Reinvigorating Non-delegable Duties in Australia?

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This article considers the recent recommendation of the Royal Commission into Institutional Child Sexual Abuse that Australia should legislate to recognise a non-delegable duty of care on some institutions in this context. At the current time, the precise status of non-delegable duties in the law of tort in Australia is somewhat uncertain, with some recent decisions appearing to cast doubt on the existence of such obligations. It is considered to be incumbent on those proposing a non-delegable duty of care to justify the circumstances in which it is or should be imposed. Notwithstanding such duties have been recognised for a long time, a satisfactory rationale for the creation of such special duties remains elusive. It will be submitted that, if ever in the law recognition of a non-delegable duty of care was necessary, developments elsewhere in the law of tort have rendered it superfluous. Thus, while it is very important that the pain caused to survivors of child sexual abuse be recognised, and compensation and reparation take place, the tragedy of child sexual abuse should not be the catalyst for the revitalisation of non-delegable duties in Australian tort law.

INTRODUCTION

The final hearings pursuant to the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) have recently been held. The extent of abuse uncovered by the Royal Commission has shocked many, which estimated that 60000 individuals have been abused. It should go without saying that survivors of such abuse deserve significant sympathy for what they have endured, that a system of legal redress may go some way to resolving ongoing issues for survivors and that society must do what it can to support such survivors and allow them to get on with the rest of their lives as best they can. It is also expected that significant reforms to civil liability and criminal liability might flow as a result of the work of the Royal Commission.[1]

Specifically, recommended areas of reform have included changes to limitation periods to make it easier for survivors of abuse to bring matters to court and clarifications regarding the impact of principles of vicarious liability with respect to abuse committed within institutions. I have considered both of these reforms in published work elsewhere[2] so will not revisit them here. My focus here will be on recommendations made in respect of so-called non-delegable duties (at common law).[3] It should be acknowledged, however, that issues pertaining to vicarious liability and issues pertaining to non-delegable duty questions can overlap. Sometimes, it is said that questions regarding non-delegable duty

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[1] Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), (*Redress Report*) (2015) <http://www.childabuseroyalcommission.gov.au/policy-and-research/our-policy-work/redress/final-report-redress-and-civil-litigation>; Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice* (2016) <http://www.childabuseroyalcommission.gov.au/policy-and-research/our-policy-work/criminal-justice>.

[2] Anthony Gray 'Liability of Educational Providers for Child Sexual Abuse' (2017) 38(2) *Sydney Law Review* 167–197; Anthony Gray 'Extending Time Limits in Sexual Abuse Cases' (2009) 38(4) *Common Law World Review* 342–384.

[3] Legislation may specifically impose a non-delegable duty (eg *Angliss v Peninsular Oriental Steam Navigation Coy* [1927] 2 KB 45), but this type of non-delegable duty is not the focus of this article.

are only asked when vicarious liability is not available.[4] Traditionally vicarious liability was applied in the employment context, specifically the employer-employee relationship, and did not apply to cases where an independent contractor was engaged. This is why some of the context in which non-delegable duty questions have been engaged has involved possible liability for independent contractors.

In recommendation 89 of its *Redress Report*, the Royal Commission recommended the introduction of a statutory non-delegable duty on certain institutions for child sexual abuse, notwithstanding the abuse comprised a deliberate criminal act by a person associated with the institution.[5] The Commission posited that the non-delegable duty would apply to six different situations involving the provision of care to children.[6]

The Commission clarified in its *Redress Report* that by non-delegable duty, it meant strict liability, rather than absolute liability.[7] This is important because there is often confusion about this, with various assertions that a non-delegable duty is absolute,[8] is strict or is non-strict in nature.[9] The institutions subject to the non-delegable duty would only be liable for accidents and incidents that result from their failure to exercise reasonable care.[10] They could be liable for both accidental and deliberate acts.[11] The Commission clarified that a non-delegable duty is to be taken literally – it cannot be delegated to another. As a result, the institution would have to ensure that reasonable care was taken by those to whom it entrusted performance of its duty of care.

This is the standard formulation of a non-delegable duty – not merely a duty to take reasonable care, but a higher duty – a duty to ensure reasonable care is taken.[12] As conceived, this liability is considered (by this author) to be strict in nature, in that it is imposed regardless of any personal fault of the person who owes it, and can include circumstances where reasonable care is not taken by another.[13] Being a form of strict liability, it is increasingly anomalous in a law of tort dominated by fault-based negligence.

It recognised that child abuse was the antithesis of the taking of reasonable care. It clarified that in such cases, application of the non-delegable duty would make the institution strictly liable for that abuse. This is because such an event would obviously mean that the institution had engaged a person

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[4] *Woodland v Swimming Teachers' Association* [2014] AC 537, 572 (Lord Sumption); "the only circumstances in which a claimant might need to pray in aid a non-delegable duty of care would be if the vicarious liability route to success in the litigation had failed": *NA v Nottinghamshire County Council* [2015] EWCA Civ 1139, [33] (Burnett LJ).

[5] "State and territory governments should introduce legislation to impose a non-delegable duty on certain institutions for institutional child sexual abuse despite it being the deliberate criminal act of a person associated with the institution." See: *Redress Report*, n 1, 77.

[6] These are "a) residential facilities for children, including out of home care facilities and juvenile detention centres; b) day and boarding schools and early childhood facilities, and outside school hours services; c) disability services for children; d) health services for children; e) any other for-profit facility providing care, supervision or control of children (excluding foster or kinship care); and f) any facilities or services provided by religious organisations" (recommendation 90) See: *Redress Report*, n 1, 77.

[7] *Redress Report*, n 1, 490.

[8] For example, Gleeson CJ may have expressed the view that a non-delegable duty was absolute in nature: "the proposition that, because a school authority's duty of care to a pupil is non-delegable, the authority is liable for any injury, accidental or intentional, inflicted upon a pupil by a teacher, is too broad, and the responsibility with which it fixes school authorities is too demanding": *New South Wales v Lepore* (2003) 212 CLR 511, 533. If he had believed that a non-delegable duty was strict, rather than absolute, he may not have stated in describing it that an authority would be liable for *any* injury inflicted upon a pupil.

[9] John Murphy, "The Liability Bases of Common Law Non-delegable Duties – A Reply to Christian Witting" (2007) 30 *University of New South Wales Law Journal* 86, 87.

[10] *Redress Report*, n 1, 490.

[11] *Redress Report*, n 1, 490.

[12] Jane Swanton, "Non-delegable Duties: Liability for the Negligence of Independent Contractors Part I" (1991) 4 *Journal of Contract Law* 183, 187.

[13] Jonathan Morgan, "Liability for Independent Contractors in Contract and Tort: Duties to Ensure That Care Is Taken" (2015) 74 *Cambridge Law Journal* 109: "the defendant (in a non-delegable duty case) must exceptionally ensure that they take reasonable care (or rather, since it is impossible to ensure that contractors are never careless, he must answer for any harm negligently caused)." There is a lively debate regarding the "strictness" or otherwise of non-delegable duties: see Christian Witting, "Breach of the Non-delegable Duty: Defending Limited Strict Liability in Tort" (2006) 29 *University of New South Wales Law Journal* 33; Murphy, n 9, 86.

who failed to take reasonable care, making the institution employing them liable under the strict non-delegable duty.[14]

The "strictness" (or, on one view, the "absoluteness")[15] of this liability is evident in the following passage of the *Redress Report*: "It is true that, even if the institution adopts best practice in every respect in relation to abuse, under strict liability it will still be liable for any abuse that does in fact occur".[16] The Royal Commission justifies imposition of this kind of strict liability on several policy grounds, including that:

> It would ensure that compensation is available for harm and provide a capacity for institutions to spread their loss through mechanisms such as insurance. The deterrent effect of the imposition of liability and the discipline it would impose on the management of institutions would be the most effective means by which a community could endeavour to ensure the safety of children in the care of another.[17]

The continuing status of non-delegable duties in Australia was somewhat uncertain after the High Court's decision in *New South Wales v Lepore*,[18] where at least some members of the High Court expressed ambivalence about non-delegable duties within the law of tort, at least with respect to the factual situation considered there, deliberate criminal acts within a school setting.[19] The Royal Commission must have had its doubts as to whether an educational institution owes a non-delegable duty of care with respect to abuse of children within its care, otherwise, logically, it would not have expressly called for legislation to introduce a non-delegable duty in such a context.

This article will consider the history of non-delegable duties of care in English and Australian law, before considering the utility of the recommendation made in this regard in the Royal Commission's recent report.

Prior to doing so, a few preliminary points by way of explanation should be made. The first is that it remains generally the position that one person or institution is not liable for the acts or omissions of another.[20] Occasions where this principle is departed from should properly be seen as exceptional and unusual, and in need of thorough justification. Specifically in the current context, generally an employer would not be liable for actions of independent contractors. Readers will be aware that traditionally, this is a major difference to the position of employees, where an employer will be liable for actions or omissions of employees occurring "within the course of their employment".[21] Indeed, some have argued that one of the reasons for the creation of the category of non-delegable duties was to overcome limitations on the doctrine of vicarious liability, specifically that vicarious liability does not traditionally extend to liability for independent contractors.[22]

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[14] *Redress Report*, n 1, 490.

