the duty imposed upon the superior party to the relationship, so as to enlarge that duty into one of strict liability or insurance. It was simply a device to bring home liability in instances that would otherwise have fallen outside the recognised categories of vicarious liability.

So we distinguish the *content* of duty ("reasonable care", if it is a negligence claim) from the question of *who* has been delegated to perform the duty. True, the doctrine of non-delegable duty may appear from the point of

⁸ (1881) 6 App Cas 740 at 829.

⁹ [1938] AC 57 at 84.

¹⁰ [1938] AC 57 at 73, adopting the statement of the Lord Justice-Clerk in *Bain v Fife Coal Co* [1935] SC 681 at 693.

¹¹ cf Barak, "Mixed and Vicarious Liability – A Suggested Distinction", (1966) 29 *Modern Law Review* 160 at 160-161.

¹² Fleming, *The Law of Torts*, 9th ed (1998) at 434.

view of the *duty-holder* (the principal) to be strict liability (because no amount of personal care on the part of the duty-holder will avoid liability if the delegate is careless), but in truth for a breach of duty in negligence to be established there must still be a failure of due care **by somebody** (for whose actions the principal will be held responsible.)

What if the non-delegable duty relates to a tort other than negligence? There are not many examples of this, but it seems fairly clear that in this case whatever standard of behaviour appropriate to that other tort will be engaged as the standard required of the wrongdoer W- though the duty-holder's (S's) responsibility will still be strict.¹³

The doctrine of NDD is a principle of attribution of liability, not a separate tort action. Christian Witting's argument to the contrary¹⁴ was, in effect, rejected by Kirby J in *Leichhardt Municipal Council v Montgomery* [2007] HCA 6; (2007) 230 CLR 22.¹⁵ His Honour was less clear on what it actually is, but he put it this way at [73]:

According to this approach to non-delegable duties, which I accept, they exist as "sub-species" within particular torts. They may thus be seen as special instances in which, in the given circumstances, "liability is truly strict while in others it is, at least theoretically, fault-based".

I must confess to thinking that this sentence could well have stopped at the word "strict", but for present purposes the key thing is that NDD is not a free-standing liability, but a part of the liability rules that attaches to *other* torts.

In Australia one of the leading cases is *Kondis v State Transit Authority* (1984) 154 CLR 672, where a principal was held to owe an NDD to his employee, and hence was held strictly liable for harm to the employee caused by a careless crane operator who was a contractor. At [110] in his judgment in *Montgomery*, Kirby J set out the main circumstances in which a non-delegable duty had been held to be previously owed in Australia as follows:

employer/employee; ¹⁶ hospital/patient; ¹⁷ school authority/pupil; ¹⁸ and occupier/contractual entrant in circumstances involving extra-hazardous activities.¹⁹

There are one or two other categories which are well recognised under the law of Australia. The relation between a prison authority and a prisoner

¹³ J Murphy "The Liability Bases of Common Law Non-Delegable Duties- A Reply to Christian Witting" (2007) 30 *UNSW Law Jnl* 86-102 at 99; see also generally J Murphy "Juridical Foundations of Common Law Non-Delegable Duties" in Neyers, Chamberlain & Pitel (eds) *Emerging Issues in Tort Law* (Oxford: Hart, 2007) 369-391.

¹⁴ C Witting "Breach of the Non-Delegable Duty: Defending Limited Strict Liability in Tort" (2006) 29(3) *University of New South Wales Law Journal* 33-60.

¹⁵ At [72]-[73], citing John Murphy, "The Liability Bases of Common Law Non-Delegable Duties - A Reply to Christian Witting", (2007) 30(1) *University of New South Wales Law Journal* 86-102.

¹⁶ *Stevens [v Brodribb]* [1986] HCA 1; (1986) 160 CLR 16 at 44.

¹⁷ *Gold v Essex County Council* [1942] 2 KB 293 at 304; *Cassidy v Ministry of Health* [1951] 2 KB 343 at 363; *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542; *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553.

¹⁸ *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 269-273, 274-275.

¹⁹ *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13; (1994) 179 CLR 520 at 550-554, 556-557; cf *Stevens* [1986] HCA 1; (1986) 160 CLR 16 at 29-30.

would be the main one.²⁰ The other is arguably that of an occupier to a “contractual entrant”,²¹ though since in those cases there will usually be a contractual duty in any case, the existence of an NDD in tort is not usually an issue. *Leichhardt Municipal Council v Montgomery* [2007] HCA 6 makes clear, however, that there is in Australia no NDD owed by a local “roads authority” to members of the public who may be harmed by the actions of contractors engaged to work on the roads.²²

a. Where courts have sometimes been getting it wrong

So, as noted above, NDD is a form of strict liability that operates when S, the “principal”, is **not** at personal fault. That is why it developed. It is therefore a fundamental category mistake to discuss NDD through a critique of what the principal should have done. That is not how the doctrine operates. Yet in a number of recent decisions it seems that the courts have been misled by the designation of the principle as a “duty” of some sort, to discuss the behavior of the duty holder.

This seems (with respect) to have happened in the decision of Court of Appeal in Western Australia in *Placer (Granny Smith) Pty Ltd v Specialised Reline Services Pty Ltd* [2010] WASCA 148 (30 July 2010.)

The injured employee here (V) was a Mr Murphy, employed by SRS (S); he was injured when a crane being operated by a Mr Leach (W) (employed by another company, Drake) dropped a heavy load on him. Placer were the general occupiers of the site (a gold mine). Placer and Drake accepted liability (Leach’s action of moving the load over some unprotected workers was clearly careless, and Placer conceded it ought to have co-ordinated activities more carefully.)

The issue was, however, whether SRS, the employer, could be held liable (for the purposes of being required to make a contribution to the damages being paid by the other companies.) At first glance the situation is so like *Kondis* that it is hard to believe that anyone thought they could be distinguished; in fairly similar circumstances in that previous decision the High Court had found the SRA, employer of the worker Mr Kondis, liable under the NDD principle for the carelessness of a crane operator who dropped part of the load onto Mr Kondis.

But unfortunately both the trial judge and the CA seem to be confused about different aspects of NDD, and in the end the CA held that the employer SRS were *not* liable. The decision is hard to explain.

It is not to the point, of course (as the slightest reference to *Kondis* would show) that the employer had *themselves* behaved without fault; the issue is whether the employer can be held liable under the law of NDD for carelessness by one of the *other* participants.

There is one relevant distinction from *Kondis*, which is that SRS had not directly “engaged” either Placer or Drake to do work for it; but the fact is

²⁰ *Howard v Jarvis* (1958) 98 CLR 177.

²¹ *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33.

²² *Leichhardt Municipal Council v Montgomery* [2007] HCA 6; (2007) 230 CLR 22 at [123]; unlike the position in England, where such a duty is well established. See P Handford, “Non-Delegable Duties: Making Straight the Highway” (2007) 15 *Tort Law Rev* 71-76; C Witting “*Leichhardt Municipal Council v Montgomery*: Non-Delegable Duties and Roads Authorities” (2008) 32 *Melb Uni Law Rev* 332-349.

that SRS placed Murphy in a situation where his safety depended on decisions made by both other companies, and in general the effect of the NDD doctrine seems designed to be to impose liability in those circumstances.

In particular, in my view the CA goes wrong in para [19] where Pullin JA says: “It [NDD] remains a duty to exercise reasonable care.” This is true, if it is referring to the nature of the obligation. But this is fundamentally misleading, if it is forgotten that the duty is best described as a duty “to see that reasonable care is taken” by whomever *else* has been entrusted with the supervision of the employee. NDD does not impose a duty to *take* reasonable care onto the duty holder.

