

BREACH OF THE NON-DELEGABLE DUTY: DEFENDING LIMITED STRICT LIABILITY IN TORT

CHRISTIAN WITTING*

I INTRODUCTION

For many observers, tort law draws its character from classical actions such as battery and assault, trespass to goods and land, and negligent product manufacture. Each of these torts is suggestive of a defendant causing harm to a plaintiff in circumstances where the parties are strangers and the injurious interaction is an isolated one. Tort law is viewed as a means of vindicating rights to personal autonomy and ownership of property. It is designed to 'correct' wrongs, conceived of as infringements of personal rights.

Yet, this picture is incomplete. Although the classical actions continue to be important, there can be little doubt that tort law today is characterised by an emphasis on 'regulatory' intervention.¹ This is hardly surprising, given that modern life is characterised by a pervasive 'corporate' presence. Much human activity is undertaken in groups or involves the supply and distribution of products and services for 'mass consumption'. The harms that result from the commission of modern torts tend to be less random and incapable of prediction than the classical view would suggest.² Measures can be taken to reduce the incidence of these torts and to determine in advance how losses should be allocated across activity types. Modern tort actions reflect these facts. They are

* Melbourne Law School. I wish to thank Peter Cane, Matthew Harding, John Murphy and this journal's three anonymous referees for reading and providing challenging feedback on earlier drafts of the paper. Thanks also go to the commentators of a predecessor piece, entitled 'Bodily States and the Obligation to Repair' (Paper presented at the Research School of Social Sciences, ANU, Canberra, 19 February 2002), particularly Heidi Hurd, Michael Moore and Jane Stapleton. All responsibility for errors and omissions remains mine alone.

1 Regulation has been defined as 'the intentional activity of attempting to control, order or influence the behaviour of others': Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1, 1. I have argued that courts have a limited role to play in regulating conduct, especially in the professions where planning of activity is possible: Christian Witting, *Liability for Negligent Misstatements* (1st ed, 2004) 68. Yet, courts must also recognise the indirect nature of their ability to 'influence' behaviour: at 31–2. For a more sceptical view of tort's regulatory power, see Jane Stapleton, 'Regulating Torts' in Christine Parker et al (eds), *Regulating Law* (2004) 122.

2 See Gregory Keating, 'The Idea of Fairness in the Law of Enterprise Liability' (1997) 95 *Michigan Law Review* 1266, 1266–7; Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 467.

concerned with matters such as strict product liability, intellectual property infringement and the liability of corporations, partnerships, employers and public authorities.³

The subject matter of this paper is the breach of non-delegable duty ('BNDD'). This is an action that takes its place at the heart of modern tort law. Like vicarious liability, it is a means of allocating losses across activity types. However, its locus is different. The BNDD has been adapted for a role beyond the commission of torts in the course of employment. It allows liability to be brought home to the employer who fails to provide a safe workplace for its employees. It also provides a means of compensation for injuries occurring in the hospital, in the schoolyard and between neighbouring occupiers of land.

Unfortunately, the contours of BNDD liability are sketchy. The law in this area has been described as comprising 'a random group of cases'.⁴ The aim of this article is to provide an explanation of the BNDD and to justify its form and operation. It does so by attempting to provide the explanation that best 'fits' the bulk of the case law.⁵ It proceeds by considering the basic elements and operation of the tort before turning to a consideration of four models of BNDD liability. These models are concerned with the relationship of the BNDD to other tort doctrines or with the issue of fault. The article argues that the BNDD instantiates a form of strict liability and goes on to provide both doctrinal and policy-based reasons for liability regardless of fault.⁶ It will be contended that the BNDD occupies a proper place in a coherent scheme of limited strict liability protection for the person.

II THE BASIC FORM AND OPERATION OF BNDD LIABILITY

The first matter to address is the basic form and operation of the BNDD. Some matters are the subject of widespread agreement.⁷ At common law, the BNDD (in the usual three-party case) permits the imposition of liability upon the duty-holder for the acts or omissions of an intermediate party to whom a task has been delegated. Often, the duty-holder's obligation is described as one to 'ensure that'

3 See John C P Goldberg, 'Twentieth-Century Tort Theory' (2003) 91 *Georgetown Law Review* 513, 523–4. Goldberg noted that 'the conduct about which modern plaintiffs tended to complain no longer consisted of everyday bad acts ... Rather, it consisted of the failure of commercial enterprises to account adequately for the safety of employees, customers, and bystanders': at 523.

4 Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (5th ed, 2003) 597 fn 372. These authors characterise the development of the breach of non-delegable duty ('BNDD') as 'unsystematic': at 599. This view is typical of the wider literature.

5 On the kind of (if not the exact) approach taken, see Ronald Dworkin, *Law's Empire* (1986) ch 2.

6 The point frequently has been made that strict liability is not liability without fault; it is liability regardless of fault: Restatement of Law (Third) of Torts: Liability for Physical Harm (Basic Principles) (Tentative Draft No 1, 2001) ch 4, scope note; Peter Cane, *The Anatomy of Tort Law* (1997) 82; John Gardner, 'Obligations and Outcomes in the Law of Torts' in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on His Eightieth Birthday* (2001) 111, 111–16.

7 In this area of law, it is not possible to assert that there is *unanimity* on the issues discussed in this section.

reasonable care is taken in the conduct of an activity.⁸ The obligation requires the taking of positive action to prevent harm. The BNDD gives rise to liability (especially relevant in the less frequent two-party case) for ‘mere omissions’.⁹ The obligation is personal to the duty-holder and any default is the duty-holder’s.¹⁰ The fact that the obligation is not fulfilled is the fundamental basis of liability.¹¹ In sum, there is widespread agreement that the BNDD imposes ‘stricter obligations on the person who owes another [the obligation] than are imposed on a similarly positioned person under an ordinary duty of care’,¹² although what this entails will be the subject of further analysis below.

The non-delegable duty is limited to specific kinds of activity.¹³ Policy choices have been made in selecting the kinds of activity that are the subject of regulation.¹⁴ The commonly accepted ‘core’ BNDD categories include: the duty of the employer to provide a safe system of work,¹⁵ competent workers and proper materials;¹⁶ the duty of the hospital with respect to the physical safety of patients accepted into its care;¹⁷ the duty of a school with respect to the physical

8 *Hughes v Percival* (1883) 8 App Cas 443, 446 (Lord Blackburn); *Blackwater v Plint* [2005] 3 SCR 3, [48]; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 332 (Brennan J), 368 (McHugh J); *Kondis v State Transport Authority* (1984) 154 CLR 672, 686 (Mason J); *Commonwealth v Introvigne* (1982) 150 CLR 258, 269 (Mason J).

9 See *General Cleaning Contractors Ltd v Christmas* [1953] AC 180.

10 *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906, 912 (Lord Brandon); *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, 84 (Lord Wright), 88 (Lord Maugham).

11 *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906, 912 (Lord Brandon). See also *Riverstone Meat Co Pty Ltd v Lancashire Shipping* [1961] AC 807, 862 (Lord Radcliffe).

12 Tomo R O Boston, ‘A Hospital’s Non-Delegable Duty of Care’ (2003) 10 *Journal of Law and Medicine* 364, 365.

13 Michael Jones, *Textbook on Torts* (8th ed, 2002) 446. This is similar to the concept of the ‘scope of duty’ in negligence law: see Witting, *Liability for Negligent Misstatements*, above n 1, 200–1 (noting that the concept limits the activities with respect to which the defendant must take care).

14 See, eg, Jane P Swanton, ‘Non-Delegable Duties: Liability for the Negligence of Independent Contractors Part I’ (1991) 4 *Journal of Contract Law* 183, 186. See also Jane P Swanton, ‘Non-Delegable Duties: Liability for the Negligence of Independent Contractors Part II’ (1992) 5 *Journal of Contract Law* 26, 38.

15 In the view of some writers, the obligation does not extend to the proper *operation* of the devised system of work. The reason for this is said to be that the operation of the system is not within the employer’s control: Deakin, Johnston and Markesinis, above n 4, 599. However, this assertion appears inconsistent with the case law: *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906, 912 (Lord Brandon commented that ‘the provision of a safe system of work has two aspects: (a) the devising of such a system and (b) the operation of it’); *Kondis v State Transport Authority* (1984) 154 CLR 672, 687. See also Jones, above n 13, 440. Arguably, control is just one of a number of factors that go towards determining responsibility: see *Cook v Square D Ltd* [1992] ICR 262, 269 (Farquharson LJ).