[15] Perhaps, the argument that this is not "absolute liability" is that by definition, when abuse occurs, there has been a failure to ensure that reasonable care is taken, so that this is not absolute liability, but strict liability, in the sense that the defendant is not personally at fault for wrongdoing, but is liable for failure to ensure that care was not taken by another. The argument that it is absolute liability is that when an organisation takes every possible precaution and adopts best practice in relation to abuse, yet still is found liable, that this is not an example of "failing to ensure that care was not taken by another". The difference occurs because of difference of opinion as to whether the abuse automatically meets the "failure to ensure that care was not taken" standard.

[16] *Redress Report*, n 1, 492.

[17] *Redress Report*, n 1, 490.

[18] *New South Wales v Lepore* (2003) 212 CLR 511.

[19] *New South Wales v Lepore* (2003) 212 CLR 511 Gleeson CJ (531–533), Gummow and Hayne JJ (598–603), Kirby J (609–610), Callinan J (624). It should be acknowledged that five members of the High Court in *Leighton Contractors Pty Ltd v Fox* (2009) 240 CLR 1, 12 acknowledged that an employer owed a non-delegable duty of care with respect to the safety of their employees (French CJ, Gummow, Hayne, Heydon and Bell JJ).

[20] *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, 263–269 (Gleeson CJ, with whom Gaudron J (270) and Hayne J (288) agreed; Callinan J to like effect (299).

[21] *Prince Alfred College Inc v ADC* (2016) 258 CLR 134; [2016] HCA 37, [40] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

[22] Morgan, n 13.

Further to this, it will be noted that much of the history of strict liability in England and Australia occurs in the context of discussion of the liability of a person or organisation who/that hires an independent contractor. It will not generally occur in the context of an employer and employee because of that relationship, and the question of the liability (if any) of an employer for acts or omissions of their employees, will occur in the context of principles of vicarious liability. Thus, at first blush, a suggestion from the Royal Commission that an institution should owe a non-delegable duty with respect to actions or omissions of their employees (as the vast majority of those whose actions are in question are) is somewhat at odds with occasions in which notions of strict liability have been recognised, at least in the context of the performance of work obligations.

The second is that, as we trace the rise of so-called strict liability in the UK decisions in the 19th century,[23] it ought to be borne in mind the legal context in which that development occurred. Specifically, it took place in the absence of a generalised duty of care concept.[24] At this time, in order to bring a successful action in negligence against an individual, it was necessary to show that the parties were within an established category of relationship in which duties of care were owed. These categories were necessarily limited in nature. Obviously, this position changed in 1932 with the decision in *Donoghue v Stevenson*.[25] It was at least partly because of this change that the High Court of Australia (eventually) abandoned the so-called *Rylands v Fletcher*[26] strict liability stand-alone principle in *Burnie Port Authority v General Jones Pty Ltd*,[27] as we will see. In pre-*Donoghue* days, it might have been difficult for an injured party to show that an independent contractor who did work for the defendant owed the injured party a duty of care; it would be much easier for the injured party to show that the defendant owed them a duty of care (eg as their employer or as a property owner). When the generalised duty of care was recognised, this rationale for imposing a non-delegable duty on a person for the acts of independent contractors also disappeared.[28] It may be that those who continue to support the non-delegable duty concept have not considered sufficiently the implications of recognition of the generalised duty of care, which explains the limited number of cases available where a defendant is liable under a non-delegable duty but would not be liable under a generalised duty of care concept.

Further, other doctrines of tort law, in particular the doctrine of common employment and the doctrine of contributory negligence, together made actions against an employer (at least, by an injured employee) impossible or extremely difficult at that time.[29] Eventually, the former was abolished, and the latter greatly modified. However, their existence in the 19th century provides the legal background against which recognition of so-called strict liability occurred in the United Kingdom in the 19th century.[30] These developments inevitably nudged Australian law in the same direction. For much of this period

[23] Strict liability has also been traced to the Middle Ages, specifically in relation to innkeepers. It was justified at that time on the basis that guests were vulnerable and forced to rely on the innkeeper for protection. Later, a similar justification was used to justify extension of strict liability to common carriers: see Adam Milani, "Patient Assaults: Health Care Providers Owe a Non-delegable Duty to Their Patients and Should Be Held Strictly Liable for Employee Assaults Whether or Not Within the Scope of Employment" (1995) 21 *Ohio Northern University Law Review* 1147, 1153–1154.

[24] *Heaven v Pender* (1883) 11 QBD 503 (CA).

[25] *Donoghue v Stevenson* [1932] AC 562.

[26] *Rylands v Fletcher* (1868) LR 3 HL 330.

[27] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; [1994] 15 Qld Lawyer Reps 5.

[28] In discussing some of the old English cases, E K Teh, "Liability for Independent Contractors – The Unifying Theme" (1980) 9 *Anglo-American Law Review* 216, 224–225 notes that at least some of them were only decided in the way that they were because the injured party had no remedy against the independent contractor under the existing rules of liability at the time (rules which have been substantially relaxed since).

[29] *Priestley v Fowler* (1837) 150 ER 1030.

[30] In *Commonwealth v Introvigne* (1982) 150 CLR 258, Mason J noted that the non-delegable duty concept had been "designed to overcome the consequences of the doctrine of common employment". See also *Davie v New Merton Board Mills Ltd* [1959] AC 604, 637 where Lord Reid noted "the lines on which the law was developing … were interrupted by the introduction of the rule of common employment. That rule made it necessary to find another basis for the employer's liability, and this was found in the idea of duties personal to the employer", and see Viscount Simons (618) to like effect; see also Glanville Williams, "Liability for Independent Contractors" (1956) 14 *Cambridge Law Journal* 180, 190.

Australian courts, including the High Court, considered themselves bound by decisions of the House of Lords and Privy Council. There are repeated examples in Australian case law where Australian courts have apparently simply followed what they considered to be binding precedent from another jurisdiction.

Developments in the UK Case Law

An early case is *Bush v Steinman*.[31] There A contracted with B to do some work on his house. B contracted some of the work to C, and C in turn contracted some of the work to D. D left some lime at the side of the highway on A's premises, which caused injury. The Court found A could be liable for what D had done.

Eyre CJ initially expressed some reservations about the plaintiff's case against A, because the "general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do, seems to be too large and loose".[32] However, he considered two situations – one where the owner of a house employed his own servants to do work and another where the owner had engaged an independent contractor to do the work. He concluded that the owner should be liable in both cases for any nuisance committed, regardless of whether it was an employee or independent contractor who committed the tort.[33] He fortified this conclusion on the basis that it was "highly convenient and beneficial to the public" because all an injured party would have to do was identify the owner of the property, not attempt to unravel all of the contractual arrangements that might have been entered into.[34] Heath J found that where a hirer hired someone to ferry them around in a carriage, the hirer was liable for any damage done by the coachman although that coachman was not the hirer's servant.[35] His justification for extending liability in this context was that the hirer benefited from the coachman's work.[36] Rooke J agreed that those who engaged independent contractors were liable for defective work; he preferred to express this principle in terms of control – the hirer controlled all who worked on his premises. He also referred to the inconvenience that would follow if the hirer were not liable for the contractor's work.[37]

A different position was apparently taken in *Quarman.* The origin of what is now called a "non-delegable duty" is sometimes taken to be the decision in *Quarman v Burnett*.[38] There the question arose as to whether defendants who hired an independent contractor to provide a carriage service were liable. The carriage was involved in a collision with the plaintiff's carriage. The plaintiff alleged the independent contractor providing the carriage service was liable; a question also arose as to whether the defendants who hired the independent contractor could be liable for the injuries caused. As indicated, Heath J in *Bush* had mentioned this precise example, concluding that the hirer would be liable.

However, the Court in *Quarman* took a different view. Parke B for the Court stated the principle that generally a person who hired an independent contractor would not be liable for that contractor's negligence. However, he added that:

> to make such person liable, recourse must be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit.[39]

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[31] *Bush v Steinman* (1799) 1 Box. And Pul. 404, 126 ER 978. The headnote indicates that this case was overruled in *Reedie v London and North West Railway Co* [1849] 4 Ex 256.

[32] *Bush v Steinman* (1799) 1 Box. And Pul. 404, 126 ER 978, 979.

[33] *Bush v Steinman* (1799) 1 Box. And Pul. 404, 126 ER 978, 980.

[34] *Bush v Steinman* (1799) 1 Box. And Pul. 404, 126 ER 978, 980.

[35] *Bush v Steinman* (1799) 1 Box. And Pul. 404, 126 ER 978, 980.

[36] *Bush v Steinman* (1799) 1 Box. And Pul. 404, 126 ER 978, 981.

[37] *Bush v Steinman* (1799) 1 Box. And Pul. 404, 126 ER 978, 981.

[38] *Quarman v Burnett* (1840) 6 M and W 508, 151 ER 509.

[39] *Quarman v Burnett* (1840) 6 M and W 508, 151 ER 509, 514.