This led to much (in my view irrelevant) focus on what SRS had done to ensure its workers were safe. All that was irrelevant because SRS, under the NDD principle, should be held responsible for what Drake or Placer did, not for their own lack of care.

There are legitimate issues about whether there is liability for a “casual act of negligence”- but (as we will see below) the only way to make sense of this exception is to regard it as applying to carelessness which is *unrelated* to the task which was entrusted to the other party; and here driving a crane carefully was clearly part of the task.

With the greatest of respect, Pullin JA wrongly attempts to distinguish *Kondis* at paras [65]-[67] by saying that liability was found there because of the “employer’s breach of its personal duty of care to provide a safe system of work”. Again, this is true, but seems to be misinterpreted- the High Court clearly meant that the “personal” duty was breached *through* the carelessness of the contractor. It may be that the habit of using the word “personal” is one of the problems here. When it is used in the NDD context, it is usually used to distinguish “vicarious” liability, which is a clear example of “transferred” liability. But to say that NDD is “personal” means simply that the duty is to “see that reasonable care is taken”, and it is a duty that results from the relationship between the principal S and the victim V, rather than from the relationship of S and the wrongdoer W. It is not intended to depart from the fundamental principle that NDD is strict liability from the principal’s perspective.

In brief, then, *Placer* is a very unsatisfactory decision and may need to be corrected in the future; but there was no appeal to the High Court. Having said that, it is interesting to note that a later lower-court decision in WA seems to be quite correct. In *Gibbs v Haoma Mining NL [No 2]* [2011] WADC 148 (20 September 2011) the question was whether an employer could be liable for careless maintenance of a vehicle provided to an employee, where maintenance had been entrusted to a contractor.

Schoombe DCJ rejected the employer’s claim that they could not be held liable as they had chosen a competent contractor:

29 Counsel for the defendant further submitted that the defendant would suffer prejudice if the plaintiff was allowed to rely on a non-delegable duty of care because it was never explored at the trial whether the defendant was capable of servicing and maintaining its own vehicles. Counsel for the defendant submitted that an employer only had a non-delegable duty of care if it had the knowledge and expertise to service and maintain its own vehicles and then delegated that task to an independent contractor.

30 This argument is fallacious. It is well established law that an employer has a duty to provide safe equipment to its employees and that this includes a duty to properly maintain the equipment: *Kondis v State Transport Authority* [1984] HCA 61; (1984) 154 CLR 672, (687 – 688) and *TNT Australia Pty Ltd v Christie* [2003] NSWCA 47; (2003) 65 NSWLR 1 [61], [175] - [177]. Mason J emphasised in *Kondis v State Transport Authority* at 680 that a non-delegable duty to provide adequate plant and equipment was not satisfied by merely engaging a competent person to perform some service. In *Lepore v State of New South Wales* [2001] NSWCA 112; (2001) 52 NSWLR 420 [29] Mason P explained that the expression 'non-delegable duty' was somewhat misleading. It implied that an employer could not delegate a duty, but the truth was that the employer could not avoid liability by relying on the delegation, even to a competent delegate.

31 In this case the defendant had a personal duty to properly maintain the vehicle which it provided to the plaintiff. If the defendant delegated that duty to Pilbara Automotive, the defendant remained liable if the duty was breached by an employee of Pilbara Automotive. Whether the defendant had the knowledge and expertise to maintain and service its own vehicles is irrelevant.

2. Recent developments of NDD in workplace contexts

So the employer's duty in the law of negligence to provide a safe working environment for his/her employees cannot be satisfied by delegation to a contractor. To quote *Kondis v State Transport Authority* (1984) 154 CLR 672 again:

[T]he respondent's duty to provide a safe system of work was non-delegable and the respondent was liable for any negligence on the part of its independent contractor in failing to adopt a safe system of work. [688]

The courts have long held that this obligation applies even if worker is “loaned out” to another or placed by a “labour hire firm”. In *White v Malco Engineering Pty Ltd* [1999] NSWSC 1055, White was employed by Skilled Engineering, and made available as forklift driver to Malco. Skilled were held to still owe a duty to White as his employer:

[467] Skilled hired the plaintiff's labour to Malco but Skilled could not thereby divest itself of its obligations to the plaintiff as his employer. The duties of an employer are "non-delegable", in the sense that performance of the duties cannot be delegated by the employer to a contractor, on the footing that delegation to a competent contractor is a sufficient performance of the duties. The employer is liable for any negligence on the part of the contractor in not taking reasonable care to provide a safe system of work or safe equipment for the employer's employee: *Kondis v State Transport Authority* (1984) 154 CLR 672.

In *Thomas v Sydney Training & Employment Ltd* [2002] NSWSC 970 the training organisation which employed Thomas (who had been placed under the supervision of another company) were held to be Thomas' employer and to have a non-delegable duty of care.²³

It should be noted that, while an employer may be found to be liable on the basis of a breach of duty by someone supervising their employee, it may be appropriate in a particular action for “contribution” among tortfeasors to

²³ Per Cooper AJ at [142]. See also *TNT Australia Pty Ltd v Christie* [2003] NSWCA 47 at [67]-[68]; *Pieter Hoekstra v Residual Assco Industries Pty Ltd & 2 Ors* [2004] NSWSC 564 (25 June 2004) at [37]-[46]; *Shields v Gurcinowski t/as Perfect Air Refrigeration Air Conditioning & Heating* [2006] ACTSC 109 at [33]-[35].

apportion all the damages to the immediate supervisor: see eg *Hodge v CSR Limited* [2010] NSWSC 27 (2 February 2010); *Barns v Parlin Pty Ltd & Ors* [2010] WADC 92 (18 June 2010). Hence in many cases the NDD will only need to be relied on where the supervisor is unavailable to be sued.

A slightly unusual (but clearly correct) case involving the non-delegable duty owed to employees was *Sneddon v Speaker of the Legislative Assembly* [2011] NSWSC 508, which involved a claim made by a former staff member of a local State MP, Milton Orkopolous. The staff member alleged she had been bullied as a result of complaints made about the member's behaviour (which proved to be true, leading to his conviction of a number of offences.)

The Speaker of the Legislative Assembly was the "employer" of staff members allocated to MP's. On this question, the court ruled that the Speaker, as the employer, was liable for the actions of the Member which led to the employee's psychological harm:

[224] The totality of the relationship includes the employment of the plaintiff by the Speaker to work under the direction, supervision and management of the third defendant at the electorate office. I do not consider that it makes a difference that the Speaker did not select the plaintiff as he approved her appointment. By the terms of the plaintiff's employment to work under the Member for Swansea's direction and management, the Speaker delegated to the parliamentary Member as his representative, the duty of care to provide a safe place of work. Whilst it is accepted that there was no economic benefit to either the first or third defendant in this arrangement, there was a mutuality of interest in the effective functioning of the Legislative Assembly and of the parliamentary and constituency duties of the Member for Swansea.

[225] It seems to me that it is not entirely correct to say that the Speaker lacked control over the Member's conduct. Although the Speaker did not have control over the third defendant's performance of his parliamentary duties, he sought to exercise control over the Members of the Legislative Assembly's behavior towards their electorate office staff by the publication of the Electorate Office Personnel — Workplace Stress Policy.

[226] I conclude that the third defendant was acting as the Speaker's representative at the time of his misconduct and the first defendant is liable for the third defendant's negligence.

The relationship of employer to employee, then, will create the "non-delegable duty". One further complication, however, arises when consideration is given to the relationship between a labour hire worker placed to work with a host, and the worker themselves. Is duty of a "host" to a labour hire worker "non-delegable"?