16 *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906; *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, 78 (Lord Wright), 86 (Lord Maugham); *Kondis v State Transport Authority* (1984) 154 CLR 672, 679 (Mason J). In England, this duty has been extended beyond the protection of employees’ bodily integrity to the protection of psychiatric integrity: *Barber v Somerset County Council* [2004] 1 WLR 1089, 1096 (Lord Rodger). Note, however, that this obligation has yet to be fully defined by the House of Lords: at 1101 (Lord Rodger). See also Anthony Dugdale and Michael Jones (eds), *Clerk and Lindsell on Tort* (19th ed, 2005) ¶13-02; Deakin, Johnston and Markesinis, above n 4, 563. In Australia, doubts have been expressed about a common law obligation to take precautions to prevent psychiatric injury based on possible inconsistency with the contract of employment: *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44, 54 (McHugh, Gummow, Hayne and Heydon JJ).

17 *Cassidy v Ministry of Health* [1951] 2 KB 343, 360 (Denning LJ).

safety of its pupils;¹⁸ and the duty of the occupier with respect to neighbouring occupiers of land.¹⁹ The latter obligation is now seen to encompass the carrying out of risk-laden activities on land which may endanger a neighbouring occupier's property.²⁰ Although the occupier's duty typically does not give rise to actions for personal injury, breach inevitably entails serious risks of personal injury – so that one might view these cases as protective of bodily integrity in the same way that the previously mentioned cases are protective of bodily integrity. The English cases extend non-delegable duties to encompass work carried out by independent contractors which causes injury similar to that arising in public nuisance claims, such as in cases involving a lamp which fell onto the highway²¹ and the use of a blowlamp which caused an explosion on the highway.²² In *New South Wales v Lepore*,²³ Gummow and Hayne JJ were of the opinion that the range of non-delegable duties should not be expanded without the exercise of 'considerable caution'²⁴ and Kirby J also expressed doubt about the wisdom of any further expansion.²⁵

Beyond these propositions, which are at least implicit in the case law, courts have been diffident about the nature of BNDD liability. Many issues arise, not all of which can be explored in detail in this paper. Brief argument will be made that the BNDD is an independent tort. There are good reasons for this contention – although it might not be possible to 'prove' its validity. The argument is that the BNDD does not merely extend liability in the way that vicarious liability does. The logic inherent in the cases suggests that it has its own elements, these being the obligation, which is non-delegable, breach of that obligation and causation of damage to a person in a specific class to whom the obligation is owed. The structure of the tort appears, thus, to resemble that of breach of statutory duty,²⁶ with which it may have an overlapping operation in some cases. It will be argued that the structure of the BNDD is different from that of negligence and of nuisance.

The matter of whether the BNDD is an independent tort aside, this paper will focus upon a number of other contentious issues. The first is whether fault is required under the BNDD. Is the BNDD a fault-based form of liability or is it a form of strict liability? Related to this is the issue of the BNDD's relationship to the tort of negligence. In recent times, the High Court of Australia has asserted that the two torts are 'connected'. This proposition will be the subject of analysis.

18 *Commonwealth v Introvigne* (1982) 150 CLR 258, 269 (Mason J).

19 *Dalton v Angus* (1881) 6 App Cas 740; *Bower v Peate* (1876) 1 QBD 321; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

20 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 550–4 (Mason CJ, Deane, Dawson, Toohey, Gaudron JJ).

21 *Tarry v Ashton* (1876) 1 QBD 314.

22 *Holliday v National Telephone Co* [1899] 2 QB 392.

23 (2003) 212 CLR 511.

24 *Ibid* 596 (Gummow and Hayne JJ).

25 *Ibid* 608 (Kirby J). A matter currently before the High Court of Australia concerns the liability of a road authority for defects in the pavement: *Leichhardt Municipal Council v Montgomery* [2005] NSWCA 432 (Unreported, Mason P, Hodgson JA and McColl JA, 18 November 2005).

26 See, eg, W H V Rogers, *Winfield and Jolowicz on Tort* (16th ed, 2002) 275–8.

The second major issue is whether the BNDD is a species of vicarious liability. The two doctrines often arise in similar circumstances, involving three parties. The defendant can be held to be liable for the failure of an intermediate party. But, it will be seen that there are substantial differences between them. On the assumption that the BNDD is a tort of strict liability, the third major issue is whether special justification can be found for liability regardless of fault. An attempt will be made to provide such justification for BNDD liability on both doctrinal and policy grounds.

III MODELLING BNDD LIABILITY

This article examines four models, each of which represents a plausible way of conceptualising BNDD liability. These are: the BNDD as a species of negligence; the BNDD as a species of vicarious liability; the BNDD as a strict liability tort; and the BNDD as an absolute liability tort.

A The BNDD as a Species of Negligence

The BNDD might be related to ‘negligence’ in two ways. First, it could be that the BNDD is breached only upon proof of a failure to take reasonable care. That is, liability depends upon proof *in someone* of a negligence standard of fault. Second, it could be that the BNDD is capable of pleading in cases of negligence only. This is a different proposition that involves confining the operation of the BNDD to the realm of an existing tort.

The proposition that there can be no liability for a BNDD without fault is a familiar one. One could be forgiven for thinking that this was the true view of the House of Lords in the seminal employment case of *Wilsons & Clyde Coal Co Ltd v English*.²⁷ Lord Thankerton opined that ‘it is the duty of the master to use due care in the provision of a reasonably safe system’.²⁸ His Lordship went on to say that

[i]f he appoints a servant to attend to the discharge of such duty, such servant, in this respect, is merely the agent or hand of the master, and the maxim *qui facit per alium facit per se* renders the master liable for such servant’s negligence as being, in the view of the law, the master’s own negligence.²⁹

In the same case, Lord Wright explained that the employer does not

warrant the adequacy of plant, or the competence of fellow-employees, or the propriety of the system of work. The obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfilment to employees, even though selected with due care and skill.³⁰

His Lordship asserted that the duty is the employer’s whether or not the employer personally is capable of performing it.³¹ Lord Maugham stated that

27 [1938] AC 57 (*‘Wilsons & Clyde Coal’*).

28 Ibid 66 (Lord Thankerton).

29 Ibid 70 (Lord Thankerton).

30 Ibid 78 (Lord Wright).

31 Ibid 84 (Lord Wright).

[i]n such employments it was held that there was a duty on the employer to take reasonable care and to use reasonable skill ... [Yet] he can and often he must, perform this duty by the employment of an agent who acts on his behalf; but he then remains liable to the employees unless the agent has himself used due care and skill in carrying out the employer's duty.³²

There is a certain ambiguity inherent in the language of their Lordships in *Wilsons & Clyde Coal*. Although there is repeated reference to the idea of reasonable care, what is not made *explicit* is the fact that there need be no fault in the person *to be made liable* – in the duty-holder. Personal fault in the delegate is not the same as personal fault in the duty-holder. The result *must* be that the BNDD is a tort of strict liability. This proposition is clearest in exactly the kind of fact situation that *Wilsons & Clyde Coal* involved – a three-party case, where the defendant duty-holder asserts that he or she has ‘taken care’ by entrusting performance of a function to competent delegates.³³ More recently, as we shall see, it *has* been stated explicitly that the BNDD is a strict liability tort; there need be no fault *on the part of the duty-holder*. But this is to run ahead of the discussion.

As to the second proposition, the High Court of Australia, in *Burnie Port Authority v General Jones Pty Ltd*,³⁴ opined that the BNDD is a ‘negligence concept’.³⁵ The view was taken that the English lateral support cases were, in reality, cases of negligence and that the BNDD simply involved the substitution of a more stringent standard of care for the ordinary standard used in negligence cases.³⁶ This idea was altered somewhat in the subsequent case of *New South Wales v Lepore*, where a number of justices expressed the view that the BNDD is ‘connected’ with the law of negligence and that this connection should be maintained. Justices Gummow and Hayne noted that

all of the cases in which non-delegable duties have been considered in [the High Court of Australia] have been cases in which the plaintiff has been injured as a result of negligence. The question has been whether a person other than the person who was negligent was to be held liable to the injured plaintiff for the damage thus sustained.³⁷

Their Honours noted that the allegations in the sexual abuse cases that they were required to consider did not involve any allegation of negligence on the part of either the school authorities or the teachers who had committed the abuse. The question was whether the BNDD owed by the school authorities could be extended to cover this problem.

Justices Gummow and Hayne opined that

to hold that a non-delegable duty of care requires that 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 be to remove the duty altogether from any connection with the law of negligence.³⁸

32 Ibid 86–8 (Lord Maugham).

33 Ibid 64 (see reference to pleading).

34 (1994) 179 CLR 520 (*Burnie Port Authority*).

35 Ibid 549–60 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

36 Ibid 550–1.

37 *New South Wales v Lepore* (2003) 212 CLR 511, 598 (Gummow and Hayne JJ).