It must be emphasised that in the immediately succeeding sentence, Parke B added that "that, however, is too large a position … and cannot be maintained to its full extent without overturning some decisions, and producing consequences which would shock the common sense of all men".[40]

Parke B then proceeded to narrow the principle by concluding that:

> it may be that where a man is in possession of fixed property, he must take care that his property is so used or managed that other persons are not injured; and that, whether his property be managed by his own immediate servants or by contractors with them, or their servants. Such injuries are in the nature of nuisances … but the same principle, which applies to the personal occupation of land or houses by a man or his family, does not apply to personal moveable chattels which … are intrusted to the care and management of others, who are not the servants of the owners.[41]

Then in 1861, the Court considered the liability of a lessee who had taken a lease over property at a railway station, including a coal cellar.[42] The lessee (defendant) had engaged a coal merchant contractor to deliver coal. While doing so, the entrance to the cellar was left open negligently. A passenger walking along the platform at night was injured when he fell into the entrance. A jury awarded the plaintiff damages, in a trial with Blackburn J presiding. On appeal, the Court was asked whether the plaintiff should have been nonsuited in his claim against the lessee. All members of the Court found that the plaintiff should not have been nonsuited; in other words, that their claim against the defendant was viable.

In so deciding, Williams J (for Willes and Keating JJ) acknowledged the general rule that a person was not generally liable for a breach of duty unless that breach was traced to themselves, their employees or agents. However, the Court added that the rule was:

> Inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent on his employer, and neglects its fulfilment, whereby an injury is occasioned.[43]

The Court said that the defendant employed the merchant to fill the coal supplies in the cellar and trusted him to apply due care to opening the cellar. It was satisfied the negligence of the merchant was the act of the defendant, done through the agency of the merchant. The defendant, "having caused danger", was bound to take reasonable steps "to prevent mischief". The fact he entrusted it to another was no defence, in law or common sense, according to the Court. The Court did not cite any authority to support the above quote, or the findings just discussed.

In the famous *Fletcher v Rylands*, Blackburn J had conceived of a strict liability of property owners in terms of things that "though harmless whilst it remains (on the defendant's premises), will naturally do mischief if it escapes".[44] Thus, the idea of strict liability being based around notions of things that were inherently dangerous took root, even if some of the later cases that used concepts of dangerousness did not expressly relate it back to the *Rylands* decision.[45]

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[40] They cited *Laugher v Pointer* (1826) 5 B & C 548, 108 ER 204, where the Court noted the "inconvenience" if the hirer of horses and a driver to drive them were held liable for negligent driving. The Court noted the lack of control the hirer exercised over the work.

[41] *Quarman v Burnett* (1840) 6 M and W 508, 151 ER 509, 514; see to like effect Rolfe B in *Reedie v London and North Western Railway Co* (1849) 4 Ex 244, 256. These remarks are consistent with a statement of Lord Kenyon CJ in *Stone v Cartwright* (1795) 6 Taunt 411, 101 ER 622 while dismissing a case brought by a plaintiff against a defendant who was a middle man engaged in mining business on land beneath that of the plaintiff. Lord Kenyon noted that precedents suggested that in such cases, the action was against either the employee alleged to be committing wrongdoing or the owner for whom the act was done, rather than the middle man.

[42] *Pickard v Smith* (1861) 10 CB (NS) 470; 142 ER 535; Dawson J said in *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 345 that it had been said that Pickard represented the "origin" of the concept of a non-delegable duty of care.

[43] *Pickard v Smith* (1861) 10 CB (NS) 470, 480; 142 ER 535, 539.

[44] *Fletcher v Rylands* (1866) 1 LR Ex 265, 279.

[45] Jane Swanton, "Non-delegable Duties: Liability for the Negligence of Contractors" (1991) 4 *Journal of Contract Law* 180, 191: "the fact that the rule in *Rylands v Fletcher* imposes liability on occupiers of land for extra-hazardous activities of independent contractors may be thought to support the recognition of a non-delegable duty for extra-hazardous activities in general."

Further evidence of this basis of strict liability appears in *Bower v Peate*.[46] The simple facts involved a plaintiff landowner suing after claiming that the defendant's actions in engaging a contractor to build them a new house undermined the plaintiff's house. It was accepted by both parties that the injuries to the plaintiff had been caused solely by the contractor's negligence. The question was the liability of the defendant, if any, for the negligent work.

The Court recited the general rule that a person employing an independent contractor was not liable for damage caused by that contractor's negligence.[47] However, the Court noted an exception where a person orders work from which "in the natural course of things, injurious consequences to his neighbour must be expected to arise".[48] Later, it was rephrased as occurring where "work is being executed from which danger may arise to others".[49] The Court said that in such cases, the person must act to prevent the mischief and cannot avoid responsibility by delegating the task to an independent contractor. In other words, this would be an occasion where the person would be found to owe the plaintiff a non-delegable duty.

Notions of "danger" and its connection with recognition of a non-delegable duty appear in *Dalton v Angus*,[50] *Black v Christchurch Finance Co*[51] and *Honeywill v Larkin*.[52] In Dalton, Lord Watson emphasised the presence of "danger" and the difference it apparently made to recognition of a non-delegable duty, in this passage:

> When an employer contracts for the performance of work, which properly conducted can occasion no risk to his neighbour's house which he is under obligation to support, he is not liable for damages arising from the negligence of the contractor. But in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take necessary precautions.[53]

In *Black*, the House of Lords found that a property owner was liable for the actions of an independent contractor whom they had engaged to do controlled burning on it. The contractor disobeyed some of the owner's instructions, yet the owner remained liable. In so finding, the Court rationalised that:

> The lighting of a fire on an open bush land … is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property. And if he authorises another to act for him he is bound, not only to stipulate that such precautions shall be taken, but also to see that they are observed, otherwise he will be responsible for the consequences.[54]

The same sentiment was evident in the Court of Appeal in *Honeywill*, where the judges observed:

> The decision in this case … does not depend merely on the fact that the defendants were doing work on the highway, *but primarily on its dangerous character, which imposes on the ultimate employers* (my emphasis) an obligation to take special precautions, and they cannot delegate this obligation by having the work carried out by independent contractors.[55]

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[46] *Bower v Peate* (1876) 1 QBD 321.

[47] *Bower v Peate* (1876) 1 QBD 321, 325 (Cockburn CJ, for Mellor and Field JJ).

[48] *Bower v Peate* (1876) 1 QBD 321, 326.

[49] *Bower v Peate* (1876) 1 QBD 321, 329.

[50] *Dalton v Angus* (1881) 6 AC 740.

[51] *Black v Christchurch Finance Co* [1894] AC 48.

[52] *Honeywill v Larkin* [1934] 1 KB 191.

[53] *Dalton v Angus* (1881) 6 AC 740, 831 (Lord Watson).

[54] *Black v Christchurch Finance Co* [1894] AC 48, 54 (Lord Shand, for the Court).

[55] *Honeywill v Larkin* [1934] 1 KB 191, 199 (Slesser LJ, for the Court). The oft-cited case of *Wilsons and Clyde Coal Coy v English* [1938] AC 57 is not considered particularly noteworthy here, because the negligence there was committed by an employee, rather than an independent contractor.

It is interesting to see how this recognition of a non-delegable duty fared with the recognition of a generalised duty of care concept in 1932 in *Donoghue*. Was there a need any more for recognition of the non-delegable duty?

The decision in *Read v J Lyons and Co Ltd*[56] can be read as heralding a change of approach. At times, the judges downplayed use of the concept of "dangerousness" to ground a non-delegable duty and appeared to emphasise the uniting role of negligence in terms of rationalisation of liability in this area; in other words, fault-based, as opposed to non-fault-based, liability. For example, Lord Macmillan pointed out that it was "impracticable to frame a legal classification of things as things dangerous or not dangerous, attaching absolute liability in the case of the former but not in the case of the latter".[57] At least in the case of personal injury, there is comment to the effect that a plaintiff seeking compensation for such injury must show negligence on the part of the defendant.[58] Strict liability did not apply.[59]

The limits of non-delegable duty concept were noted in *Davie v New Merton Board Mills Ltd*.[60] There an employee was injured while using tools that were later found to be defective. He sued his employer for his injuries. His employer was not at fault for failing to maintain or inspect the tools. The fault lay with the manufacturer of the tools. The manufacturer had sold the tools to a supplier, who in turn supplied them to the employer. The employer was not in a contractual relationship with the manufacturer.

The Court dismissed the plaintiff's claim, mainly on the basis that the negligent manufacturer was not the independent contractor of the employer, so no real question arose as to the extent to which a person was liable for the actions of independent contractors whom they engaged.[61] Some concern was expressed there with the possibility of absolute liability being placed on individuals or organisations,[62] and the idea that decisions about liability should be affected by the question of whether the defendant does, or would be likely to, have insurance.[63] However, the Court did not disclaim the use of non-delegable duties and apparently continued to accept their existence.[64]

The existence of a non-delegable duty of care has been recognised and extended in subsequent cases.[65] Most recently, the UK Supreme Court allowed an appeal that had struck out a non-delegable duty claim as not having a reasonable prospect of success.[66] The case concerned the question of the possible liability of a school authority that had entrusted the care of pupils in swimming lessons to an independent contractor. The question thus arose as to whether the school authority owed a non-delegable duty with respect to the swimming instruction.

Lord Sumption undertook the task of providing justification for imposition of non-delegable duties or at least a conception of the categories of case in which such duties had been recognised. He said that, exceptional cases aside, such cases involved plaintiffs who were especially vulnerable or dependent on

[56] *Read v J Lyons and Co Ltd* [1947] AC 156.