Yes, at least in some cases, according to *TNT Australia Pty Ltd v Christie* [2003] NSWCA 47. In this case Mr Christie was a long-term" worker who had been working on the premises of TNT alongside employees, and we may say effectively "integrated" into TNT's workforce. TNT were held liable for injuries suffered by Mr Christie because *another* contractor they had engaged to maintain machinery had done so carelessly. Mason P commented:

41... Judge Delaney was correct to have concluded that TNT was in a position analogous to that of an employer as regards [its] (non-delegable) duty of care to the plaintiff. TNT exercised day-to-day control over the plaintiff's work activities, treating him to all intents the same as its employees as regards work on the factory floor... It can

be seen that the plaintiff and TNT placed themselves in a relationship, day in and day out, indistinguishable from that of employee and employer. I am not saying that every client of an employment bureau will assume such a relationship with the person at whose workplace he or she attends. But here the plaintiff had for months been under the daily control of TNT and its managerial staff at the brewery. He was a relatively unskilled labourer. He reported daily to the brewery and everything that he did there was done under the full control of TNT. TNT's relationship was more than that of an occupier of the factory. In all respects relevant to the imposition of a duty of care the plaintiff was in an identical position to that of the four TNT employees with whom he worked.²⁴

A possible complication which has emerged in recent years, however, is the question whether the non-delegable duty of an employer applies when the employee is sent to work on **different premises** which are completely under the control of someone else. In *DIB Group Pty Ltd t/as Hill & Co v Cole* [2009] NSWCA 210 Mr Cole was a truck-driver delivering fuel to premises occupied by DIB; he was injured when he stepped on a loose pit lid and fell into a pit. The trial judge found that DIB as occupiers of the premises ought to have fixed the loose lid, and this was not challenged on appeal. But what was in issue was whether Cole's employer, Lewingtons, were *also* liable for the injury. This came down to the issue whether the employer could be said to be in breach of a non-delegable duty.

Basten JA, in a very interesting judgment, made a number of suggestive points. He said that the term "non-delegable" is not a very good one, as it is unclear what is meant by "delegation"- [27]. His Honour preferred, he said, the term used in one of the early English decisions, *Wilsons and Clyde Coal Co v English* [1938] AC 57: the question is what is the "personal" duty of the employer?

In *Wilson* Lord Wright had commented:

There is perhaps a risk of confusion if we speak of the duty as one which can, or cannot, be delegated. The true question is, What is the extent of the duty attaching to the employer? Such a duty is the employer's personal duty, whether he performs or can perform it himself, or whether he does not perform it or cannot perform it save by servants or agents. A failure to perform such a duty is the employer's personal negligence. (at [1938] AC, 83-84.)

Basten JA noted that there are a number of problems that arise when this personal duty is applied to circumstances outside the immediate control of the employer. For example, in *Davie v New Merton Board Mills Ltd* [1959] AC 604 it was held that an employer is not "personally" liable for a defect in equipment that has been supplied by an outside manufacturer- see [32]. Accepting that there is liability for carelessness of a contractor on the employer's premises, as in *Kondis*, this still leaves a number of difficult questions where an employee is injured elsewhere:

39 The application of these principles has given rise to differing views in cases where the employer is not in control of the premises or place on which or at which the worker is injured.

Some cases where liability of an employer was found for an incident occurring on other premises involved the employer having personal

²⁴ See also the agreement with this view by Foster AJA at [178].

knowledge of conditions on the premises- eg *Bourke v Hassett* [1998] VSCSA 24. Arguably that was not a true application of “non-delegable duty” but a culpable personal failure of the employer to take due precautions against a known hazard.

In the end his Honour came to the following conclusions:

54 The employer’s duty, however effected, to adopt safe systems of work and to provide proper plant and equipment, will **operate differently on its own premises and in circumstances over which it has full control, as compared with premises under the control of others and circumstances over which it does not have control**. Where the safety of premises is at stake, as in this case, it is appropriate to ask quite specific questions with respect to what may be expected of an employer exercising reasonable care for the safety of its employees. For example, is it reasonable for the employer to request or require access to premises to carry out its own safety inspection? Is it necessary (and sufficient) if the employer inquires of the occupier what steps it has taken to conduct such an assessment? Is it necessary (and sufficient) for the employer to inquire in specific terms of its own employees as to the nature of the conditions they encounter at other premises?

55 These questions are analogous to the approach to be adopted with respect to the acquisition of plant and equipment discussed in *Davie*. In such a case, it is not sensible, nor consistent with the requirement to take reasonable care, to treat the employer as “delegating” its duty to provide safe equipment to the manufacturer or supplier. So long as it has acted reasonably, the employer will not be liable for injury to its employee resulting from a defect in equipment or plant not identifiable by reasonable care on the part of the employer, even though the defect is the result of negligent manufacture.

In this particular case, even if it had been reasonable to expect the trucking company to conduct a “risk assessment” inspection of the premises where the truck was to unload, the trial judge had found that the loose pit lid would not have been noticed- [61]. Hence in this situation there was no liability on the employer.

It has to be said that this is a fairly fundamental restatement of the law of “non-delegable duty” owed by employers, and would seem not to sit very happily with some of the cases noted above. The decision may be influential in the future in seeing a limitation of the non-delegable duty to situations where the employer would (apart from the engagement of some third party) have “control” over the circumstances of work. But it leaves a high degree of uncertainty.

For example, in many cases where a worker is sent somewhere else to work the employer will still have a personal obligation to provide proper safety systems and equipment. In *Pacific Steel Constructions Pty Limited v Barahona; Jigsaw Property Group Pty Limited v Barahona* [2009] NSWCA 406 the company Pacific Steel, employer of Mr Barahona, were found to be in breach of their duty of care:

[128]...Pacific required Mr Barahona to undertake work on a building site without tools, equipment or direction. It abandoned him to the site. He was required to undertake work which was dangerous and for which equipment should have been provided to ensure that he would not fall from a height. This was not a case such as the labour hire cases where the employer has no input into the manner in which work is to be undertaken. Pacific must be **taken to know** that rectification work may be undertaken at heights as the original steel works had been performed at heights. The work Mr Barahona was undertaking was part of the steel works that Pacific had contracted to do. Pacific did not take

adequate steps to ensure that Mr Barahona was provided with a safe method of work, adequate directions, a safe place of work, or with the tools and equipment reasonably necessary to safely carry out the work which he was directed to do. In our opinion, Pacific breached its non-delegable duty of care to Mr Barahona. (emphasis added)

One difference between the approach in the *DIB* case and that in *Barahona* may be that in *DIB* the issue was really one of the “condition of the premises” (an unobservable hole in the ground), whereas in *Barahona* the issues relate to a system of work which should have been known to the employer. However, the decision continues to reveal the confusion into which it is easy to slip when dealing with the NDD issue. The emphasized words refer to actual personal fault on behalf of the employer, which was “taken to know” certain things about the site on which the employee had been sent to work. This is not, then, despite the concluding sentence, an example of the principle of “non-delegable duty”. It is an example of a culpable personal failure on behalf of the employer.

The contrast between these two approaches can be seen in two other decisions. The first is one which well recognises the orthodox difference between a personal culpable failure and liability imposed under NDD. The second seems confused.

In *Glynn v Challenge Recruitment Australia Pty Ltd* [2006] NSWCA 203, the plaintiff was employed by the “labour supply” service, CRA. He was sent to work for the host company Concrete Demolition Contractors Pty Ltd (CDC). He was injured by falling off a ladder that had not been properly secured by the CDC foreman, Mr Madden. The court held that CRA was liable on two, independent, grounds: (1) through culpable breach of its personal duty of care because it had not provided proper training in working at heights; but also (2) because it was liable for the casual act of negligence of the CDC supervisor in sending the plaintiff up an unsecured ladder, due the non-delegable nature of the duty. Giles JA commented:

48 The judge did not find that Mr Madden was holding the ladder but was momentarily distracted by answering his mobile phone. The finding was wider, that Mr Madden failed to ensure that “either he or some other worker was available to stabilise the ladder”. The ladder could have been secured otherwise than by someone holding it. The failure was in the system of work, which did not properly attend to securing the ladder, and it was a **breach of the defendant’s non-delegable duty** of care; the injury was in law caused by the negligence. There was **also a direct breach** by the defendant in its failure to instruct the plaintiff as to the use of ladders, negligence which may also in law have caused the injury in that, properly instructed, it may be that the plaintiff would not have assumed that Mr Madden was holding the ladder and would have gone up the ladder only when it was secured; but it is not necessary to rest the defendant’s liability on that breach.