38 Ibid 601 (Gummow and Hayne JJ).

Although (as will be seen) their Honours conceived of the BNDD as imposing strict liability upon the duty-holder, they were of the view that liability should be found only in cases involving a failure of care amounting to negligence on the part of the delegate. For this reason, and for reasons of policy not relevant to the present discussion, there could be no BNDD in circumstances where an employee committed a battery involving sexual abuse.³⁹

In response to these contentions, it appears that there is a sense in which the BNDD often has been ‘connected’ with the tort of negligence. The tort is committed in circumstances where the tort of negligence would be the preferred cause of action. The typical allegation against a hospital, for example, is that its staff failed to take care in conducting a medical procedure or in advising the patient of the risks of treatment. BNDD liability has been formulated to complement negligence liability; specifically, to provide a remedy against the hospital where negligence would otherwise fail because of the inability of the patient to identify a specific failure of care in the hospital or in its employees.⁴⁰

In a similar way, the BNDD is both supplementary and remedial in other contexts where negligence would otherwise be pleaded. But this is not an indication that the BNDD tort and negligence are the same thing. BNDD is pleaded *because of* inadequacies in the reach of negligence; their operation often is mutually exclusive.

Although the judgment of Gummow and Hayne JJ, in *New South Wales v Lepore*, might be read as restricting actions under the BNDD to cases ‘of negligence’, it does not appear that this was actually the intended outcome. Their Honours acknowledged that BNDD cases include some which have no relation to the tort of negligence. Their Honours did not express the view that these had been decided incorrectly. Instead, it seems that Gummow and Hayne JJ were concerned to do two things in their judgment: to discourage the *further* expansion of strict liabilities in tort⁴¹ and to delineate the ambit of obligations owed in particular by employers, hospitals and school authorities.⁴² For this reason, it appears reasonable to eschew the idea that the BNDD is invariably ‘connected to’ the tort of negligence in any juridically significant sense – even if the cases *often* involve a pleading of negligence made in the alternative (and even if, on the facts of a BNDD case, a delegate has failed to take care).

That the BNDD cases have *no necessary juridical connection* to the tort of negligence appears evident in a number of senses. The *structure* of the BNDD appears to differ substantially⁴³ from that of negligence. First, the non-delegable duty is not a general duty that arises as between strangers. The obligation that it

39 For a critique of this, see Jane Wangmann, ‘Liability for Institutional Child Sexual Abuse: Where Does *Lepore* Leave Australia?’ (2004) 28 *Melbourne University Law Review* 169. For the view that the commission of an intentional tort might be analysed as a failure in care supporting an action in negligence, see John Murphy, ‘The Juridical Foundations of Common Law Non-Delegable Duties’ in Jason Neyers (ed), *Emerging Issues in Tort Law* (forthcoming, 2006).

40 See *Cassidy v Ministry of Health* [1951] 2 KB 343, 362–3 (Denning LJ); John Murphy, *Street on Torts* (11th ed, 2003) 561.

41 See *New South Wales v Lepore* (2003) 212 CLR 511, 601 (Gummow and Hayne JJ).

42 Ibid.

43 In the sense of ‘not trivially’.

imposes is tightly defined, arising with respect to, for example, the physical safety of patients of a hospital undergoing medical treatment. Second, the type of harm for which it provides a remedy, in all but some of the lateral support cases, is physical injury. But even the lateral support cases involve the exposure of persons to grave risks of personal injury. There has been no suggestion that the BNDD offers any remedy where the primary injury is to a mere financial interest – the latter being amenable to actions in negligence. Only the lateral support cases involve liability for property damage – which is subject to very extensive protection in negligence. The duty-holder is liable for all failures which are within the scope of the obligation. The BNDD does not appear to give rise to the wide problems of remoteness which occasionally plague the law of negligence.⁴⁴ Third, as analysis of *General Cleaning Contractors Ltd v Christmas*⁴⁵ will reveal, ordinary defences to negligence such as contributory negligence are inappropriate in most (if not all) BNDD cases.

The distinctiveness of the BNDD from the tort of negligence is further established by considering two separate lines of authority. Perhaps the disjunction is most apparent in the fact that BNDDs often arise under statute,⁴⁶ especially in the area of employment law⁴⁷ and healthcare law.⁴⁸ Where statute vests responsibility for the fulfilment of an obligation in an officeholder or delegate, that person remains liable for any failure to fulfil it. Any attempt to divert responsibility from the duty-holder will fail.⁴⁹ Although I accept that the breach of statutory duty cases offer real support to the argument that the BNDD is not confined to cases involving negligence, it is conceded that some commentators would not accept the value of this analogy: statute and common law rules, they would say, are incommensurable.⁵⁰

With respect to the common law, some of the earliest BNDD cases indicate a strict liability pedigree. *Tarry v Ashton*⁵¹ is often analysed (no doubt by those assuming that the BNDD is not an independent tort) as a case of public nuisance, the defendant occupier of a house being held liable for the fall of a heavy lamp into the pavement. Although the defendant had engaged a competent gas fitter to

44 In negligence, remoteness issues usually arise because duties potentially include within their scope different kinds of damage arising in different ways: see Jones, above n 13, 266 ff. The extent of liability in BNDD cases is the subject of policy limits and determined as a matter of scope of the obligation: see Swanton, 'Non-Delegable Duties: Part II', above n 14, 42. If remoteness is an element of the BNDD, it is in the eviscerated form that marks remoteness in intentional torts cases: see Christian Witting, 'Tort Liability for Intended Mental Harm' (1998) 21 *University of New South Wales Law Journal* 55, 65–6.

45 [1953] AC 180 ('*General Cleaning Contractors*'). See also below nn 80–5 and accompanying text.

46 See Deakin, Johnston and Markesinis, above n 4, 597–8; Dugdale and Jones, above n 16, ch 6.

47 See, eg, *Employers' Liability (Defective Equipment) Act 1969* (UK) c 37, s 1(1).

48 See, eg, *National Health Service Act 1977* (UK) c 49, s 3 considered in *Razzell v Snowball* [1954] 1 WLR 1382.

49 See, eg, *Riverstone Meat Co Pty Ltd v Lancashire Shipping* [1961] AC 807 (considering the obligations of a shipowner under the *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, opened for signature 25 August 1924, 120 LNTS 187 (entered into force 2 June 1931) ('*Hague Rules*'), incorporated in the *Carriage of Goods by Sea Act 1924*, 14 & 15 Geo 5, c 22 and the *Sea Carriage of Goods Act 1924* (Cth)).

50 I am not alone in treating statutory and common law torts as being comparable juridical phenomena: see, eg, Cane, *The Anatomy of Tort Law*, above n 6, 76.

51 (1876) 1 QBD 314.

‘put the lamp in repair’, upon its falling and injuring a passer-by the defendant was not permitted ‘to ride off by saying, I employed a competent person to do the repairs, and it is his fault that they were not properly done’.⁵² Although there was an express finding of ‘negligence on the part of’ the gas-fitter, this finding is of diminished importance given that public nuisance is recognised as being a tort of strict liability.⁵³

*Bower v Peate*⁵⁴ involved the withdrawal of lateral support from land. It does not fit neatly within any legal category; but has been noted to have arisen at the intersection between private nuisance, interference with an easement and negligence.⁵⁵ The defendant occupier engaged a building contractor to excavate the soil on his property to a level lower than the walls and foundations of the plaintiff’s neighbouring house. The defendant secured contractual agreement from the contractor that this operation would be performed by proper ‘shoring and supporting’ of the neighbouring house. Owing to inadequate underpinning, damage was done to the plaintiff’s house.⁵⁶ The defendant occupier was held liable. In the words of Cockburn CJ (Mellor and Field JJ concurring):

[t]he act of removal was an act done by the order and authority of the defendant – in other words, was the act of the defendant; and no man can get rid of liability for injury occasioned to another by a wrongful act by seeking to throw the responsibility on an agent whom he has employed to do that work.⁵⁷

The decision in *Bower v Peate* was later approved by the House of Lords in *Dalton v Angus*.⁵⁸ Lord Watson stated that ‘[t]he obligation which the ... right by user imposes upon the owner of the adjacent soil is to give continued support to the building’.⁵⁹ All indications are that the English courts continue to adhere to this proposition,⁶⁰ even if it is not entirely clear to individual judges whether the underlying right is a right in tort law or in property. But, as Lord Blackburn stated in *Dalton v Angus*, ‘whether it is to be called by one name or the other is, I think, more a question as to words than as to things’.⁶¹

In *Burnie Port Authority*, Brennan J accepted that there is strict liability for BNDD arising from the commission of a nuisance.⁶² He stated that the relevant obligation is to prevent the interference, the obligation being of a ‘higher’ nature than that in negligence.⁶³

52 Ibid 320 (Quain J).

53 See, eg, *Dymond v Pearce* [1972] 1 QB 496, 499 (Sachs LJ), 508 (Stephenson LJ); *Farrell v John Mowlam & Co Ltd* [1954] 1 Lloyd’s Rep 437, 440 (Devlin J); Jones, above n 13, 388. Cf Deakin, Johnston and Markesinis, above n 4, 490 (stating that the matter is ‘not free from doubt’, but arguing that fault is required).