[57] *Read v J Lyons and Co Ltd* [1947] AC 156, 172; see to like effect Lord Simonds (182): "there is no rule which imposes on him who carries on the business of making explosives, though the activity may be 'ultra hazardous' and an explosive a 'dangerous thing' a strict liability to those who are lawfully on his premises," and Lord Uthwatt (186): "I do not think that the invitee, any more than the occupier, would assume that, by reason only of the dangerous nature of the business carried on, the occupier guaranteed him freedom from harm."

[58] *Read v J Lyons and Co Ltd* [1947] AC 156, 166 (Viscount Simon), 170–171, 172–173 (Lord Macmillan), 180 (Lord Simonds).

[59] *Read v J Lyons and Co Ltd* [1947] AC 156, 181 (Lord Simonds).

[60] *Davie v New Merton Board Mills Ltd* [1959] AC 604.

[61] *Davie v New Merton Board Mills Ltd* [1959] AC 604, 624 (Viscount Simons), 629 (Lord Morton), 642 (Lord Reid), 647 (Lord Tucker), 648 (Lord Keith).

[62] *Davie v New Merton Board Mills Ltd* [1959] AC 604, 619 (Viscount Simons)

[63] *Davie v New Merton Board Mills Ltd* [1959] AC 604, 626–627 (Viscount Simons).

[64] *Davie v New Merton Board Mills Ltd* [1959] AC 604, 624 (Viscount Simons), 646 (Lord Reid), 647 (Lord Tucker), 648 (Lord Keith).

[65] *McDermid v Nash Dredging and Reclamation* [1987] 1 AC 906; *D and F Estates v Church Commissioners England* [1989] 1 AC 177.

[66] *Woodland v Swimming Teachers' Association* [2014] AC 537.

the defendant for protection against injury, in circumstances where the defendant had control, custody or care of the plaintiff, from which it could be inferred that the defendant had assumed a responsibility for the plaintiff's care.[67]

Developments in Australian Case Law

The first High Court decision in which the liability of a defendant for actions or omissions of an independent contractor was considered was *McInnes v Wardle*.[68] The simple facts there involved the question of the liability of a landowner who engaged an independent contractor to fumigate the land to clear rabbits. As a result of the contractor's actions, a fire started. The fire caused damage to a neighbouring property owned by the plaintiff.

In finding the defendant liable to the plaintiff, members of the High Court used the concept of "great danger" and "exceptional danger". Gavan Duffy CJ and Starke J adopted and accepted statements in *Black v Christchurch Finance Co*[69] to the effect that a landowner defendant could be liable to other landowners for fire that spread from the defendant's property, though caused by a contractor whom they had engaged, because it was an operation attended with great danger. So too Dixon J referred to the liability of a defendant landowner to protect others from "exceptional dangers".[70]

The matter was considered again in *Torette House Pty Ltd v Berkman*.[71] There the question was whether a defendant landowner was liable to an adjoining landowner for water that escaped from the former property onto the latter. The defendant had engaged an independent contractor plumber to do some work. In the course of doing the work, the contractor disturbed an existing pipe, causing damage to the plaintiff's premises. The High Court rejected a suggestion that the defendant landowner was liable for the independent contractor's negligence. In so doing, Latham CJ noted an English legal principle suggesting that someone who engaged an independent contractor to do "extra-hazardous" work would be liable if, as a result, a third party was injured. He left open whether that English principle was part of Australian law, holding it irrelevant to the case at hand because the plumbing work involved did not meet that description.[72] Starke J seemed to accept the English principle, but found it was not applicable here, because no "special or peculiar hazard" was involved.[73] Dixon J was content to note the general rule that someone who engaged an independent contractor was not generally liable for the negligence of that contractor, and that none of the exceptions to that general rule applied here.[74]

There was little development in this area for some time. There were a couple of brief mentions of the concept of non-delegable duties in two decisions in the 1960s.[75] These canvassed the possibility of adopting the English doctrine by which a person engaging an independent contractor would be liable where the work involved "extra-hazardous activity". The position of this doctrine in Australian tort law

[67] *Woodland v Swimming Teachers' Association* [2014] AC 537, 583–584; he also referred to whether the plaintiff had control over how the defendant chose to perform its obligations and whether the thing delegated was an integral part of positive duty which had been assumed. The other Law Lords expressed agreement with Lord Sumption (590).

[68] *McInnes v Wardle* (1931) 45 CLR 548.

[69] *Black v Christchurch Finance Co* [1894] AC 48. Evatt J also cited *Black* with apparent approval but placed more emphasis on the fact the defendant knew the independent contractor was to light a fire as part of the fumigation work (552). McTiernan J relied on statements in *Laugher* and *Reedie* to the effect that someone in possession of fixed property had a duty to ensure their property was used such that others would not be injured (554).

[70] *McInnes v Wardle* (1931) 45 CLR 548, 552.

[71] *Torette House Pty Ltd v Berkman* (1939) 62 CLR 637.

[72] *Torette House Pty Ltd v Berkman* (1939) 62 CLR 637, 648.

[73] *Torette House Pty Ltd v Berkman* (1939) 62 CLR 637, 651.

[74] *Torette House Pty Ltd v Berkman* (1939) 62 CLR 637, 656.

[75] *Voli v Inglewood Shire Council* (1963) 110 CLR 74, 95 where Windeyer J noted that it had become "somewhat the fashion" to speak of delegable and non-delegable duties; [1963] 57 QJPR 97. He concluded that apart from "true" cases on strict liability, the distinction between delegable and non-delegable duties might merely be a question of adopting "convenient headings". In *Ramsay v Larsen* (1964) 111 CLR 16, 38, Taylor J quoted with approval a statement by a lower court judge that where a person had assumed a legal duty to another, they could not avoid liability by delegating its performance to someone else.

was doubted by members of the High Court in *Stoneman v Lyons*.[76] Again, the general position, that someone who engaged an independent contractor was not liable for their negligence, was asserted.[77] This was subject to exceptions, such as when the hirer specifically authorised the acts complained of, or the measures taken were necessarily involved in doing what was directed, or where there was a significant degree of control.[78] At this point, the precise ambit of strict liability in Australia and non-delegable duties was uncertain.

Leading cases in the 1980s apparently reasserted the existence of non-delegable duties in Australian law. It arose in *Commonwealth v Introvigne*.[79] The facts were unusual, in that the Commonwealth had delegated authority and responsibility to New South Wales to run a school in the Australian Capital Territory. The question was the liability of the Commonwealth when a student was injured in the playground.

Mason J (with whom Gibbs CJ generally agreed)[80] recognised the existence of duties performance of which could not be delegated to others. He recognised the existence of such a duty in the educational context,[81] and noted it had also been applied in the context of health-care providers.[82] He did not provide a rationale to explain the categories of case in which a non-delegable duty might be owed, beyond noting that some of the categories (at least) involved precautions regarding the safety of others[83] and that, in the case of students, their "propensity for mischief" suggested that such a duty should exist.[84] Mason J specifically held that the fact the Commonwealth did not control the teachers did not mean that a non-delegable duty could not be recognised.[85] Murphy J agreed that a non-delegable duty existed in relation to school and pupil and hospital and patient.[86] In so finding, he noted the propensity of some students to misbehave, as well as the school's control over students.[87] He also referred to principles of "loss-spreading" in reaching his conclusions.[88]

Subsequently, the High Court again considered the question of a non-delegable duty in *Kondis v State Transport Authority*.[89] There an employee was injured on an employer's premises when a part was dropped from equipment operated by an independent contractor. The Court found that the employer had breached the duty of care they owed to the employee. In so finding, members of the Court made reference to the concept of a non-delegable, or personal, duty.

Mason J, with whom Deane J and Dawson JJ agreed,[90] explained some of the English cases that suggested that a non-delegable duty of care was owed.[91] He said that they were caused by a "reluctance

[76] *Stoneman v Lyons* (1975) 133 CLR 550, 563–565 (Stephen J) and 575 (Mason J); see also *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 29 (Mason J) and 41–42 (Wilson and Dawson JJ).

[77] *Stoneman v Lyons* (1975) 133 CLR 550, 562–563 (Stephen J), 574 (Mason J). Mason J added that a person who owed a duty to a third party could not avoid responsibility for its discharge by engaging another (574).

[78] *Stoneman v Lyons* (1975) 133 CLR 550, 564 (Stephen J).

[79] *Commonwealth v Introvigne* (1982) 150 CLR 258.

[80] *Commonwealth v Introvigne* (1982) 150 CLR 258, 260.

[81] *Commonwealth v Introvigne* (1982) 150 CLR 258, 271.

[82] *Commonwealth v Introvigne* (1982) 150 CLR 258, 270.

[83] *Commonwealth v Introvigne* (1982) 150 CLR 258, 271.

[84] *Commonwealth v Introvigne* (1982) 150 CLR 258, 271.

[85] *Commonwealth v Introvigne* (1982) 150 CLR 258, 272.

[86] *Commonwealth v Introvigne* (1982) 150 CLR 258, 274–275.

[87] *Commonwealth v Introvigne* (1982) 150 CLR 258, 275.

[88] *Commonwealth v Introvigne* (1982) 150 CLR 258, 275; of the other judges, Brennan J did not address the question of non-delegable duties, and Aickin J died before judgment was delivered.