In *Pollard v Baulderstone Hornibrook Engineering Pty Ltd* [2008] NSWCA 99 a driver who was employed by a “labour hire firm”, Dependable, was allocated to work for Pioneer. He was injured when cleaning his truck at a Pioneer depot. Pioneer conceded liability; McColl JA (for the Court of Appeal) held that Dependable was also liable, as it had not discharged its non-delegable duty of care, because it had effectively not considered at all what system of work Pioneer had adopted for the drivers:

[58] Dependable **must have known** that Pioneer's system of work exposed the appellant to different site conditions throughout the day. In my view it was incumbent upon Dependable, in order to discharge its non-delegable duty of care to the appellant, to ensure that a reasonably safe system of work was devised which ensured that the appellant could carry out work of an ambulatory nature with safety.

It will be noted that, while the language of "non-delegable duty" is used, the focus on what the employer should have done means that the orthodox doctrine is not being applied.

Not all judges have forgotten what "non-delegable duty" means, however. In *Galea v Bagtrans Pty Ltd* [2010] NSWCA 350 (15 Dec 2010), [2011] *Aust Torts Reports* 82-078 the plaintiff was employed by Adecco (a labour hire firm) and had been placed to work as a truck driver with Bagtrans. He suffered a back injury after driving a particular Mack truck for Bagtrans in circumstances where he had previously complained to the firm about the defects in the truck seat, but nothing had been done to repair it. He had specifically asked Pat, a Bagtrans employee, whether the seat had been fixed and had been told, wrongly, that it had.

There was no doubt that Bagtrans were liable to Mr Galea, but the question was whether Adecco, the employer, were also liable for breach of non-delegable duty. On the general principles previously noted, the Court of Appeal unanimously ruled that Adecco were liable.

There is a very good review of the law by Allsop P, who points out that the employer had a non-delegable duty to see that reasonable care was taken to provide its employee with a safe place of work and equipment; and that if this were not done, then the employer would be held responsible for the failure by the person to whom the employee had been entrusted (even in the absence of any personal fault by the employer):

[5]...Mr Galea was its employee. It therefore was, and at all times remained, subject to a non-delegable duty to exercise reasonable care to provide and maintain its employee with a safe place of work, a safe system of work and safe plant and equipment: *Kondis v State Transport Authority* [1984] HCA 61; 154 CLR 672 and *TNT Australia Pty Limited v Christie* [2003] NSWCA 47; 65 NSWLR 1. I respectfully agree with the reasons of Mason P in *TNT*. The non-delegability of that duty means that the employer is liable for any breach of the duty whoever was retained by Adecco to perform it. This is reflected in the *Civil Liability Act 2002* (NSW), s 5Q, in the comment of Gummow J in *Scott v Davis* [2000] HCA 52; 204 CLR 333 at 417 [248] that a non-delegable duty involves the imposition of strict liability upon the defendant (that is for breach of the duty by others) and in the comments of Gleeson CJ in *Leichhardt Municipal Council v Montgomery* [2007] HCA 6; 230 CLR 22 at 27-28 [6]-[8].

Hence, as his Honour noted at [6], whether or not Adecco was themselves at fault is irrelevant. It is to be hoped that courts will be encouraged by this judgment to a more orthodox interpretation of the non-delegable duty.

3. NDD and the *Civil Liability Act 2002*

Another important issue that Australian courts must wrestle with these days, however, is the impact of the various pieces of "tort reform" legislation on the doctrine.

In NSW we can refer to s 5Q of the *Civil Liability Act 2002* (NSW).

5Q Liability based on non-delegable duty

(1) The extent of liability in tort of a person ("the defendant") for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any [work](#) or task delegated or otherwise entrusted to the person by [the defendant](#) is to be determined as if the liability were the vicarious liability of [the defendant](#) for the [negligence](#) of the person in connection with the performance of the [work](#) or task.

(2) This section applies to an action in tort whether or not it is an action in [negligence](#), despite anything to the contrary in section 5A.

There is one positive thing that can be said: the summary here of what the law of NDD is about is very good. It is a “duty to **ensure that reasonable care is taken** by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant”. There is a correct focus on the fact that it is a duty to see that some other person carries out a task entrusted to them by the defendant.

But there are many curious features here. Villa gives a very good analysis of the background in his commentary on the Act, and makes a reasonable case there may have been some confusion in the mind of the Ipp Committee when recommending this provision, based perhaps on the way that the *Lepore* decision was framed at the Court of Appeal level before it reached the High Court.²⁵ In the end he suggests the main impact of the provision may be to ensure that, where the wrongdoer W has a “defence or limitation” under the CLA which they can rely on, then just as under s 3C S, as an *employer* of W could rely on this, then so where an NDD is invoked as a ground of liability, so S as a *principal* can rely on these.

There are also odd comments about s 5Q in *Galea v Bagtrans Pty Ltd* [2010] NSWCA 350 (15 Dec 2010), [2011] Aust Torts Reports 82-078, noted above. Hodgson JA commented:

[65]...Where an employer entrusts another with the task of providing the employee with the place and/or system of work, and/or with plant and equipment, the employer will generally be **vicariously** liable for failure by that other person to exercise reasonable care in those matters: *Civil Liability Act 2002 s 5Q*. {emphasis added}

It is hard to see whether the reference to s 5Q adds much to the judgment, but it does at least provide justification for the word “vicariously” to be used in a way which it would not have been used at common law. It is not entirely clear whether that is how s 5Q is intended to operate, however.

There are also one or two remarks, however, which are helpfully suggestive of the need for further thought on the question of “collateral negligence”, and how one defines the point at which the principal will no longer be liable for some wrong committed by the contractor. At [8] Allsop P raises the question whether, if the sole ground on which Bagtrans were being held liable was the deliberate lie told by Pat, this would have justified application of the NDD doctrine:

It may be that the misleading of Mr Galea by Pat’s misrepresentation would not fall within the scope of the non-delegable duty. On the facts here, it can, however, be seen as indicative of an inadequate system of maintenance. One would not assume or infer that Pat said what he did knowing that the seat had not been fixed. His mistake assists in the

²⁵ See his discussion, in *Annotated Civil Liability Act 2002 (NSW)* (2nd ed, 2013) at [1A.5Q.080].

inference that Bagtrans had an inadequate system of keeping track of repairs and maintenance.

The difficulty facing the Court here would be, as we will see below, that the High Court has told us in *Lepore* that NDD cannot be applied to a case of “intentional” wrongdoing; and one might be able to make a case that Pat’s lie was “outside the scope” of the supervision that had been entrusted to Bagtrans. However, the question is resolved by noting that Bagtrans as a whole seem to clearly have had an inadequate system for repairs of equipment, and this is a matter of negligence, not only related to any possible lie.

Hodgson JA then says at [67]-[71]:

67 The employer may not be liable for casual acts of negligence by a person entrusted with providing the place of work or system of work or plant and equipment, or an employee of that person, if those casual acts fall outside the scope of the task so entrusted: cf *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 at 32 – 33. Thus, in cases where an employee of a labour hire company is sent to work for a surrogate employer, and is injured due to a failure of an employee of the surrogate employer to keep a proper lookout, the labour hire company may escape liability unless the failure can be linked with some failure of the surrogate to exercise reasonable care in the provision of a safe place or system of work, and safe plant and equipment...