54 (1876) 1 QBD 32.

55 Patrick S Atiyah, *Vicarious Liability in the Law of Torts* (1967) 331, 352, 355.

56 Again, it is conceded that there was a finding of a ‘want of care’ on the part of the contractor: *Bower v Peate* (1876) 1 QBD 321, 325 (Cockburn CJ).

57 Ibid 327 (Cockburn CJ).

58 (1881) 6 App Cas 740.

59 Ibid 830 (Lord Watson).

60 Rogers, above n 26, 731.

61 *Dalton v Angus* (1881) 6 App Cas 740, 809 (Lord Blackburn).

62 *Burnie Port Authority* (1994) 179 CLR 520, 576–8 (Brennan J).

63 Ibid 576 (Brennan J).

The extent of the duty ... depends on the nature of the liability which would attach if the injurious consequences of the authorised act were not prevented: a duty to take reasonable care to avoid the injurious consequences when the only tortious liability would be for negligence; a higher duty when the tortious liability would be for nuisance.⁶⁴

In the subsequent case of *Northern Sandblasting Pty Ltd v Harris*,⁶⁵ McHugh J, adopting a similar view, stated:

Bower and *Dalton* were actions for nuisance in respect of the subsidence of land. Since nuisance is a tort of strict liability with exceptions, it is understandable that the law should develop so as to prevent the owner of land from avoiding the imposition of strict liability by the device of employing an independent contractor.⁶⁶

This reasoning is an accurate reflection of the law regarding the duty to provide lateral support insofar as it indicates that liability is strict. It affirms that there is no necessary connection between the BNDD and the tort of negligence. What is left unclear is whether the BNDD is an independent tort. The strongest indication in the lateral support cases, like *Bower v Peate*, that the BNDD is an independent tort lies in the absence of discussion of the private nuisance requirement of balancing benefit and burden.⁶⁷ A stronger indication arises from the fact that the BNDD can be pleaded in a range of factual situations beyond those involving the occupiers of neighbouring land. BNDD cases are not restricted to the kinds of case in which nuisance arises.

For these reasons, the BNDD appears to be distinguishable from both negligence and nuisance.

B The BNDD as a Species of Vicarious Liability⁶⁸

As is apparent, the BNDD frequently is pleaded in a three-party situation. The plea is that the duty-holder should be made liable for the failure of his or her delegate. This indicates some factual resemblance to cases of vicarious liability, which always involve a claim that the defendant should be held responsible for a tort committed by another. There is no reason why these doctrines cannot *both* be used in a given case, as the basis for imposing liability on the defendant. As such, it is not surprising that the BNDD and vicarious liability have been confused with each other. Many textbook writers treat them together. Fleming has described the BNDD as a 'disguised form of vicarious liability'.⁶⁹ Rogers comments that '[i]t is not very clear why we are reluctant simply to say that there is a vicarious liability in these [BNDD] cases, for that seems to be the practical effect'.⁷⁰ Trindade and Cane treat the BNDD as a 'case in which the status of the worker is irrelevant to

64 Ibid 577–8 (Brennan J).

65 (1997) 188 CLR 313.

66 Ibid 367 (McHugh J).

67 See *Bamford v Turnley* (1862) 3 B & S 62, 83; 122 ER 27, 32–3 (Bramwell B); Rogers, above n 26, 509–11 (discussion of 'reasonableness').

68 Note that there is difficulty in untangling the relationship between vicarious liability and the BNDD. Courts have, at times, used concepts from each doctrine interchangeably: Murphy, 'The Juridical Foundations of Common Law Non-Delegable Duties', above n 39.

69 John Fleming, *The Law of Torts* (9th ed, 1998) 434.

70 Rogers, above n 26, 702.

the employer's vicarious liability'.⁷¹ They say that '[a]n employer may be vicariously liable for the negligence of anyone to whom the employer entrusts or delegates the task of fulfilling its duty'.⁷² This being so, the BNDD

is not a ground of liability for the employer's own actions but a ground of liability for the actions of others ... Strict liability for the tort of another is the hallmark of vicarious liability, and so liability for breach of a duty to see that care is taken in effect constitutes an exception to the rule of no vicarious liability for the negligence of independent contractors.⁷³

Two problems arise with this conception of the BNDD. The first is the express stipulation by the courts that non-delegable duties are obligations *personal to the defendant*; that a failing by an independent contractor may amount to a failing *by the defendant*. The second, and more fundamental point, is that the BNDD cannot be confined to three-party situations. Liability also arises in two-party situations,⁷⁴ usually on the basis of a failure to provide adequate procedures or processes for the safe conduct of an activity. This is in sharp contrast to the position in vicarious liability, which arises in cases where an employee has committed a tort.⁷⁵ In the words of Lord Nicholls, 'the employer's [vicarious] liability is ... substitutional, not personal. The employer is liable for the fault of another'.⁷⁶

In *General Cleaning Contractors*, the facts revealed only two parties. The plaintiff window-cleaner's allegation was that the defendant employer had failed to provide a safe system of work in that it failed to provide a means of ensuring that self-locking windows stayed open during cleaning, when a cleaner might be perilously poised on a window sill a number of metres above the ground. This plea was accepted by the House of Lords, which held that 'the appellants were to blame in not taking all reasonable steps to see that the system of work which they required their men to adopt was made as safe as possible'.⁷⁷ More specifically, Earl Jowitt stated:

'[i]t does not appear that the appellants had given any instructions to their workers to test the windows before cleaning them, or that they had applied their minds to the provision of wedges or blocks to prevent the window becoming closed'.⁷⁸

Quite clearly, *General Cleaning Contractors* is not capable of being analysed as a case of vicarious liability. The reason is well-expressed in the statement by Lord Oaksey that '[e]mployers are not exempted from this duty by the fact that their men are experienced and might, if they were in the position of an employer,

71 Frances Trindade and Peter Cane, *The Law of Torts in Australia* (3rd ed, 1999) 725.

72 Ibid 726.

73 Ibid 730. This approach seems to be contradicted by the authors' later explanation of the strict personal duty: at 742.

74 Noted also in Murphy, 'The Juridical Foundations of Common Law Non-Delegable Duties', above n 39; Swanton, 'Non-Delegable Duties: Part I', above n 14, 188.

75 The matter is summarised in a leading text: '[t]he expression "vicarious liability" signifies the liability which A may incur to C for damage caused to C by the negligence or other tort of B': Rogers, above n 26, 701.

76 *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, 383 (Lord Nicholls).

77 *General Cleaning Contractors* [1953] AC 180, 189 (Earl Jowitt).

78 Ibid.

be able to lay down a reasonably safe system of work themselves'.⁷⁹ Rather, 'the problem is one for the employer to solve and should not ... be left to the workmen'.⁸⁰ One might reasonably deduce from these propositions that a defence of contributory negligence, which would be available to reduce liability in ordinary negligence, would not have been available to answer the *prima facie* case of BNDD.⁸¹ It appears of no consequence that the injured plaintiff knew of the risks and did not take some proper precaution.⁸²

The obligation upon the employer is an onerous one. Similarly demanding obligations are imposed upon hospitals, which are required to provide proper systems of treatment for patients,⁸³ and upon school authorities, which must provide for the safety of pupils even where the authority 'does not control and cannot direct the teaching staff in the performance of its duties'.⁸⁴ The obligation under a BNDD 'can be expressed positively and not merely in terms of a duty to refrain from doing something'.⁸⁵ These obligations can be breached without the involvement of an intermediate party. Liability arises for the failure to see that certain precautions have been taken.⁸⁶ It matters not that the task in hand is a technical one, beyond the actual competence of the duty-holder (often 'management').⁸⁷ By contrast, whether or not vicarious liability arises for mere omissions depends upon the specific rules concerning the tort alleged to have been committed by the employee.⁸⁸ Although liability for the BNDD is wider than that of vicarious liability because it extends beyond liability for the acts of employees, it is also bounded by the fact that there is no responsibility for 'collateral' acts of negligence by delegates.⁸⁹ For these reasons, it is plain that the structure of BNDD and vicarious liability claims are not invariably similar.

79 Ibid 190 (Earl Jowitt), 194 (Lord Reid).

80 Ibid.

81 For another analysis of the difference between BNDD and negligence in the employment context, see *Kondis v State Transport Authority* (1984) 154 CLR 672, 680–8, 686–8 (Mason J).

82 Incidentally, this case cannot be analysed as a mere case of negligence either. The speeches of their Lordships are replete with references to the fact that the obligations of the employer are non-delegable. This is inconsistent with the law of negligence.

83 *Wilsher v Essex Area Health Authority* [1987] QB 730, 776 (Browne-Wilkinson VC); *Cassidy v Ministry of Health* [1951] 2 KB 343, 359 (Singleton LJ).