[89] *Kondis v State Transport Authority* (1984) 154 CLR 672.

[90] *Kondis v State Transport Authority* (1984) 154 CLR 672, 694, 695. Brennan J found that the employer had breached their duty of care but did not explore the concept of the non-delegable duty.

[91] *Kondis v State Transport Authority* (1984) 154 CLR 672, 680–686.

to accept"[92] the result that an employer could meet their duty of obligations to their employees in relation to safety by engaging an independent contractor to perform particular work. He acknowledged that the English decisions had been criticised on the basis they were not supported by an express policy rationale[93] and that no criteria had been advanced for the existence of non-delegable duties in some cases, but not others.[94]

Mason J then proceeded to offer a justification. He observed that non-delegable duties had been accepted with respect to hospital and patient, and educational authority and student, and with respect to safeguarding the property of others. He indicated that there was a common element in all such cases:

> In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision and control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or her safety, in circumstances where the person affected might reasonably expect that due care will be exercised.[95]

Murphy J essentially adopted a similar position, though he called it the "organisation test" whereby "industry or parts of industry are carried out by undertakings or authorities such as factories, hospitals, schools and mining corporations".[96] He cited the increased use by builders of contractors and subcontractors, concluding that a builder would be liable for the negligent work of these subcontractors, because "the contractors and sub-contractors are often workers or gangs of workers who are not financially strong and who may not be insured". Murphy J concluded that there were sound policy reasons for making those engaged in undertakings such as shipbuilding, railway operations, mining and construction liable for their subcontractors.[97] He did not explain why he singled out these particular industries for liability under the "organisation test" or non-delegable duty principle.

The High Court next considered notions of strict liability in *Burnie Port Authority v General Jones Pty Ltd*.[98] This was the landmark decision in which the Court subsumed the *Rylands v Fletcher*[99] principle of strict liability into the general law of negligence.[100] In this case, the Court explained further the judgment of Mason J in *Kondis*, summarising that the categories of case that Mason J recognised as involving non-delegable duties were all cases involving substantial control by the defendant, and special dependence or vulnerability on the part of the plaintiff.[101] In justifying the subsumption of the strict liability *Rylands* principle into the law of negligence, the joint reasons equated *Rylands* with its non-delegable duty concept.[102] As this was in the context of a case where the separate *Rylands* principle

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[92] *Kondis v State Transport Authority* (1984) 154 CLR 672, 680.

[93] *Kondis v State Transport Authority* (1984) 154 CLR 672, 681.

[94] *Kondis v State Transport Authority* (1984) 154 CLR 672, 684, citing Williams, n 30, 183–184.

[95] *Kondis v State Transport Authority* (1984) 154 CLR 672, 687.

[96] *Kondis v State Transport Authority* (1984) 154 CLR 672, 690.

[97] *Kondis v State Transport Authority* (1984) 154 CLR 672, 690.

[98] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; [1994] 15 Qld Lawyer Reps 5.

[99] *Fletcher v Rylands* (1866) LR 1 Ex 265; *Rylands v Fletcher* (1868) LR 3 HL 330; *Rickards v Lothian* (1913) 16 CLR 387; [1913] AC 263.

[100] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 556 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); [1994] 15 Qld Lawyer Reps 5. This has not occurred in the United Kingdom: *Transco Plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1.

[101] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 551 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); [1994] 15 Qld Lawyer Reps 5: "viewed from the perspective of the person to whom the duty is owed, the relationship of proximity giving rise to the non-delegable duty of care in such cases is marked by special dependence or vulnerability on the part of that person."

[102] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; [1994] 15 Qld Lawyer Reps 5: "the relationship … which exists, for the purposes of ordinary negligence, between a plaintiff and a defendant in circumstances which would prima facie attract the rule in *Rylands v Fletcher* is characterised by such a central element of control and by such special dependence and vulnerability" (551) (to be read in conjunction with n 67, where the Court said that special dependence and vulnerability

was subsumed into ordinary negligence law, it is understandable that the Court wished to maintain that little substantive difference in legal outcome would occur in *Rylands*. It seemed to accept that a possible further category of case in which a non-delegable duty might be owed was involving cases where a defendant was engaged in a dangerous activity.[103] This may, as was the case in the actual facts in *Burnie Port Authority*, overlap with the recognised category involving one landowner's liability to someone on a neighbouring property.

The high-water mark of the concept of non-delegable duty in Australian tort law may be *Northern Sandblasting Pty Ltd v Harris*,[104] where several members of the Court found that a property owner had a non-delegable duty to provide safe premises to their tenants. There the owner was held legally responsible for the electrocution of one of the tenants, caused by defective electrical work performed by an independent contractor electrician. There Brennan CJ accepted that non-delegable duties could arise with respect to the special relationships referred to in *Kondis*, and also where the task performed contained "inherent risks", ie how the work will necessarily be done or how the employer directs it to be done.[105] Similarly, Dawson J referred to *Kondis* in his observations regarding when a non-delegable duty will be owed, emphasising issues of control, assumption of responsibility and vulnerability or dependency.[106] Toohey J expressed a similar view.[107] Similarly, Gaudron J identified features of control and vulnerability as hallmarks of the establishment of a non-delegable duty.[108] McHugh J expressed a similar view.[109] On the other hand, Gummow and Kirby JJ rejected use of the concept of non-delegable duties, at least in relation to the facts before them.[110] Kirby J expressly referred to the academic criticism of the concept of a non-delegable duty, and the difficulties involved in clarifying the precise principles by which the existence or otherwise of such a duty would be determined.[111]

Either by accident or by design, developments elsewhere in tort law began to undermine the non-delegable duty concept. The High Court had been using notions of "proximity" as a control mechanism in relation to negligence claims,[112] but abandoned it. This forced it to articulate principles by which the existence of a general duty of care should be determined. In a series of cases around the turn of the century, the High Court used concepts such as control, assumption of responsibility, reliance and vulnerability in application of general principles of negligence.[113] These factors had been held up in *Kondis*, *Burnie Port Authority* and *Northern Sandblasting Pty Ltd* as those that explained and justified the existence of a non-delegable duty, as opposed to general principles of negligence that would generally permit someone who owed a duty to (legally) delegate its performance. Their acceptance as the "salient features" that

characterised the category of case where the Court had recognised non-delegable duties), and then "it follows that the relationship … which exists in the category of case into which *Rylands v Fletcher* circumstances fall contains the central element of control which generates, in other categories of case, a special 'personal' or 'non-delegable' duty of care under the ordinary law of negligence" (552).

[103] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 552; [1994] 15 Qld Lawyer Reps 5: "it is the person in control who has authorised or allowed the situation of foreseeable potential danger to be imposed on the other person by authorising or allowing the dangerous use of the premises and who is likely to be in a position to insist upon the exercise of reasonable care."

[104] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

[105] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 332–333.

[106] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 344–346.

[107] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 350.

[108] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 361.

[109] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 367–369.

[110] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 385 (Gummow J) and 403–404 (Kirby J).

[111] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 395–397.

[112] *Gala v Preston* (1991) 172 CLR 243.

[113] *Hill v Van Erp* (1997) 188 CLR 159, 184–185 (Dawson J), 188 (Toohey J), 198–199 (Gaudron J) and 229 and 234 (Gummow J); *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 194 (Gleeson CJ), 201 (Gaudron J), 220 (McHugh J), 259 (Gummow J), 326–328 (Callinan J); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 559 (Gleeson CJ, 577 (McHugh J), 597–598 (Gummow and Hayne JJ) (with whom Gaudron J agreed (570)), 630 (Kirby J) and 664 (Callinan J).

determined the existence of a generalised duty of care only gave further credence to those critics of the concept of a non-delegable duty, and their criticism that the boundaries within which such a duty would operate were ill-defined and hard to articulate.

Finally, the Australian High Court considered the question of non-delegable duties in the educational setting in *New South Wales v Lepore*,[114] involving the question of whether a school authority was liable for sexual abuse committed by one of its teachers. The Court rejected the use of non-delegable duties with respect to deliberate actions.[115]

Gleeson CJ interpreted the question of whether a school authority owed a non-delegable duty to students as one involving absolute liability. If it were accepted, a school would be liable for injuries caused by a student in circumstances where the authority's duty of care covered the victim. He dismissed the suggestion as "too broad".[116] Gaudron J continued to accept the position as had been established in *Harris*, citing the relationships in which a non-delegable duty had been found and emphasising notions of control and vulnerability.[117] The judgment of McHugh J was similar in this regard.[118]

Apparent hostility to the notion of non-delegable duties was most evident in the judgment of Gummow and Hayne JJ:

> The early English cases, which first identified non-delegable duties to ensure that reasonable care was taken, offered no reason for departing from the generally accepted rule that a person was not liable for an accident that occurred without the fault either of that person or of a servant in the course of employment. Lord Blackburn's often quoted proposition, about not escaping responsibility by engagement of a contractor, if applied to cases of duties to act carefully as distinct from duties to achieve a particular result, proffers no basis for what appears to the resulting conflation of two distinct propositions – one about personal responsibility to see that a duty is performed and the other about vicarious responsibility for the negligent performance of the task. At best, when applied in the context of duties to act carefully, the proposition appears to be the assertion of a conclusion about responsibility, rather than any demonstration of a reason for reaching that conclusion. That being so, its citation offers no certain basis for defining the breadth of the proposition that it is intended to state.[119]

Gummow and Hayne JJ said that a school authority should not be liable if a child stumbled in a well-maintained school yard, or if a stranger threw a bottle onto the school grounds, injuring a child. Thus, they rejected any notion that absolute liability should attach to a school authority for any injury caused to children under their care. They appeared to reject the move by the High Court in cases such as *Burnie Port Authority* to place the concept of a non-delegable duty of care within the law of negligence:

> To hold that a non-delegable duty of care requires the party concerned to ensure that there is no default of any kind committed by those to whom care of the plaintiff is entrusted would remove the duty altogether from any connection with the law of negligence. No longer would the duty of the employer, the hospital, the school authority, be in any sense a duty to take reasonable care for the safety of the employee, the patient, the pupil. It would be a duty to bring about a result that no person (employee or independent contractor) who was engaged to take steps connected with the care of the plaintiff did anything to harm the plaintiff. This would introduce a new and wider form of strict liability to prevent harm, a step sharply

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[114] *New South Wales v Lepore* (2003) 212 CLR 511.