71 Another contributing cause of Mr Galea’s injury was the incorrect information given by Pat that the seat had been fixed; and a question arises whether Adecco is vicariously liable for that act of negligence by Bagtrans. In my opinion, it is. In my opinion, the giving of correct information concerning the safety of equipment is part of the task of providing a safe place and system of work, and safe plant and equipment.

With respect to his Honour, I found it a bit hard to reconcile the end of para [67] with the finding in para [71]. It would seem to me to be an obvious part of supervising a worker to keep a proper lookout for possible harm (but it may be that his Honour means something unexpected such as a driver running down the employer in a courtyard where all normal precautions had been taken.) Nevertheless, the finding is that Pat’s provision of incorrect information was something that Adecco were liable for (and this may be assisted by his Honour characterising it as an “act of negligence” rather than focussing on whether Pat was lying).

I must also mention one point that does not seem to have been considered- that s 5Q is referred to as if it were applicable in determining the liability of Mr Galea’s employer, Adecco. But the fact is that by virtue of s 3B(1)(e) CLA the provisions of Part 1A of the CLA (in which s 5Q falls, in Divn 7) do not apply to civil claims to which the *Motor Accidents Compensation Act* 1999 applies²⁶- and this claim of Mr Galea’s was held to be a “motor accident” (see Hodgson JA at [74]-[82]). Still, we can take it that the comments about s 5Q represent what the court *would* say if the section were in fact applicable!

Withyman bht Withyman v NSW and Blackburn [2013] NSWCA 10 is another recent case which featured some comment about s 5Q. The question was whether the State of NSW was liable for harm caused by a teacher, Ms

²⁶ While s 3B(2) applies a number of other provisions of the CLA to motor accidents, Divn 7 of Part 1A is not one of those provisions- see s 3B(2)(a) picking up “Divisions 1-4 and 8 of Part 1A”.

Blackburn, employed by the State, who had sex with her 17 year old intellectually impaired student, Mr Withyman.

Allsop P at [132] noted:

The accepted non-delegable duty of the State is to be determined as if the liability were the vicarious liability of the State for the negligence of Ms Blackburn: the CL Act, s 5Q.

With the greatest of respect, this comment may be in error. There was no reason to discuss the State's liability for harm caused to school-children in terms of NDD. However, this "error" (as we will see below) may be one of which the High Court of Australia was guilty in *Lepore v NSW*, and so perhaps the mistake is understandable.

The point at this stage is this: NDD as it currently applies is really only a doctrine that should be applied where the issue is that of liability for harm committed by a non-employee. If an *employee* commits harm, then the separate doctrine of vicarious liability contains the relevant attribution rules.

While it is true to say that the development of the doctrine of NDD saw it initially applied in some cases dealing with liability for the wrongs of employees as well as those dealing with the wrongs of contractors (the seminal decision of *Wilson and Clyde Coal Co v English* is the best example), in more recent years it has not been applied to the wrongs of employees. Once the courts stopped applying the principle of "common employment" to exempt employers from liability for the torts of employees against fellow employees, then there was no longer any need to use NDD if the wrongdoer were an employee.

Unfortunately, there has been no clear direction as to this long-standing practice. And in *Lepore v NSW* the High Court engaged in an extensive discussion of NDD, despite the fact that the wrongs alleged to have been committed were carried out by an employed teacher.

To come back to *Withyman*, the only alleged wrongdoer here, Ms Blackburn, was an employee. It seems arguable, then, that the claim should have been one for vicarious liability, not one based on "non-delegable duty". Hence s 5Q of the CLA should not have been relevant at all to Mr Withyman's claim against the State.

There is another complication in the proceedings. The earlier part of the judgment shows why the trial judge was correct to say that the Act as a whole did **not** apply to the action by Mr W directly against Ms B (because under s 3B(1)(a) her acts fell under the description of "an intentional act that is ... sexual misconduct"- see [52]-[53].)

The action against the State, then (insofar as it was *based on* Ms B's wrongdoing, rather than any failure of supervision by the State) would also seem to have fallen within this paragraph. (Their liability was "in respect of" that very activity in terms of s 3B.) But if that is the case, then this was another reason that s 5Q did not apply!²⁷

A key issue here, however, is this- when s 3B excludes the CLA from governing an action against a primary wrongdoer, does it also exclude the CLA from applying to S, the principal? It is now well established that in

²⁷ Under s 5A(2): "This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B." Section 5Q is contained in Part 1A, which is governed by s 5A.

relation to vicarious liability, this is so: see *Zorom Enterprises Pty Ltd v Zabow* [2007] NSWCA 106.²⁸ It would seem to be clear that as a matter of general policy that someone who is liable as a principal under the doctrine of NDD, should be treated in the same way as an employer who is vicariously liable. One legal reason can be offered in the wording of s 3B(1)(a): the Act does not apply to

civil liability of a person in respect of an intentional act that is done **by the person** with intent to cause [injury](#) or death or that is sexual assault or other sexual misconduct committed by the person.

What about the phrase “by the person” here? The history of the insertion of this phrase shows that it is designed to deal with a situation where a defendant D is being sued by a plaintiff P for D’s **failure to control the actions of** a wrongdoer W. The classic such case is liability of a prison authority for harm committed to a prisoner: see *State of New South Wales v Bujdoso* [2007] NSWCA 44 (13 March 2007). The words are then designed to ensure that, in an action against the State for its personal failure to control a prisoner, it can rely on the CLA to limit its damages.

One might have thought that this would also extend to vicarious liability. But *Zorom*, decided in May 2007 and conscious of the decision in *Bujdoso*, holds not. Vicarious liability is based on liability for the actions of the employee, and hence the liable employer is not entitled to argue that the CLA does not apply.

There seems, then, to be no directly relevant case where the issue is: does s 3B allow a principal, S, to argue that the CLA does not apply to an action based on NDD principles? The passing comment of Allsop P noted above does not seem to me to squarely resolve the issue. On general policy grounds I would like to suggest that, if the courts hold that an employer who is vicariously liable cannot be granted the benefit of the CLA, nor should a principal who is strictly liable under NDD. But it seems that this is not yet clear to the courts.

One recent case illustrates a possible operation of s 5Q that may, however, be in accordance with the intentions of the Ipp Committee. In *Echin v Southern Tablelands Gliding Club* [2013] NSWSC 516 (28 May 2013) Mr Echin had been injured in a gliding accident and was suing the club which had organized the activity. As a matter of fact the trial judge found that the instructor who had been in the plane with Mr Echin when the accident had happened had not behaved carelessly, nor had the Club been deficient in its training or procedures.

But his Honour went on to consider what the situation might have been if there had been negligence of an instructor. Under s 61 of the *Civil Liability Act* 2002 (NSW) a “volunteer” doing community work cannot be sued. It was conceded that this applied to the instructor in question. But could the Club rely on this immunity?

Under s 3C of the CLA any immunity applying to a person was automatically available to any other person who is vicariously liable for the

²⁸ See also *Crilly v Bumble Group Pty Limited t/a My Security* [2012] NSWDC 3 (30 January 2012), where it was accepted, on the authority of *Zorom*, that the CLA did not apply to an action in a “bouncer” case based on vicarious liability- see para [5].

commission of a tort by the first person. Indeed, this led the Club, somewhat curiously, to argue that they were vicariously liable for any wrongs committed by the instructor! The court rejected this proposition: the instructor was clearly not an employee.