84 *Commonwealth v Introvigne* (1982) 150 CLR 258, 272 (Mason J).

85 *New South Wales v Lepore* (2003) 212 CLR 511, 551–2 (Gaudron J).

86 See, eg, the use of necessary protective equipment by employees: *Bux v Slough Metals Ltd* [1973] 1 WLR 1358. See also *New South Wales v Lepore* (2003) 212 CLR 511, 551–2 (Gaudron J); Dugdale and Jones, above n 16, ¶13-02; Jones, above n 13, 440.

87 *Riverstone Meat Co Pty Ltd v Lancashire Shipping* [1961] AC 807, 879 (Lord Hodson); *Cassidy v Ministry of Health* [1951] 2 KB 343, 360 (Denning LJ); *Gold v Essex County Council* [1942] 2 KB 293, 301 (Lord Greene MR).

88 The general rule in tort law is that there is no liability for omissions: *Stovin v Wise* [1996] AC 923, 930 (Lord Nicholls); *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 502 (Deane J). For explanation, see Patricia Smith, 'Omission and Responsibility in Legal Theory' (2003) 9 *Legal Theory* 221; Andrew Simester, 'Why Omissions Are Special' (1995) 1 *Legal Theory* 311.

89 *Cassidy v Ministry of Health* [1951] 2 KB 343, 364-5 (Denning LJ); *Padbury v Holliday & Greenwood (Ltd)* [1912] 28 TLR 494, 495 (Fletcher-Moulton LJ); *Pickard v Smith* (1861) 10 CB NS 470, 480; 142 ER 535, 538 (Williams J); Stephen Chapman, 'Liability for the Negligence of Independent Contractors' (1934) 50 *Law Quarterly Review* 71, 78–81.

The differences between the BNDD and vicarious liability go further still. In three-party cases, it appears that one of the *intended consequences* of the imposition of a BNDD is to make irrelevant matters of authorisation of the acts of an intermediary.⁹⁰ Thus, Swanton has observed:

Since the imposition of non-delegable duties facilitates the task of finding an appropriate person to sue, it may be that this has operated as an unexpressed reason for the recognition of such duties in some circumstances. Where a patient is injured by treatment received in hospital, or a user of the highway is injured as a result of work being carried out by a highway authority it may be difficult for the plaintiff to discover whose negligence caused the injury. The victim's natural and not unreasonable instinct would be to turn for redress to the hospital or highway authority as the undertaking which has employed all concerned.⁹¹

Indeed, the BNDD arises in circumstances well beyond that of employer and employee.⁹² The BNDD is a means by which the duty-holder can be made responsible for the acts or omissions of persons who are not employees – or even independent contractors. They can be made responsible for the acts or omissions of persons who act gratuitously for the duty-holder (such as in the case of hospitals and later-year medical students or of the relative ‘minding’ the owner’s business).⁹³

Yet, authorisation of the employee remains a key consideration in vicarious liability. In *Bazley v Curry*,⁹⁴ McLachlin CJC stated that the ‘fundamental question’ in cases of vicarious liability involving intentional wrongdoing by the employee ‘is whether the wrongful act is sufficiently related to conduct authorised by the employer’.⁹⁵ In *New South Wales v Lepore*, Gummow and Hayne JJ stated that ‘[i]t is the identification of what the employee was actually employed to do and held out as being employed to do that is central to any inquiry about course of employment’.⁹⁶ None of this is to deny that courts have recognised the limitations of legal conceptions of ‘authority’ or that they impose liability upon employers for the torts of their employees in circumstances where actual or implied authority is absent. These are cases in which courts are apt to analyse the conduct of the parties in terms of ‘sufficiency of connection’ between the employer’s activity and the tort of the employee. But the point remains that courts in vicarious liability cases start with the question of authorisation; they

90 The issue of non-delegable duties is *confused* by references to liability for independent contractors who act as agents: R Evans, ‘Note’ (1985) 59 *Australian Law Journal* 230, 231. For judicial support of the proposition, see, eg, *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848 (Lord Diplock); *Hughes v Percival* (1883) 8 App Cas 443, 454 (Lord Fitzgerald); *New South Wales v Lepore* (2003) 212 CLR 511, 567 (McHugh J).

91 See Swanton, ‘Non-Delegable Duties: Part II’, above n 14, 35.

92 The fact that the employer is not responsible for the torts of independent contractors is established in, for example, *Quarman v Burnett* (1840) 6 M & W 499; 151 ER 509. See also Fleming, above n 69, 433.

93 Jones, above n 13, 420; William P Whippy, ‘A Hospital’s Personal and Non-Delegable Duty to Care for Its Patients – Novel Doctrine or Vicarious Liability Disguised?’ (1989) 63 *Australian Law Journal* 182, 199.

94 [1999] 2 SCR 534.

95 Ibid 559. See also *Blackwater v Plint* [2005] 3 SCR 3, where the Court held that ‘[v]icarious liability may be imposed where there is a significant connection between the conduct authorised by the employer or controlling agent and the wrong’: at [20].

96 *New South Wales v Lepore* (2003) 212 CLR 511, 591 (Gummow and Hayne JJ).

regard it (to use Chief Justice McLachlin's expression) as 'central to any inquiry'.

It also appears that the BNDD must be justified on a basis different from that of vicarious liability. Vicarious liability often is justified on the basis that the employer should be responsible for the torts of an employee where the employer 'stands to profit' from his or her industrial enterprise.⁹⁷ This rationale is not compelling in the range of cases in which BNDDs have been found. Hospitals and schools do not necessarily profit from their activities. In *Cassidy v Ministry of Health*,⁹⁸ Denning LJ noted that a hospital owed a non-delegable duty to a patient no matter whether the treatment was to be paid for or not. 'Once they undertake the task, they come under a duty to use care in the doing of it, and that is so whether they do it for reward or not.'⁹⁹ This issue will be explored further below.

C The BNDD as an Independent Tort of Strict Liability

Despite the all too frequent failures to distinguish between the tort of negligence and the BNDD, and between vicarious liability and the BNDD, doctrinal analysis and evidence of court practice support the view that they are distinguishable. Given this, the next task is to more closely examine significant characteristics of the BNDD. I begin with further discussion of the issue of fault.

As foreshadowed, courts (and commentators) in recent years have been more explicit that there need be no fault on the part of the duty-holder in order for the BNDD to give rise to liability. In *New South Wales v Lepore*, Gummow and Hayne JJ explained that the proper view of the BNDD is that the obligation which it imposes is strict. This is because the duty-holder can be held liable regardless of fault on his or her part.¹⁰⁰ Moreover, the authors of the Australian *Review of the Law of Negligence Final Report*¹⁰¹ were of the opinion that courts have, in the past, operated upon the erroneous assumption that liability for the BNDD would rest upon fault in the duty-holder. They wrote that

97 Goldberg, 'Twentieth-Century Tort Theory', above n 3, 538. Activities susceptible to the prescriptions of enterprise liability theorists include employment (attracting vicarious liability), the mass production of products (attracting strict product liability) and automobile driving (attracting no-fault compensation schemes): at 539–40. The salience of enterprise liability theory is criticised in Jason Neyers, 'A Theory of Vicarious Liability' (2005) 43 *Alberta Law Review* 287, 297–300.

98 [1951] 2 KB 343.

99 Ibid 360 (Denning LJ).

100 *New South Wales v Lepore* (2003) 212 CLR 511, 599–600 (Gummow and Hayne JJ). See also *Scott v Davis* (2000) 204 CLR 333, 417 (Gummow J); *Watson v Haines* (1987) Aust Torts Reports 80-094, 68,558 (Allen J); Jones, above n 13, 440.

101 Panel of Eminent Persons (Ipp JA, Chair), *Review of the Law of Negligence Final Report* (2002) <<http://revofneg.treasury.gov.au/content/review2.asp>> at 19 October 2006.

courts often give the impression, when they impose a non-delegable duty, that they are not imposing a form of strict liability but rather a form of liability for breach of a duty committed by the employer in the course of being an employer. In other words, although it is clear that a non-delegable duty is not a duty of care, courts often seem to think that a non-delegable duty can only be breached by conduct on the part of the employer that is *in some sense faulty*. As a result, courts do not think that they need to justify the imposition of a non-delegable duty in terms of the justifications for the imposition of strict liability.¹⁰²

In three-party cases, BNDD liability is obviously strict. Fault of the duty-holder is not an essential element, even if it is frequently present on the facts of the case. The *unanswered* question is whether the two-party cases are also cases of strict liability – that is, where the duty-holder has omitted to do something. In two-party cases, the obligation is to adopt proper systems, processes or procedures to ensure the safety of the duty-holder's activities. The fact of breach will ordinarily speak of a failure to take care on the part of the duty-holder. But principle (not to mention the dictates of coherence) points to the imposition of liability regardless of fault. This is likely to prove most important where evidence as to the conduct of the duty-holder is either equivocal or difficult for the plaintiff to obtain.