[115] Prue Vines, "New South Wales v Lepore; Samin v Queensland; Rich v Queensland" (2003) 27 *Melbourne University Law Review* 612, 614; Jane Wangmann, "Liability for Institutional Child Sexual Assault: Where Does Lepore Leave Australia?" (2004) 28 *Melbourne University Law Review* 169.

[116] *New South Wales v Lepore* (2003) 212 CLR 511, 533; to be clear, he did not actually reject the proposition that an educational institution owed a non-delegable duty of care to students; rather, he concluded that "the proposition that, because a school authority's duty of care to a pupil is non-delegable, the authority is liable for any injury, accidental or intentional, inflicted at school upon a pupil by a teacher, is too broad, and the responsibility with which it fixes school authorities is too demanding" (533). However, he clearly appeared to disfavour the non-delegable duty, concluding that "in cases where the care of children, or other vulnerable people, is involved, it is difficult to see what kind of relationship would not give rise to a non-delegable duty" (534).

[117] *New South Wales v Lepore* (2003) 212 CLR 511, 551–553.

[118] *New South Wales v Lepore* (2003) 212 CLR 511, 568.

[119] *New South Wales v Lepore* (2003) 212 CLR 511, 599–600, reflecting ambivalence that Gummow J showed to non-delegable duties in *Scott v Davis* (2000) 204 CLR 333, 416–417.

> at odds with the trend of decisions in this Court rejecting the expansion of strict liabilities. It would sever the duty from its roots in the law of negligence. It would make the employer an insurer of the employee against any harm done by any person engaged by the former to care for the latter.[120]

Now, to be clear, those comments were in the context of rejecting a suggestion that the non-delegable duty could be applied to make an educational institution liable for deliberate, criminal acts of an employee. However, my reading of them suggests a broader, more general criticism of the place of non-delegable duty in the law of tort.[121]

Of the remaining judges, Kirby J maintained his indifference to the concept of a non-delegable duty[122] and Callinan J expressly rejected it.[123]

Subsequently, the High Court refused to recognise highway authority and user as a category of case in which a non-delegable duty would be owed. In so doing, several members of the Court again criticised the concept of a non-delegable duty in a way suggestive of grave doubt as to the future of the doctrine in Australian tort law.[124] However, to be clear, the Court did not overrule past Australian cases that had found that non-delegable duties existed, including in relation to school authority and student.

Criticisms of the Concept of a Non-delegable Duty

Lack of Policy Rationale

The first criticism of the concept of a non-delegable duty is the failure of those advocating it to explain the policy rationale said to justify its existence.[125] There are repeated assertions that such duties exist and case decisions reflecting the existence of a such duties. However, the cases do not reflect a strong articulation of the policy reason(s) for the recognition of such a duty.[126] Glanville Williams called the idea of a non-delegable duty in one of the leading cases "one of the leading sophistries in the law of tort" and stridently criticised the cases said to have recognised non-delegable duties for their failure to articulate any policy rationale for their imposition.[127]

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[120] *New South Wales v Lepore* (2003) 212 CLR 511, 601–602.

[121] This view of the case is shared by Vines, n 115, 618: "there is a strong indication given by four High Court judges and one judge who has recently been elevated to the High Court that the non-delegable duty as it has been conceived in Australia is a concept which may be on the wane."

[122] "At the heart of my reluctance (to expand the concept beyond those categories identified in other cases) lies a concern that I feel about the doctrinal foundations of this exceptional principle of tortious liability" *New South Wales v Lepore* (2003) 212 CLR 511, 608. He rejected any suggestion that a "superior party which is in the best position to accept such liability" should effectively become an insurer under the doctrine.

[123] *New South Wales v Lepore* (2003) 212 CLR 511, 624.

[124] *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22, 34–35 (Gleeson CJ), 54 and 64 (Kirby J), 75 (Hayne J) and 86 (Callinan J), with Crennan J agreeing with Gleeson CJ and Hayne J. Gleeson CJ concluded that non-delegable duties may have a "useful, if not entirely admirable" role in some cases (36).

[125] "English law has long recognised that non-delegable duties exist, but it does not have a single theory to explain when or why": *Woodland v Swimming Teachers' Association* [2014] AC 537, 573 (Lord Sumption).

[126] Jane Swanton, "Non-delegable Duties: Liability for the Negligence of Contractors Part I" (1991) 4 *Journal of Contract Law* 180, 192; Jane Swanton, "Non-delegable Duties: Liability for the Negligence of Contractors Part II" (1992) 5 *Journal of Contract Law* 26, 26: "there is no attempt to indicate what circumstances will give rise to this sort of especially stringent duty. Nonetheless, there has been a tendency in subsequent cases to cite the dictum (in *Dalton v Angus*, a leading non-delegable duty case) as though it stated a rule or principle"; Robert Stevens, "Non-delegable Duties and Vicarious Liability" in Jason W Neyers, Erika Chamberlain and Stephen G A Pitel (eds), *Emerging Issues in Tort Law* (Hart Publishing, 2007); John Murphy, "Juridical Foundations of Common Law Non-delegable Duties" in Neyers, Chamberlain and Pitel (eds), *Emerging Issues in Tort Law* (Hart Publishing, 2007).

[127] Williams, n 30, 180, 180–181. Surveying the English cases, he concluded there were "decided on no rational grounds, but depend merely on whether the judge is attracted by the language of non-delegable duty" (186). See also Paula Giliker, "Making the Right Connection: Vicarious Liability and Institutional Responsibility" (2009) 17 *Torts Law Journal* 35, 45: "it remains difficult to identify a single principle capable of unifying the various non-delegable duties, which are often uncertain in scope and seemingly imposed in an ad hoc manner"; Andrew Corkhill, "Dangerous Substances and Activities in the Context of a Non-delegable Duty of Care" (2007) 15 *Tort Law Journal* 233, 238; P S Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) 335.

Kirby J commented on the situation in *Leichhardt Municipal Council v Montgomery*:

> This elusive "element in the relationship" suggests the need for close attention to the common characteristics of those categories that the common law has so far accepted in Australia as giving rise to non-delegable duties. What is it that the employee in the workplace, the patient in the hospital, the pupil in the school premises and the occupier/contractual entrant on premises where extra-hazardous activities are carried out, have in common? There are obvious dangers here in elevating historical categories into a genus that is no more than a retrospective rationalisation.[128]

Once the existence of such duties was accepted, as occurred in the United Kingdom in the late 19th century, subsequent cases merely assume the continued existence of such a duty, rather than explore its origins, and question whether its original raison d'être continues to justify its existence or whether developments elsewhere in tort law mean that, even if the doctrine made sense in earlier times, when related tort principle was very different, today, with substantial changes in other tort principle, any rationale for such duties has vanished. Specifically, I refer to the law's eventual abandonment of the doctrine of common employment. Many judges have sourced the development of the non-delegable duty to a perceived need to circumvent the common employment doctrine. Similar may be said about past iterations of contributory negligence, in times when it was a complete defence to a negligence claim. A generalised duty of care was established in 1932, well after the non-delegable concept was first articulated. Specifically, this made it much easier for an injured plaintiff to sue a contractor directly for negligence.

It is suggested that those who advocate the place of non-delegable duties must provide a policy rationale for its existence. Further, they must explain why the concept of a non-delegable duty has not in effect become redundant in the law of tort, given numerous developments elsewhere in that field that arguably serve to undermine any historical justification for the doctrine. Of course, this would include those now advocating for recognition of a non-delegable duty in the context of alleged institutional child sexual abuse.