However, the court held that if there had been some non-delegable duty of care owed to the trainee, then the effect of s 5Q would be to deem the immunity of s 61 to apply to the Club:

[104] If the Defendant had some non-delegable duty of care to the Plaintiff which was breached s 5Q would operate so that the Defendant's liability would be regarded as vicarious. In those circumstances s 3C would, in conjunction with s 61, mean that the Defendant had no liability. However, it is difficult to see that the Defendant owed any such non-delegable duty: *Scott v Davis* [2000] HCA 52; (2000) 204 CLR 333 at [248]; *Kondis v State Transport Authority* [1984] HCA 61; (1984) 154 CLR 672 at 679-687.

In the circumstances, then, there was no need to invoke s 5Q. But at least this possible application illustrates the (fairly rare) circumstances where it might be of use.

4. *Woodland* and the future development of NDD in the common law world

While not a case about liability for what might be called a “workplace” injury, the recent litigation in *Woodland* has given the UK Supreme Court an opportunity to provide some clearer guidance on how the principle of “non-delegable duty” operates in that country, and there may be an impact of this in the wider common law world.

In recent years it had become apparent that courts in the UK did not accept all the categories accepted by the High Court of Australia. The decision in *Woodland v Swimming Teachers' Association* [2012] EWCA Civ 239 raised the issue sharply, and the recent decision on appeal in *Woodland v Essex County Council* [2013] UKSC 66 (23 October 2013) now opens up new avenues for NDD in the UK. It may also provide a reason for Australian courts to rethink an important question, as we will see.

The facts of the case were summed up well at [78] in the CA judgment by Kitchin LJ:

The appellant suffered her terrible injuries in the course of a swimming lesson which she attended together with other members of her class at the Gloucester Park swimming pool in Basildon. The swimming pool was run by the Basildon Council, and the arrangements under which the children had their swimming lessons were organised by Ms Beryl Stotford trading as Direct Swimming Services. The life guard and the swimming teacher supervising the lesson in which the plaintiff suffered her injuries were employees of Ms Stotford, not the authority.

The appellant sued a number of parties, but the issue at stake in the case was this: could Essex Council, who were the school authority, be held responsible under the doctrine of non-delegable duty, for the carelessness of the life-guard and the swimming teacher? (There was also a claim based on the personal failure of the Council to select competent swimming teaching contractor, but that issue has apparently still not been tried.)

In *Woodland v The Swimming Teachers' Association* [2011] EWHC 2631 (17 Oct 2011) at first instance Langstaff J held that a school which sends

a pupil off to swimming lessons does not owe a non-delegable duty to the pupil in those circumstances, and hence cannot be held directly liable for carelessness of the swimming instructor (not employed by the school).

There was some mention of the fact that authority at the highest level in Australia (*Commonwealth v Introvigne* [1982] HCA 40; (1982) 150 CLR 258) clearly holds that a school owes an NDD to pupils, and counsel had even discovered the more recent application of this principle in *Fitzgerald v Hill & Ors* [2008] QCA 283 to pupils who were outside the main "educational premises". Despite this, however, Langstaff J held that English law did not support the extension of NDD generally to pupils, and especially to pupils who are not on the school premises. (There is a concession in para [67] that "the necessary degree of integration may arguably be present where a supply teacher is contracted through an independent agency to teach a lesson inside the school, in a situation indistinguishable (but for the private contractual arrangements) from that of an employed full time teacher teaching a similar lesson to the same pupils in the same classroom", but even that is not very certain.)

What was lacking from the judgment was any interaction with more recent academic writing on the issues. The judgment would have benefited from some discussion of the pieces by Christian Witting, John Murphy and Robert Stevens which were referred to by Kirby J in the High Court of Australia's more recent decision in *Leichhardt Municipal Council v Montgomery* [2007] HCA 6; (2007) 230 CLR 22. There is also an interesting attempt to invoke general "policy" considerations in coming up with a result - eg see [46]-[53].

Montgomery suggested that there are certain situations which are well recognised to involve an NDD owed by S to different categories of V. In terms of a general principle, in that case Kirby J suggested the following overall questions would be relevant: whether there was:

- (1) creation of a substantial risk due to the "enterprise" carried out by the defendant, coupled with
- (2) assumption of responsibility toward the claimant;
- (3) (these factors usually only being found where the plaintiff is particularly "vulnerable"); and
- (4) Usually there will be a clear reason for imposition of a positive duty to take care for the safety of the claimant. (See paras [117]-[120])

Christine Beuermann has started to put forward a theory in some of her writing that NDD could legitimately be analysed as applicable in the particular situation where S has entrusted W, the wrongdoer, with some form of authority over the actions of V, the victim. I think this theory would neatly explain many of the cases, especially the school and employment cases, and would plausibly be able to extend to the hospital and some other cases.²⁹

On appeal in *Woodland* to the English Court of Appeal, the majority, Tomlinson & Kitchin LJJ, agreed with the trial judge that in the circumstances the school did not owe a non-delegable duty to a pupil who was injured due to carelessness of those conducting a swimming lesson off-site. Of course this is *not* the law in Australia.

²⁹ See C Beuermann, "Vicarious liability and conferred authority strict liability" (2013) 20/3 *Torts Law Journal* 265-274.

There was a strong and persuasive dissent by Laws LJ, who would have accepted the Australian authority that there is an NDD owed by schools to pupils and hospitals to patients. His Lordship at [30] seems to capture the decisions and put some reasonable limits on the doctrine:

A school or hospital owes a non-delegable duty to see that care is taken for the safety of a child or patient who (a) is generally in its care, and (b) is receiving a service which is part of the institution's mainstream function of education or tending to the sick.

The fact that Australian courts (following *Introvigne*) were taking a different approach can be seen in *Harris v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2011] NSWDC 172 (10 Nov 2011), with very similar facts to *Woodland*. The Plaintiff was a student at a Roman Catholic school who had gone on a school ski-ing excursion. Effectively it was alleged that the ski instructor had been carelessly, leading to his injury, and that the school was liable (due to its non-delegable duty) for the carelessness of the ski instructor.

Elkaim SC DCJ confirmed that on authority of *Introvigne* the school owed a non-delegable duty- [117]. He also ruled that what the ski instructor was doing was within "the scope of the engagement" to teach the children- [119]. His Honour referred to an argument that this was a "casual act of negligence" for which the principal could not be held liable (referring to comments in the *Galea* case noted above), but ruled that what had happened was well within the scope of what the instructor was being paid to do and certainly not "spur of the moment"- [122]. The instructor was found to have been careless by allowing the class to take place in an area where there was a "ditch" which caused the accident; hence the school were liable for his carelessness (though they were entitled to recover their damages from the instructor).

On final appeal in *Woodland v Essex County Council* [2013] UKSC 66 (23 October 2013) the Supreme Court as a whole all held that schools do indeed owe a non-delegable duty of care to pupils, and hence that in the *Woodland* case the matter needed to be sent for trial on the basis that the local authority running the school might be held liable for negligence by the contracted swimming instructors whose carelessness may have given rise to Miss Woodland's injuries. Lord Sumption set out five criteria, which he thought should be applied to determine if an NDD is owed, at para [23], which are very similar to criteria suggested by John Murphy a few years ago:

(1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.

(2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren.

(3) The claimant has no control over how the defendant chooses to perform those obligations, i.e. whether personally or through employees or through third parties.

(4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it.

(5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

Lady Hale, in an essentially concurring judgment, specifically cited Christine Beuermann's TLJ article at [33].³⁰

Lord Sumption referred in detail to High Court of Australia decisions on the point and agreed that the approach taken in *Introvigne* and *Kondis* is generally correct. There is a comment in the judgment worth noting, where his Lordship suggests at [21] that in *Lepore* "by a majority of 4-3 (Gaudron, McHugh, Gummow and Hayne JJ) the Court held that the schools owed a non-delegable duty". This is confusing if it is not realized that his Lordship's concern is with the general *existence* of a non-delegable duty owed by schools to pupils, which indeed it is clear that Gummow and Hayne JJ support. However, in the overall balance of opinions in the *Lepore* decision their Honours did *not* support the application of the non-delegable duty to an intentional, as opposed to negligent, tort. We turn to this issue now.