D The BNDD as an Absolute Liability Tort

What has been said so far in this article is sufficient to deal with the contention that the BNDD is, in fact, a tort of absolute liability. Absolute liability is liability regardless of fault in anyone;¹⁰³ and it is often understood as excluding argument on the basis of excuses such as inevitable accident.¹⁰⁴ Under this conception of the BNDD, what is important in the defendant's liability is not the means by which injury has arisen (in the sense of a failure in care), but the fact that the duty extends to the activity in question (is of sufficient scope) and that this has, for whatever reason, been breached. Although BNDDs have been held to be absolute where imposed by statute,¹⁰⁵ courts have not recognised such duties within the common law – despite toying with this idea in some of the early cases.

One of the strongest statements that liability for the BNDD involves absolute liability came in *Honeywill and Stein Ltd v Larkin Bros Ltd*.¹⁰⁶ This was a case involving so-called 'extra-hazardous operations' in the taking of a photograph inside an olden day cinema using a magnesium flash. A strong Court of Appeal, comprised of Lord Hewit CJ, Lord Wright and Slessor LJ, opined that the defendant photographers 'assumed an obligation to the cinema company which was ... absolute, but which was at least an obligation to use reasonable

¹⁰² Ibid 167.

¹⁰³ See Rogers, above n 26, 63.

¹⁰⁴ See Goldberg, 'Twentieth-Century Tort Theory', above n 3, 541.

¹⁰⁵ See, eg, *National Health Service Act 1977* (UK) c 49, s 3 considered in *Razzell v Snowball* [1954] 1 WLR 1382. See also *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] AC 807; *Smith v Cammell Laird & Co Ltd* [1940] AC 242; *The Pass of Ballater* [1942] P 112; *Hole v Sittingbourne and Sheerness Railway Co* (1861) 6 H & N 488; 158 ER 201; *Kitchener (City of) v Robe and Clothing Co* [1925] SCR 106.

¹⁰⁶ [1934] 1 KB 191.

precautions, so to see that no damage resulted to the cinema company from these dangerous operations'.¹⁰⁷

This statement is inconsistent with the subsequent decision of the House of Lords in *Wilsons & Clyde Coal*,¹⁰⁸ which has been discussed already. Moreover, in *New South Wales v Lepore*, Gummow and Hayne JJ expressed the view that liability for the BNDD is not absolute. The BNDD does not import 'a duty to preserve against any and every harm that befalls someone while [the relevant] activity is being conducted'.¹⁰⁹ In the case of a school authority, for example, there is no liability simply because a child falls in a perfectly well-maintained playground or because a passer-by throws a bottle into the school yard.¹¹⁰ The danger which their Honours sought to avoid is perfectly obvious: that of unlimited liability for harms.¹¹¹

E Summary of Findings

In this section, four models of the BNDD have been considered. It has been concluded that the BNDD is no mere species of the tort of negligence. The BNDD can arise in circumstances removed from those in which negligence has a role to play. The withdrawal of support cases are evidence of this. But this is not to say that the BNDD bears no relation to the tort of negligence. Indeed, the BNDD evolved as a supplement to cases of negligence and nuisance. The obligations which it encompasses fill gaps in the liability to which those torts give rise. It has also been noted that the BNDD is no mere species of vicarious liability. The BNDD arises in circumstances removed from those in which vicarious liability arises. There can be liability for breach of a non-delegable duty in two-party cases; there need be no intermediary who has committed a tort. It appears clear that the BNDD is a strict liability tort, not an absolute liability tort. Fault on the part of the duty-holder is not required; however, this should not be seen as a cause of consternation, as will be explained in the next section of this article.

IV DEFENDING LIMITED STRICT LIABILITY IN TORT

In many cases, liability for the BNDD can be seen to fall within the classic tort paradigm of agent-focused responsibility. According to Cane, '[i]n agent-focused accounts of responsibility, being responsible depends primarily on what a person has done or failed to do, on their acts or omissions'.¹¹² The focus is upon the acts and omissions of the *person to be made liable*. Agent-focused responsibility ordinarily takes the presence or absence of fault in the defendant to be pivotal. The idea that persons should not be liable in tort without fault is one which is

107 Ibid 200 (Lord Hewit CJ, Lord Wright and Slesser LJ).

108 See also *Smith v Cammell, Laird & Co Ltd* [1940] AC 242, 258 (Lord Atkin), 264 (Lord Wright).

109 *New South Wales v Lepore* (2003) 212 CLR 511, 600–1 (Gummow and Hayne JJ).

110 Ibid.

111 The example is, perhaps, ill-chosen. It might just as well be said that the harmful activity which it supposes is outside the scope of the obligation of the school authority to prevent.

112 Peter Cane, *Responsibility in Law and Morality* (2002) 49.

‘deep-rooted’.¹¹³ Analysis of the BNDD cases reveals that, on the facts, the defendant often has failed to take care and this might be seen as a vindication of his or her liability. But this analysis is not sufficient in the three-party BNDD cases, where a task has been delegated with reasonable care. These are cases in which it is most evident that the BNDD is a tort of strict liability. Fault need not be proved.

In this section, a defence of limited strict liability in tort will be presented. It will be argued that the BNDD ordinarily is recognised in those cases in which the defendant duty-holder’s activity involves the causation of, or exposure to the risk of, personal injury. The BNDD is a special tort doctrine, the primary purpose of which is the protection of bodily integrity. Its protection is strict because courts have chosen to uphold the protection of bodily integrity over the exercise of autonomy where conflict arises between these interests. The BNDD caters to the case where the defendant duty-holder is engaged in ongoing activity and where agents are held outcome responsible. In these circumstances, it is just that the law should prefer protection of bodily integrity over the exercise of autonomy.

A The Default Position in Tort Law

Although courts have become increasingly uncomfortable about the imposition of strict liability in tort, this is not to say that strict liability was or is unusual. Indeed, the opposite is true.¹¹⁴ In historical terms, tortious liability for bodily injuries derives from actions in trespass. Originally, the courts intervened in trespass disputes on the jurisdictional basis of a breach of the King’s peace. There was no requirement of fault. Indeed, courts evinced little concern about the so-called ‘moral dimension’ of attributions of responsibility.¹¹⁵ Up to the late 19th century, leading judges viewed strict liability in tort as the default rule and fault-based liability as the exception.¹¹⁶ One learned writer on the common law concludes that ‘it could not be credibly suggested that ... [instances of strict

113 Atiyah, above n 55, 12.

114 David Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) 58–63, 155; Gary T Schwartz, ‘The Character of Early American Tort Law’ (1989) 36 *University of California at Los Angeles Law Review* 641, 715–17; James B Ames, ‘Law and Morals’ (1907) 22 *Harvard Law Review* 97, 99.

115 According to David Ibbetson: ‘[t]he shift of emphasis onto personal fault as the grounds of liability put an end to this [attitude], and from the 1970s there was an increasing awkwardness in the courts’ attitude to such cases’: Ibbetson, above n 114, 182. Although Ibbetson believes that this trend has since been reversed (at 198) a significant degree of ‘awkwardness’ undoubtedly remains. For example, one of Professor Cane’s major theses about tort law is that it can, in general, ‘be viewed as a system of ethical rules and principles of personal responsibility for conduct’: Cane, *The Anatomy of Tort Law*, above n 6, 1. Tort law is ‘a set of principles about how people ought to behave rather than as a means to an end’: at 24. Given these precepts, the justifications for strict liability at least have the potential to be ‘ethically problematic’: at 50.