Attempts to Articulate a Rationale Unconvincing

It should not be denied that some have attempted to provide a rationale for the imposition of non-delegable duties to avoid the perception that might otherwise arise that decisions in these cases represent no more than "pragmatic responses to perceived injustices" in particular circumstances.[129]

However, the rationales that have been given have, with respect, not been convincing. Initially, it was argued that imposition of non-delegable duties was appropriate where the defendant was involved in dangerous, or extra-hazardous, activity. The precise reasoning for confining strict liability to such cases is not entirely clear. It may be that it draws from the concept of Blackburn CJ in *Rylands* of liability for a thing escaping from land where the landowner knows the thing will be dangerous if it escapes, though there is clearly not a precise analogy between liability for an independent contractor and liability for something that escapes from land. It is not clear why something known to be dangerous or "extra-hazardous" (*Honeywill*) attracts strict liability, as opposed to general duty of care liability.[130] If there is evidence that something, for instance on the defendant's land, is dangerous, that would be relevant to the

[128] *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22, 64; Hayne J found attempts to categorise cases in which a non-delegable duty was owed might be "historically prescriptive but (not) … normatively predictive" (75); Callinan J questioned whether a sound basis existed for non-delegable duties (87). Members of the Court also cited *Burnie Port Authority* as evidence of the disfavour with which strict liability was generally viewed in Australia, and referred to the decision in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, where the Court subsumed old highway-liability rules within (fault-based) negligence. In the past, highway liability had been treated, particularly in England, as an example of strict liability.

[129] *New South Wales v Lepore* (2003) 211 CLR 511, 596 (Gummow and Hayne JJ).

[130] Williams, n 30, 180, 192: "the concept of 'extra-hazardous acts' is not a suitable one for legal rules"; Stevens, n 126, 344: "it seems insupportable that a (careful) defendant will be held liable for the extra-hazardous activity of an independent contractor, when it would not be so liable if it carefully carried out the same activity itself"; Ezra Thayer, "Liability Without Fault" (1916) 8 *Harvard Law Review* 801, 811: "the very nature of such a discrimination (extra-hazardous activity) involves difficulties and fluctuations of individual opinion in their application; the comparison of instances is likely to produce somewhat bewildering results."

standard of care that the defendant would be expected to apply in terms of magnitude of risk, probability of risk etc. In other words, existing ordinary duty of care principles already takes into account such issues in determining the standard of care that the defendant is expected to apply. It does not make the case for a non-delegable duty.

However, regardless of its precise origin, even if the singling out of "dangerous activities" can be justified, it is far from clear what is meant by dangerous. Of course, any activity may be dangerous, in that harm to another may be caused. So how dangerous, or extra-hazardous, does something need to be in order to justify the non-delegable duty? Again, there are no easy or clear answers.[131] And, of course, concepts of "dangerousness" or "extra-hazardous" activity cannot justify imposition of a non-delegable duty in major categories to which it has been extended, including, most relevant to this article, school and pupil. An educational institution is not considered to be engaged in an inherently dangerous activity.

The other main rationale given was that non-delegable duties were imposed in cases involving an assumption of responsibility by the defendant, in circumstances where they exercised significant control and in circumstances where the plaintiff was vulnerable, and/or reliant on the plaintiff.[132] This concept has also endured criticism in this context.[133] Now, even if this rationale could be defended at one time, it has been engulfed by the explosive growth in the negligence principle. Obviously, questions of assumption of responsibility are relevant in establishing a duty of care, particularly in the area of pure economic loss.[134] And in more recent years, Australian tort law has strongly embraced control, vulnerability and reliance as part of the "salient features" approach it now takes to recognition of a generalised duty of care. Again, we are left struggling to articulate a rationale to explain the categories of case in which a non-delegable duty will be owed, as opposed to other cases. Now, a rationale based on control and vulnerability could be argued in relation to the current context. It must be conceded that educational authorities do exercise significant control over students and that students of young age are vulnerable and reliant on authorities in terms of safety. However, these factors would already be taken into account in determining the extent to which an educational institution owes an ordinary duty of care to its students and the scope of the duty. Again, it is difficult to articulate why that situation calls for recognition of a non-delegable duty, as opposed to other remedies in tort law, including standard negligence principle.

Occasionally, a theory is advanced that non-delegable duties are appropriate in cases where the organisation that is said to owe such duties is expected to have insurance against such risks and losses. Or, in what amounts to the same thing, an argument is made that an independent contractor may lack the resources available to satisfy any judgment against them, while the defendant may have deep pockets or access to insurance.[135] I cannot agree, at the level of principle, that legal doctrine should be shaped by the availability of insurance in particular cases and whether particular kinds of defendants do have or are likely to have insurance or deep pockets.[136] I have made this argument in more detail in published work elsewhere and will not repeat it here. Suffice it to say that insurance is moulded by the law, not the other way around. Obviously, decisions about liability in particular cases create precedents. If one finds against a defendant in a particular case because the defendant is insured, it can hardly be right that

[131] "Many of these decisions are founded on arbitrary distinctions between ordinary and extraordinary hazards which may be ripe for re-examination": *Woodland v Swimming Teachers' Association* [2014] AC 537, 573 (Lord Sumption).

[132] Most recently, *Woodland v Swimming Teachers' Association* [2014] AC 537, 583 (Lord Sumption, with whom the other Law Lords agreed); Teh, n 28, 216.

[133] Jonathan Morgan, n 13.

[134] *Hedley Byrne and Co Ltd v Heller and Partners Ltd* [1964] AC 465.

[135] In the course of defending the non-delegable duty principle against criticism, members of the UK Supreme Court recently referred to "poorer and un-or-under insured contractors", presumably in an attempt to justify the imposition of a non-delegable duty on the defendant, which was often a "large organisation": *Woodland v Swimming Teachers' Association* [2014] AC 537, 590 (Baroness Hale, with whom Lords Clarke, Wilson and Toulson agreed).

[136] Similarly, Swanton, n 126, 26, 29: "there are problems with treating insurance cover as a criterion for the imposition of a non-delegable duty".

next year, when a very similar case arises but because of some technicality the defendant does not have insurance, the result should differ. Cases with "like facts" ought to be treated alike. Insurance is not relevant in establishing legal principle, and nor should it be. Nor should the fact that certain defendants may, or do, have deep pockets.[137] Arguments about insurance or deep pockets cannot be used to defend an otherwise indefensible principle.

A further argument appears to be based on the fact that the defendant has chosen the independent contractor:

> The most popular argument for insulation (of a defendant from the actions or omissions of an independent contractor) is that since the employer of an independent contractor has no control over him in the prosecution of his work and since it is unjust to hold a man liable for the torts of another whom he cannot direct, the employer of an independent contractor should not be liable for the latter's torts. Those who make this argument overlook the fact that while the contractee does not bargain for and usually does not want control of the contractor, he nevertheless makes the selection of the contractor.[138]

By way of respectful response, the fact that the defendant chose the independent contractor does not justify making them an effective insurer of the contractor's actions or omissions in terms of non-delegable duty. Certainly, an argument can be made in relation to cases in which a defendant has chosen an incompetent or otherwise unsuitable contractor to do the work. However, that claim would ground in negligence. Again, it is not a satisfactory explanation or justification for imposition of a non-delegable duty.

Other justifications for non-delegable duties have also been articulated, but since they have not attracted much judicial support, they are not considered in detail here.[139]

The Law and Risk

Elsewhere, the law appears very comfortable with individuals and organisations managing their risks. The concept of a corporation is sourced in the idea that entrepreneurs did not wish to place their personal assets at risk through business failure. This fear was accommodated through a company structure, with limited liability. Contracts typically involve an allocation of risk between the contracting parties. As one example, the contractor takes on the risk they will not perform the work to the required standard; the engager takes the risk that the contractor will go out of business before completing the task. The law of contract gives contracting parties great freedom in framing their contractual terms as they wish, in recognition of the fact that the parties are usually best placed to know what is in their best interests, and the law should minimally regulate freely entered into transactions between parties.

In this context, it is problematic that the law seeks to limit the ability of an individual or organisation to manage their risk by delegating a task to an independent contractor. Indeed, one of the reasons that an organisation or individual may wish to engage an independent contractor is a risk management strategy. An organisation that is aware that it would be liable for actions or omissions of an employee might thereby decide to engage an independent contractor, as part of a considered risk management strategy.

It is considered inconsistent in this context where the law recognises risk, and that some parties may legitimately wish to manage or limit that risk by entry into contract, the inclusion of particular clauses,

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[137] Respectfully, Burnett LJ was correct in *NA v Nottinghamshire County Council* [2015] EWCA Civ 1139, [37] when he said that "the appellant seeks to disconnect the non-delegable duty from the law of negligence and impose a new form of strict liability. The justification for such a step appears to be that foster parents may not be in a position to satisfy a claim for damages and costs if sued directly. Whether that is right or wrong in general, in my judgment it provides too insubstantial a ground for a significant extension of the law in this area, which might have wide implications".

[138] Clarence Morris, "The Torts of an Independent Contractor" (1935) 29 *Illinois Law Review* 339, 343.

[139] Christian Witting has advanced another rationale for non-delegable duties, the protection of "bodily integrity": Christian Witting, "Case Note: Leichhardt Municipal Council v Montgomery: Non-delegable Duties and Roads Authorities" (2008) 32 *Melbourne University Law Review* 332, 348; Witting, n 13, 49. With respect, I am not convinced that notions of bodily integrity can explain why, in the spectrum of personal injury liability, only some kinds of invasion of bodily integrity appear to attract the non-delegable duty and not others.

or the establishment of a corporate structure, that in some cases, a party may be prevented effectively from transferring risk to another. This problem is exacerbated when, as has been demonstrated, no one has been able to actually articulate a justification for why the transfer of risk is apparently acceptable in some cases, but not in others, and there is no agreement on the factors that would lead to the imposition of a non-delegable duty, as opposed to more mainstream doctrine.