5. NDD and intentional torts

A question which in my view has been answered in an unsatisfactory way in Australia is whether there can be liability under the NDD principle for commission of an intentional tort.

The issue came up in *NSW v Lepore* (2003) 212 CLR 511, where the intentional wrongful act was the alleged sexual assault of a student by a teacher. Kirby J at [295] declined to rule on this issue as the teacher was an employee; with respect this seems correct, but the rest of Court went on to decide the point.

The decision of majority was effectively that there can be **no** breach of a non-delegable duty by an intentional wrongful act- see Gleeson CJ at [38]; Gummow & Hayne JJ at [265]; Callinan J at [339] agreeing with Gleeson CJ.

McHugh J, dissenting on this point, held that a school owes its pupils a non-delegable duty of care which is breached even by intentional wrongdoing by a teacher- [136]. Kirby J, while refusing to formally rule on the issue, on the question of "whether intentional wrongdoing can form the basis of a finding of breach of a non-delegable duty", comments at [293] that "my approach...prima facie... would be no different in relation to non-delegable duties", to his approach to the issue of vicarious liability. At [309]-[314] that approach is clearly that there **can** be vicarious liability for intentional wrongdoing; as a result Kirby J would seem to count as a vote in favour of the proposition that there can be breach of an NDD as a result of intentional wrongdoing.

The result of the majority reasoning may lead to different results in case of a workplace assault depending on the employment status of the worker committing the assault. This seems odd and inconsistent.

³⁰ See above, n 29.

This aspect of *Lepore* has been cogently criticised as “indefensible” by Stevens, *Torts and Rights* (2007) at 122-123:

Liability for the breach of a primary duty cannot be avoided by showing that the breach was gross. It is as if a seller of ginger beer could escape liability to the buyer for its defective quality if it could be shown that it had been deliberately poisoned by the manufacturer. If the duty assumed is a duty that care will be taken, this is breached where the child is abused. This does not mean that the duty assumed is absolute. A child who falls over in the playground does not necessarily have a claim. Such injury can occur even if all care is taken of the child. However, liability for deliberate abuse follows *a fortiori* from liability for want of care. Only if non-delegable duties are seen as a “disguised” form of vicarious liability, as the majority erroneously assumed [see (2003) 212 CLR 511 at [257] (Gummow and Hayne JJ), 608-610 (Kirby J)] does it make sense to refuse the claim on the basis that the abuse was intentional.

Stevens’ approach overall to this area is not the traditional analysis- he argues that so-called “non-delegable duties” are really situations where there has been a “voluntary undertaking” of a “personal” responsibility. But it is not clear yet whether his analysis, which requires rejection of at least some *obiter* comments by members of superior Courts (see critique here of the majority in *Lepore*) will be generally accepted.³¹

Some of the problems created by the view that NDD cannot apply to an intentional tort can be seen in the interesting decision in *Nationwide News Pty Ltd v Naidu & Anor; ISS Security Pty Ltd v Naidu & Anor* [2007] NSWCA 377. Mr Naidu was employed as a security guard by ISS. He was placed by ISS to work in the premises of Nationwide News (“NN”), under the supervision of the head of security for NN, Mr Chaloner. Chaloner was found to have bullied and humiliated Mr Naidu and to be personally liable (if sued) for the tort of intentionally causing harm under *Wilkinson v Downton*.

The question that had to be resolved, then, was whether either of ISS or NN were liable for Naidu’s harm, or both? ISS as Naidu’s employer were held (in line with the authorities noted above) to have a non-delegable duty of care, so that they would be held liable for *carelessness* by NN- see Spigelman CJ at [27], Basten J at [424].

But the CA held that ISS were *not* to be in breach of their “personal” or “direct” duty to Mr Naidu, as no officer of ISS had a personal knowledge of the harassment- see Spigelman JA at [48]; Basten JA at [424]. Hence they were not liable for the harm at all.

The finding that ISS were not liable seems (though this is not very clearly spelled out) to relate to the fact that the person in NN who clearly *did* know about the harassment was the wrongdoer Chaloner himself, who was the perpetrator of what the Court overall found to be an *intentional* tort. But since the High Court in *Lepore* held that there can be no liability based on “non-delegable duty” for commission of an intentional tort, ISS could not be held liable for that wrong committed by the very person to whose care Mr Naidu had been entrusted.

NN, on the other hand, were found to be liable on two separate grounds: because Chaloner, as a sufficiently senior officer of NN responsible

³¹ See also his chapter on the issue (cited prior to publication by the High Court in *Montgomery* by Kirby J at [31]): R Stevens, “Non-Delegable Duties and Vicarious Liability” in Neyers, Chamberlain & Pitel (eds) *Emerging Issues in Tort Law* (Oxford: Hart, 2007) 331-368.

for security, acted “as the company”, and hence it was as if NN had committed the tort “directly”- Spigelman JA at [84]-[86]; Beazley JA at [228]-[236] (Basten JA declining to rule on this issue at [388]); and because Chaloner was an employee of NN, and they were vicariously liable for the tort under whatever principle came from *Lepore*- Spigelman CJ at [89], Beazley JA at [261], Basten JA at [398]-[409].

Still, it seems an odd result that Mr Naidu’s employer were held not to be liable at all where the very person to whose supervision he had been entrusted had deliberately mis-used their power. Presumably if Mr Chaloner had been less culpable, by simply failing to provide Mr Naidu with a safe system of work, for example, then ISS would have been liable!

Getting the complex issues straight here is by no means easy. In a decision concerning the possible liability of a hospital for a sexual assault alleged to have been committed on a patient by an orderly, *NB v Sydney South West Area Health Service* [2010] NSWDC 172 (6 October 2010), the court accepted that there was a possible liability under non-delegable duty (see eg [130]). On the authority of *Lepore* this was clearly wrong (though as the claim was rejected on the basis of findings of fact, the result was not affected).³² However, one can understand the trial judge’s ruling, as it seems natural to suppose that a hospital has undertaken the care of a vulnerable patient, and should be held responsible if a staff member were to take advantage of that situation to commit a sexual assault.

The trial decision in *Withyman v State of NSW & Anor* [2010] NSWDC 186 is consistent with *Lepore* but illustrates some of the tricky issues that are raised. The case, noted above, involved an action by a mentally impaired student against NSW and against a female teacher who had been employed in a NSW school, on the basis of a sexual relationship initiated by the teacher.

The claim for damages was based on incidents that had occurred after the relationship had been terminated, when the student committed a series of further assaults on the teacher and spent time in jail for them. The claim was clearly doomed to failure on a number of grounds (the “illegality” or *ex turpi causa* defence was clearly applicable, on facts similar to the *Gray* case.)

But the judge considered whether or not NSW would have been liable in other circumstances on the basis of a non-delegable duty for what amounted to a sexual assault on a then-minor by the teacher, and held that it would not. This was clearly required by the ruling in *Lepore*. However, illustrating the tendency to misunderstand the principle previously noted, at [415] his Honour said that NDD did not apply because “there has been no fault on the part of the school”. This is clearly wrong, of course: lack of fault on the part of the person having an NDD is not a preclusion from a successful NDD claim, as it is a principle of strict liability.

The judge also held that the school could not be regarded as vicariously liable. Correctly quoting *Lepore* at this point, his Honour concluded that this was because the particular responsibilities that the teacher had did not of themselves involve “acts of intimacy”. I would have thought

³² See comment on the case in Bill Madden & Tina Cockburn, “Hospital liability for sexual assault of a patient” (2011) 19 (2) *Australian Health Law Bulletin* 35-37.

this was a closer call than the judge seems to; the correct test is whether there was a “close connection” between the tort and the duties of employment, and I think the issue required a bit more analysis. However, as noted above for *ex turpi causa* reasons the claim failed.