116 Ken Oliphant, ‘*Rylands v Fletcher* and the Emergence of Enterprise Liability’ in Helmut Koziol and Barbara Steininger (eds), *European Tort Law 2004* (2005) 81, 90–2, 106–7. This view was not shared, however, by leading academic writers on tort such as Pollock in England and Holmes in the United States: at 104. See also Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (2004) 254 (Pollock’s view that strict liability is confined largely to wrongs to property) and 256 (the imposition of strict liability is a ‘hard rule’).

liability] have been exceptional or marginal in the sense of having been infrequent in fact, or insignificant in effect'.¹¹⁷

That said, it is also true that the historical movement has been away from the imposition of strict liability in tort towards greater fault-based liability.¹¹⁸ In the development of the trespass torts, the mere prospect of a breach of the King's peace lost importance as a basis for court intervention in disputes.¹¹⁹ As the jurisdiction of the King's court became an accepted one, the attention of the judges turned to the intellectual task of finding the reasons in justice for shifting losses from the sufferers to the doers of harm.¹²⁰ Proof of fault was seen as providing a strong reason for shifting losses. At present, the simple fact of injury to the plaintiff *appears* to provide no particular reason for which the defendant can be required to compensate the plaintiff. Absent special circumstances, the defendant will be liable for the infliction of bodily injury only if he or she was 'at fault'. The typical fault requirement in tort law is negligence.¹²¹ Negligence consists of the failure to take the degree of care expected by the law, a falling short of the legal standard of care.¹²²

B Autonomy¹²³

Courts do not make their attributions of tort liability from a value neutral position. Their decisions are made on the basis of various assumptions. Thus, it has been said that the principle of 'civil liberty' lies at the foundation of the common law.¹²⁴ This is the idea that the individual should be permitted a liberal degree of freedom to act. The individual should be permitted to act, so long as he or she does so 'with due regard for the liberty of others'.¹²⁵ As a consequence, the law has two closely related purposes to serve in protecting civil liberty. It is required to promote the freedom of persons to act¹²⁶ and it is required to sanction

117 Stephen Waddams, *Dimensions of Private Law* (2003) 105. See Oliphant, 'Rylands v Fletcher', above n 116, 86.

118 See *Read v J Lyons & Co Ltd* [1947] AC 156, 180 (Viscount Simonds); *Burnie Port Authority* (1994) 179 CLR 520, 567 (Brennan J); *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 15, 42 (Wilson and Dawson JJ); Ibbetson, above n 114, chs 8–9; Ames, above n 114, 99.

119 See Ibbetson, above n 114, 39, 158.

120 Ibid 157 ff.

121 '[L]iability for negligence is the paradigm in tort law': Peter Cane, 'Mens Rea in Tort Law' (2000) 20 *Oxford Journal of Legal Studies* 533, 533.

122 Restatement of the Law (Third) of Torts: Liability for Physical Harm (Basic Principles) (Tentative Draft No 1, 2001) § 3. See especially Cane, 'Mens Rea in Tort Law', above n 121, 536; Cane, *The Anatomy of Tort Law*, above n 6, 36.

123 'Autonomy' is, potentially, a multi-faceted concept involving much more than the simple idea of the freedom of the self: see, eg, Joel Feinberg, *The Moral Limits of the Criminal Law Volume Three: Harm to Self* (1989) ch 18. Feinberg states that '[r]espect for a person's autonomy is respect for his unfettered voluntary choice as the sole rightful determinant of his actions except where the interests of others need protection from him': at 68.

124 See William Blackstone, *Commentaries on the Laws of England* (facsimile ed, 1979) 144 in John C P Goldberg, 'Rights and Wrongs' (1999) 97 *Michigan Law Review* 1828, 1829; Oliver Wendell Holmes, *The Common Law* (1881) 144.

125 Goldberg, 'Rights and Wrongs', above n 124, 1829.

126 David Owen, 'Philosophical Foundations of Fault' in David Owen (ed), *Philosophical Foundations of Tort Law* (1995) 204. See also David Owen, 'The Fault Pit' (1992) 26 *Georgia Law Review* 703, 719.

persons for actions which unduly interfere with the liberty of others. It is not enough to intervene on the basis that the defendant has acted and made some difference to the fortune of others. The defendant must have acted wrongly. Tort law provides a remedy to the plaintiff only insofar as the defendant *wrongs* the plaintiff.¹²⁷

In *The Common Law*,¹²⁸ Oliver Wendell Holmes indicated an obvious concern for the need to protect individual liberty. His view was that

[courts] identified a standard of conduct that would permit a broad realm of free action, even action that risked harm to others, but would compensate those who suffer bodily harm and property damage by conduct that poses excessive risks. For this task, a fault standard was required. The old rule of strict liability threatened to make conduct too expensive, and thereby to inhibit unduly freedom of action and productive activity.¹²⁹

Ernest Weinrib also identifies as the base norm of the private law the need to promote free purposive agency, which entails the ability of the agent to modify his or her given world.¹³⁰ 'The concept of right ... postulates an area of permissibility where the actor can strive to accomplish any purpose whatsoever, provided that the act is consistent with the form of relationship between wills insofar as they are free.'¹³¹ The protection of the will *does* require that the body be protected, although this is a secondary interest. The law offers protection to the body because 'the body houses the free will and is the organ of its purposes'.¹³² According to Weinrib, liability can be imposed only where the defendant has abused his or her 'capacity for purposiveness'; it is the capacity for purposiveness that 'characterises the injurer's status as an agent, and differentiates the injurer from an irresponsible force of nature'.¹³³

Weinrib's theory points to the proposition that the presence of actual fault in the defendant gives rise to an *agent-specific reason* for making good damage done to the plaintiff; it provides a reason why this defendant should be liable to this plaintiff that does not apply to other persons (for example, bystanders to injurious interactions).¹³⁴ Faulty conduct 'gives agents reasons for acting that they did not previously have'.¹³⁵

127 Jules Coleman, *Risks and Wrongs* (1992) ch 17, 331–2.

128 Holmes, *The Common Law*, above n 124.

129 As summarised in John C P Goldberg, 'Tort' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 21, 23–4. It should be noted, in response, that some writers see rules of strict liability as having the opposite effect – that of *licensing* risky conduct, *on the condition* that the person conducting the activity be held liable for all injuries caused by it: see Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* (2nd ed, 2003) 895–6. See also *Lubin v Iowa City*, 131 NW 2d 765 (Iowa, 1964); *Greenman v Yuba Power Products Inc*, 377 P 2d 897 (Cal, 1963); Gregory Keating, 'The Theory of Enterprise Liability and Common Law Strict Liability' (2001) 54 *Vanderbilt Law Review* 1285, 1322.

130 Ernest Weinrib, *The Idea of Private Law* (1995) 127.

131 *Ibid* 97.

132 *Ibid* 128.

133 *Ibid* 181.

134 Coleman, above n 127, 313–15, 319, 325–6.

135 *Ibid* 325.

C Choice as a Responsibility Base

Under one theory, fault is most appropriately found in the making of bad choices. The idea of choosing was at the centre of Oliver Wendell Holmes' conception of liability in tort. Holmes wrote that

the philosophical analysis of every wrong begins by determining what the defendant has actually chosen, that is to say, what his voluntary act or conduct has been ... and then goes on to determine what dangers attended ... the conduct under the known circumstances.¹³⁶

The reason for this is that there should be no liability unless the defendant 'had at least a fair chance of avoiding the infliction of harm before he becomes answerable for such a consequence of his conduct'.¹³⁷

More recently, David Owen has argued that '[w]hen the interaction is a harmful one, the prior choices of both persons give moral character to their acts and omissions that combined to cause the harm'.¹³⁸ The particular choices which give 'moral character' to acts and omissions are those that involve harming others without good reason or which expose them to unreasonable risks of harm.¹³⁹ This is not the same as choosing to cause harm to others;¹⁴⁰ the choice is bad insofar as it involves exposing others to an unreasonable *risk* of harm. The choice of the action exposing others to an unreasonable risk of harm reveals a failure to reach lawful standards of conduct and betrays the negligence of the defendant.

It cannot be doubted that the making of bad choices gives reason (often a decisive reason) for the imposition of liability upon the defendant. However, it is easy to think of examples of harm-causing without a genuine, deliberative and bad choice having been made. In negligence, this is the case of the 'shortcomer', who is incapable of meeting ordinary standards, try as he or she might. But even beyond the shortcomer exception, it is *typical* of negligence that accidents arise where serious deliberation about the available options is absent and where the choice to act is, thus, of limited juridical importance. Although what the defendant chooses to do is important, liability does not always depend upon the choices that the defendant made.¹⁴¹ Strict liability for the BNDD is another example of liability not based on particular choices made by the duty-holder. As it happens, this kind of liability is not without justification.

The reasons why the choices of the defendant are not always decisive to questions of tort liability become clearer when account is taken of the fact that the defendant's interests (especially in autonomy) are not the only interests considered by the court. According to Cane, 'responsibility in law is a three-way relationship between agents, "victims" and the wider community'.¹⁴² Tort is

¹³⁶ Holmes, *The Common Law*, above n 124, 161.

¹³⁷ Ibid 163. See also *Donoghue v Stevenson* [1932] AC 562, 620 (Lord Macmillan).

¹³⁸ Owen, 'Philosophical Foundations of Fault', above n 126, 207.

¹³⁹ Ibid 209.

¹⁴⁰ This would be 'intention' in the law of tort: see Cane, 'Mens Rea in Tort Law', above n 121, 534–5.

¹⁴¹ See especially John Fischer and Mark Ravizza, *Responsibility and Control* (1998).

¹⁴² Cane, *Responsibility in Law and Morality*, above n 112, 56.

relational.¹⁴³ Liability arises with respect to injury done by one *to another*.¹⁴⁴ The law takes into account the impact of conduct upon injured persons and the means by which this can be repaired.