In sum, there continues to be no policy rationale that can explain existing categories of case in which non-delegable duties have been held to be owed. Suggested policy justifications, including arguments about extra-hazardous activities, arguments about control, vulnerability and dependence, and arguments about insurance, have all been found wanting. Elsewhere, the law is very comfortable with the management of risk through voluntary agreements. In this regard, arguments that some defendants should not be able to manage risk by delegating responsibility to others are highly dubious.

Arguments in Favour of a Non-delegable Duty

The work of Dr Beuermann has recently attracted significant interest in this area,[140] and I should respond to it. Writing in the context of the question of an educational institution's liability for child sexual abuse, Dr Beuermann discusses various possible heads of responsibility. She rejects use of vicarious liability in such situations, a position with which I agree. However, she apparently supports the existence of a non-delegable duty owed by the school in such cases. I must acknowledge that she does not use this phrase, instead using the concept of "conferred authority strict liability". However, my reading of her work suggests that this concept would be similar in nature and effect as a non-delegable duty.[141] She uses the concept of conferred authority strict liability quite distinctly from vicarious liability, again a position with which I agree.[142]

She justifies imposition of "conferred authority strict liability" on the basis of the potential of one conferred with authority by an institution to direct the conduct of a child. She argues that this relationship dynamic creates the potential for it to be abused. The educational authority's power and control over the student is enshrined in legislation. Her thesis is that the power and control dynamic in this relationship creates the potential for abuse and the justification for the imposition of strict liability in such cases. She admits that under this concept, an educational institution could be liable for both employees and independent contractors.

By way of response, first it must be acknowledged that Dr Beuermann's suggestion of "conferred authority strict liability" is not designed, as I read her work, to apply to *all* situations in which the law has in the past recognised a non-delegable duty. Her comments have been made in the context of a relationship between an employer and employer, and school authority and student. So, it is not entirely clear to me that Dr Beuermann's work is designed as a justification for the recognition of all non-delegable duties. Indeed, in my view, it could not be. It could not be argued that a non-delegable duty that one property owner might owe to a neighbour, or that a property owner might owe to a tenant, is based on "conferred authority". Legislation does not confer "authority" on a property owner in relation to neighbours; it does not place them in a position of superiority over others or give them the ability to direct conduct over others. The same can be said of property owners vis-a-vis tenants. So, it is not clear that Dr Beuermann's theory of "conferred authority strict liability" can rationalise or justify the

[140] Christine Beuermann, "Conferred Authority Strict Liability and Institutional Child Sexual Abuse" (2015) 37 *Sydney Law Review* 113; Christine Beuermann, "Tort Law in the Employment Relationship: A Response to the Potential Abuse of an Employer's Authority" (2014) 21 *Torts Law Journal* 169; Christine Beuermann, "Vicarious Liability and Conferred Authority Strict Liability" (2013) 20 *Torts Law Journal* 265; Christine Beuermann, "Dissociating the Two Forms of So-called Vicarious Liability" in Stephen Pitel, Jason Neyers and Erika Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013).

[141] Christine Beuermann, "Conferred Authority Strict Liability and Institutional Child Sexual Abuse" (2015) 37 *Sydney Law Review* 113, 128: "such liability has commonly been referred to as strict liability for breach of a non-delegable duty of care, but can be more meaningfully described as conferred authority strict liability."

[142] Christine Beuermann, "Conferred Authority Strict Liability and Institutional Child Sexual Abuse" (2015) 37 *Sydney Law Review* 113, 128: "the two forms of strict liability are distinct" (when read in context, my view is that Dr Beuermann is referring to vicarious liability, on the one hand, and non-delegable, or conferred authority strict liability, on the other).

imposition of non-delegable duties in all categories of case in which they have been recognised to date, though to be fair to Dr Beuermann, it is not clear that her work in fact sets out to do this, as opposed to justify it in some of those categories.[143]

Second, however, it is somewhat difficult to apply Dr Beuermann's theory to the large range of cases in which an organisation has been found to owe a non-delegable duty with respect to work conducted by independent contractors. In some cases, the organisation did not even engage these independent contractors themselves, those contractors being subcontractors engaged by others. In situations like this, *Bush v Steinman* being one example, it is very difficult to say that the defendant organisation has "conferred authority" with respect to the independent contractor.

The third point is that Dr Beuermann's focus on the fact that schools have substantial influence over students, including their ability to direct and manage conduct, is considered quite similar to notions of "control" that tort law, in Australia at least, uses as part of its salient features approach to the recognition of a general duty of care. To be fair to Dr Beuermann, it is conceded that the United Kingdom uses a different approach to consideration of whether a duty of care is owed.[144] However, in Australia, which applies the so-called salient features approach to recognition of a duty of care in negligence, we know that the fact a defendant has substantial control over a plaintiff, or a situation involving the plaintiff, and/or the fact that the plaintiff is in a vulnerable position, reliant on the defendant, will be highly relevant in establishing that a duty of care exists and, to some extent at least, its content. So, with respect, we come back to the same old problem with recognition of a non-delegable duty, the inability of those who advocate for it to provide a satisfactory rationale for it, as something quite separate and distinct from ordinary rules of tort liability. Exceptionalism requires justification, and it is elusive in the case of the non-delegable duty.

Conclusion

It goes without saying that survivors of child sexual abuse deserve our full sympathy and support and should be offered appropriate "redress", to the extent this is possible given what they have suffered. However, the question of law reform must be carefully considered. It would be easy to be convinced by the emotion around the issues uncovered by the recent Royal Commission that radical reform to tort law is needed. This is a temptation that must be avoided. Reform may well be needed, but proposals for law reform deserve property scrutiny. This article has focused on the recommendation of the Royal Commission relating to the introduction of a statutory non-delegable duty in relation to institutional child sexual abuse.

It has found that the concept of non-delegable duties retains an awkward place in tort law. It runs counter to fundamental principles that generally one person is not liable for the acts or omissions of another. It runs counter to the explosive growth of fault as an organising concept of tort law, primarily through negligence. It runs counter to the general theme of Australian tort law in recent years, which has generally turned away from strict liability. In this context, suggestions that a non-delegable duty be recognised in a limited category of case must be carefully scrutinised.

The article has noted that the historical and factual context in which non-delegable duties were recognised in the past has changed substantially. In particular, the disappearance of the doctrine of common employment and the recognition of a generalised duty of care concept have undercut the rationale, whether spoken or unspoken, of many cases in this area. Indeed, this has been a criticism of many of the cases said to reflect a non-delegable duty, the lack of a convincing exposition as to why a non-delegable duty should be imposed in some cases, and not in others.

To the extent that some rationales have been offered, they have been found to be wanting, or have been overtaken by developments elsewhere in tort law. Attempts to argue that non-delegable duties are

[143] In fact, she appears to doubt the imposition of a non-delegable duty in the context of liability of a hospital to a patient: Beuermann, n 140, 273.

[144] This is the three-stage approach in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, an approach that has been rejected in Australia: *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

applicable and appropriate in circumstances involving "dangerous" or "extra-hazardous" activity have generally foundered, at least in Australia, because the difficulty of defining such concepts has been recognised. Further, there has been recognition that any activity could be dangerous if proper care is not taken. And further, it is unclear why existing mechanisms within ordinary principles of negligence law, for instance a standard of care that is already receptive to different conceptions of risk, do not and cannot already accommodate notions of dangerousness in framing appropriate principle.

Subsequent attempts to argue that it is notions of control and assumption of responsibility that attract non-delegable duties, and occasions where the plaintiff is somehow vulnerable or dependent or reliant, have also proven problematic. I include within this category arguments that some defendants are liable on the basis of "conferred authority strict liability". This is most particularly the case in Australia, given the use of the "salient features" approach to duty of care recognition. The salient features that the High Court has identified are the very same features that advocates of non-delegable duties say mark out the appropriate borders of that doctrine. Again, posited rationales for the doctrine, which would mark out with some certainty what the contours are, collapse when subjected to intellectual scrutiny. And insurance or deep pockets can never be a rationale for the imposition of liability.

Legislatures should not need the call of the Royal Commission for the introduction of a non-delegable duty in the context of institutional child sexual abuse. There are other areas of the law in this area, eg limitation periods and the so-called *Ellis* defence, which do require serious consideration of reform to remove barriers to survivors of child sexual abuse from seeking redress. Consideration of those reforms, while important, is beyond the current scope of the article. And arguably, the High Court should make the difficult call to abandon notions of non-delegable duties altogether.[145] The rationale for them has never been articulated properly in the cases, and any possible arguments for them have disappeared given developments elsewhere in tort. The current delicate situation, whereby past High Court cases recognising such duties have not been overruled, yet recent cases in the past decade appear to convey negative sentiment about such duties, in particular their possible expansion to other categories of case, is not satisfactory. It would simplify matters greatly if the High Court simply rejected them, once and for all. Their reason for being has effectively passed.

[145] Such a move would not be inconsistent with the minor references to non-delegable duties in civil liability legislation: *Civil Liability Act 2002* (NSW) s 5Q; *Wrongs Act 1958* (Vic) s 61; *Civil Liability Act 2002* (Tas) s 3C.