On appeal, in *Withyman bht Withyman v NSW and Blackburn* [2013] NSWCA 10, the trial judge’s decision that NSW was not liable for breach of a non-delegable duty was upheld as correct; some of the complexities of the application of the CLA 2002 have been noted above.

So we are left in Australia with the unsatisfactory situation that an intentional tort cannot be sheeted home to a principal through the NDD principle, although negligence can. Does the decision in *Woodland* make a difference here? I think it may.

Lord Sumption summarises the main principles of NDD in his judgment at [12]:

Both principle and authority suggest that the relevant factors are the vulnerability of the claimant, the existence of a relationship between the claimant and the defendant by virtue of which the latter has a degree of protective custody over him, and the delegation of that custody to another person.

None of these matters depend on the harm committed to the child who is owed such a duty being committed by carelessness as opposed to an intentional act of assault. Similarly, when the five factors noted above from [23] are considered, none explicitly address the type of wrong. A child being cared for in a school, for example, is “vulnerable” to intentional sexual assault; the school has assumed a duty to “protect the claimant from harm” of all sorts; the child has no control over how that duty is realised; the school will commonly have delegated to the wrongdoer the care of the child. Even the fifth and final point, which refers to the wrongdoer being “**negligent** not in some collateral respect but in performance of the very function assumed by the defendant and delegated by the defendant to him” (my emphasis), while it uses the word “negligent”, is really aimed at the question of whether the wrongdoer was behaving wrongfully in a core or a “collateral” area.

Indeed, it may be that this type of flexibility in understanding the wording used is what Lady Hale is referring to in her concurring judgment, where she notes at [38] that her agreement is:

subject of course to the usual provisos that such judicial statements are not to be treated as if they were statutes and can never be set in stone.³³

Indeed, it seems as if her Ladyship may be deliberately leaving open the possibility of a future clarification that a non-delegable duty owed by a school may well be extended to provide liability for intentional sexual assault. In her reference in [33] to Beuermann’s article,³⁴ she specifically picks up the point that it would have been possible in previous cases dealing with sexual assault of children to have adopted the logic of “non-delegable duty” (what

³³ See also her Ladyship’s remarks at para [28]: “But the word used by judges in explaining why they are deciding as they do are not to be treated as if they were the words of statutes, setting the rules in stone and precluding further principled development should new situations arise”.

³⁴ C Beuermann, “Vicarious liability and conferred authority strict liability” (2013) 20/3 *Torts Law Journal* 265-274.

Beuermann refers to as “conferred authority strict liability”) rather than the principle of vicarious liability.³⁵

In my view this would be a sensible development of the law, and it is one that ought to be rethought by the High Court of Australia. There is no opportunity here to develop the point in any detail, but it is submitted that the development of the law in the area of vicarious liability for child sexual in the most recent decision of the UK Supreme Court in *The Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56 has taken the law in unhelpful directions. The criterion of a relationship “akin to employment” is so vague and potentially broad that it risks allowing a wide and uncontrolled expansion of strict liability for the wrongs of third parties. However, most if not all child sexual assault cases involving the churches and schools would clearly fall within the criteria accepted now in *Woodland* (and accepted for many years in Australia since *Introvigne*) for the existence of a non-delegable duty. That principle would provide a clear and appropriately limited avenue for recovery of compensation for the dreadful harms inflicted by persons in trusted positions of authority, without unduly stretching the boundaries of vicarious liability in yet another uncontrolled expansion.

6. Collateral negligence?

Finally, more work needs to be done (I can offer no radical new insights at the moment) on the question of “collateral” negligence or wrongdoing that will mean that the principal is not liable for harm committed by the contractor.

An employer is only vicariously liable for wrongs committed by an employee “in the course of employment”, and the rules as to this issue are fairly well developed. There must clearly be a similar limitation on the liability of a principal for negligence committed by a contractor, where the principal has a non-delegable duty. But the precise scope of the limitation is unclear.

The limitation is sometimes stated to be that the principal will not be liable for “collateral negligence” of a contractor. The sense seems to be that there is some negligence of a contractor that would be outside the scope of the obligation undertaken by the principal to the person who was harmed. But defining this limit seems difficult, and some of the older cases offered to illustrate it seem to me to no longer be valid.

Balkin & Davis, for example, offer the example of *Padbury v Holliday & Greenwood Ltd* (1912) 28 TLR 494 (CA), where a principal was held not responsible for harm caused by a hammer falling from a window ledge onto a pedestrian, the carelessness of the contractor in leaving the hammer being said to be “collateral” to the task of installing a window.³⁶

But why is that so? If the person harmed was, for example, an employee to whom the employer owed a non-delegable duty, it is hard to see why the carelessness is “outside the scope” of the contractual undertaking. Surely carelessness in handling tools is the sort of thing that is entirely foreseeable. On the other hand it may be that the person injured was simply a

³⁵ Referring to “previous cases concerning harm suffered by school pupils”, the ones being discussed by Beuermann at 273 of her article being “the child sexual assault cases”.

³⁶ 4th ed, at [26.35].

passing pedestrian, in which case may not be a case of non-delegable duty at all.

The whole concept is criticised for its lack of clarity by Callinan J in his judgment in *Montgomery* at [179]:

...[T]he identification of what should be regarded as merely casual or collateral is an exceedingly difficult one to make. In his reasons for judgment the Chief Justice describes the creation here of the concealed trap as an "apparently low-level and singular act of carelessness"^[247], an equally apt description of which would be, to use the language of *Halsbury*, a "merely 'casual' or 'collateral'" act of negligence... [T]he distinction is an uncertain one...

Perhaps the best we can say is that the limits of the notion are unexplored, and would benefit from further work.

Still, the decision in *Gibbs v Haoma Mining NL [No 2]* [2011] WADC 148 (20 September 2011) provides an example of the court dealing with the issue. The trial judge addressed the question whether the failure to maintain a wheel could be an act of "casual negligence" and held that it could not

44 In this case the particular duty that was delegated by the defendant to Pilbara Automotive was to exercise reasonable care in the repair and maintenance of the vehicle. If an employee of Pilbara Automotive was negligent in under-tightening or over-tightening the nuts he would have breached the very duty that was delegated to Pilbara Automotive. There is no scope for saying that such an act would have been a 'casual act of negligence' in the sense of an act which fell outside the particular duty delegated to Pilbara Automotive. It would be fallacious to argue that Pilbara Automotive had a good system of re-fitting wheels and that an employee who did not follow that system had committed a casual act of negligence. The duty delegated to Pilbara Automotive by the defendant was not a duty to have a good system of work in place while the plaintiff worked in its workshop. The duty was to exercise reasonable care in the maintenance of the defendant's vehicles.

Conclusion

This paper has raised in a preliminary way a number of issues that require attention in the area of attributed liability for the actions of non-employees under the principle known as "non-delegable duty". It has noted that, while the principle enjoys a long pedigree, it is being misunderstood in some court decisions. There are complexities in its treatment under "tort reform" legislation. But the recent expansion of the area in the UK in the *Woodland* decision seems to go a long way to set it again on a principled basis, and suggests that if the High Court of Australia is prepared to revisit the question of its application to intentional torts, a revitalized non-delegable duty analysis may be a preferable way of dealing with the tort issues presented by institutional sexual abuse of children. Finally, more work needs to be done on defining with increased clarity the boundary line beyond which wrongdoing by a contractor will be outside the scope of the contractual engagement entered into by the principal and be viewed as merely "collateral" rather than central to the contractual purpose.