When we move to the civil law paradigm of liability, the inadequacies of the choice theory of responsibility [become] obvious. In the civil law paradigm, the interests of victims are given at least as much weight as those of agents. This is reflected in the fact that the basic measure of civil law remedies is the impact of the proscribed conduct on the victim, not the nature of the agent's conduct or the quality of the agent's will.¹⁴⁵

The consequence of these insights is that courts might legitimately take into account the interests of those who are injured and the need to distribute risks of harm and costs of injury. The BNDD appears to be recognised in cases where the courts have taken *policy* decisions to impose liability for the causation of personal injury (or, in cases of lateral support, exposure to the risk of personal injury).¹⁴⁶ Non-delegable duties represent an attempt by courts to 'achiev[e] a fair balance between the interests of agents and victims',¹⁴⁷ seen as classes of actors. Liability rules have been formulated (at least in part) by ideas of where injured persons would expect (or should be expected) to turn in the various factual situations under review.¹⁴⁸

D The Lexical Priority Argument

Given the priority afforded by tort scholars to the liberal idea of autonomy, protection of the will ordinarily is seen as paramount and protection of the body as secondary. Yet, in conformity to the explanation of the BNDD cases given in this paper, a strong argument can be put for the need to protect the body and, occasionally, to protect it in priority to the exercise of autonomy. This is the lexical priority argument.

The departure point for this argument is that the human mind and body cannot be thought of in terms of a Cartesian duality.¹⁴⁹ Without the body, there can be

143 More generally, '[r]esponsibility is relational in that it is constituted by the relationship between a subject who is responsible, an object for which that subject is responsible, and a body to whom that subject is responsible for that object: to be responsible is to be responsible for A to X': R A Duff, 'Who is Responsible, for What, to Whom?' (2005) 2 *Ohio State Criminal Law Journal* 441, 442. See also Tony Honoré, 'Responsibility and Luck' (1988) 104 *Law Quarterly Review* 530, 543 ff.

144 Cane, *Responsibility in Law and Morality*, above n 112, 109.

145 Ibid 99.

146 See also related reasoning in vicarious liability cases: *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, 377 (Lord Nicholls).

147 Cane, *Responsibility in Law and Morality*, above n 112, 189.

148 A view initially suggested in Atiyah, above n 55, 335. See also Swanton, 'Non-Delegable Duties: Part II', above n 14, 35.

149 See Howard Robinson, 'Dualism' in *Stanford Encyclopaedia of Philosophy* (2003) Stanford University <<http://plato.stanford.edu/entries/dualism/>> at 11 October 2006.

no mind and there can be no will.¹⁵⁰ This is made clear in a concise description of the operation of the human brain published by the Mayo Clinic:

A neuron [within the brain] communicates with other cells through electrical impulses, which occur when the nerve cell is stimulated. Within a neuron, the impulse moves to the tip of an axon and causes the release of neurotransmitters, chemicals that act as messengers.

These neurotransmitters pass through the synapse, the tiny gap between two nerve cells, and attach to receptors on the receiving cell. This process is repeated from neuron to neuron, as the impulse travels to its destination.

This intricate web of communication allows you to move, think, feel and communicate. ... In short, *this wondrous process is the foundation of your physical, mental and emotional life. It makes you who you are.*¹⁵¹

It is little wonder, then, that many rules of law have the avowed intention of protecting, first and foremost, physical being. The protection of physical being is basic in a way that the facilitation of action¹⁵² is not.¹⁵³

There are numerous examples of laws and practices which demonstrate the importance of the body and which provide a basis for arguing that this interest might be given priority over autonomy interests. The interest of the person in physical integrity is one of the pre-eminent rights under various international instruments and constitutional provisions. The *European Convention on Human Rights and Fundamental Freedoms*¹⁵⁴ provides that everyone's 'right to life shall be protected by law'¹⁵⁵ and that everyone shall have the right to 'security of person'.¹⁵⁶ Moreover, under the Convention, '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'.¹⁵⁷ Likewise, the Fourth Amendment to the *United States Constitution* speaks of 'the right of the people to be secure in their persons' and the *Canadian Charter of Rights and*

150 Of the person, it has been written that: '[i]n members of our species the one factor unifying and activating the living reality of each individual is at once vegetative, animal (sentient and loco-motive), and intellectual (understanding, self-understanding, and, even in thinking, self-determining by judging and choosing)': John Finnis, 'The Priority of Persons' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence (Fourth Series)* (2000) 1, 14–15.

151 See Mayo Clinic, *The Nervous System: How Your Brain Works* (2005) Mayo Clinic <<http://www.mayoclinic.com/health/brain/BN00033&slide=9>> at 11 October 2006 (emphasis added).

152 For example, through rules in contract and property.

153 See John Finnis, above n 150, 15, describing the 'spirit person' as an artificial construct and removed from the reality of the unified self or 'person'. See also John Eekelaar, 'The Emergence of Children's Rights' (1986) 6 *Oxford Journal of Legal Studies* 161.

154 *European Convention on Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETA No 5 (entered into force 3 September 1961).

155 *European Convention on Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETA No 5, art 2 (entered into force 3 September 1961).

156 *European Convention on Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETA No 5, art 5 (entered into force 3 September 1961).

157 *European Convention on Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETA No 5, art 3 (entered into force 3 September 1961).

*Freedoms*¹⁵⁸ provides that everyone shall have ‘the right to life, liberty and security of the person’.¹⁵⁹

One of the major objectives of the criminal law is to protect the physical integrity of persons. No crime is regarded as more heinous than that of murder, which involves the killing of the person, the extirpation of physical being. A mass of criminal laws protect physical integrity in circumstances short of death. These include a prohibition upon the ability of the person to consent to the infliction of serious bodily injuries.¹⁶⁰ It is clear that, at least in extreme cases, the criminal law regards the preservation of bodily integrity as more important than individual autonomy.

In the law of torts, bodily integrity is protected in many ways. The law of trespass to the person is premised upon the idea that ‘every person’s body is inviolate’.¹⁶¹ In most cases, there can be no touching of another without that other’s consent. A non-consensual touching is a battery, which, on one conception, is a tort of ‘strict liability’.¹⁶² The non-consensual touching might also result in the commission of other torts such as assault and/or false imprisonment. These are all torts which require the causation of no damage in the form of ‘physical harm’. They are actionable per se and might even support an award of exemplary damages. This underscores the pervasiveness of the protection offered. The major exception to the need for consent when touching another is the principle of necessity. This exception arises when the defendant interferes with the plaintiff’s person ‘in order to save the life or preserve the health of the [person]’.¹⁶³

There are a number of situations in which tort law can and does protect the body *simpliciter* – that is, where there can be no argument regarding the existence of the plaintiff’s ‘free will’.¹⁶⁴ The newborn baby, for example, is recognised as a legal person. This is despite the fact that the newborn has no ability to plan for his or her life or to make any decisions concerning it. He or she exercises no autonomy. Any protection that the law offers to the newborn is not

158 *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11 (‘*Canadian Charter of Rights and Freedoms 1982*’).

159 *Canadian Charter of Rights and Freedoms 1982* s 7. Obviously, this provision appears to rank body and will equally. However, this ranking is subject to much explanation and qualification, including many of the points to be made in the following sections of the paper.

160 ‘One cannot overlook the physical danger to those who may indulge in sadomasochism’: *R v Brown* [1994] 1 AC 212, 255 (Lord Lowey).

161 *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 72 (Lord Goff of Chieveley). See also *Schloendorff v Society of New York Hospital*, 211 NY 125, 126 (1914).

162 This is the view of the common law in both the United States (Keating, ‘The Theory of Enterprise Liability’, above n 129, 1321) and Australia (*Williams v Milotin* (1957) 97 CLR 465, 474 (Dixon CJ, McTiernan, Williams, Webb and Kitto JJ)). D will escape liability only where able to disprove fault of any kind: *McHale v Watson* (1964) 111 CLR 384, 388 (Windeyer J). For an explanation of why this kind of case can be seen as one of ‘strict liability’, see Cane, *The Anatomy of Tort Law*, above n 6, 130). This view also formerly prevailed in England: Ibbetson, above n 114, 184. But see *Letang v Cooper* [1965] 1 QB 232, 240 (Lord Denning MR).

163 *Marshall v Curry* (1933) 3 DLR 260, 275.

164 Peter Cane is very careful in distinguishing between body and will. In his recent masterful study, he confidently states that ‘[t]o the extent that tort law is considered to have a prime function, it is to protect the interest in bodily health and safety’: Cane, *Responsibility in Law and Morality*, above n 112, 215.

the protection of a subsisting interest in anything other than his or her body.¹⁶⁵ Indeed, consent to necessary medical treatment can, in the case of the young, be obtained without any regard to their wishes. 'The law thus denies even the competent child any right of autonomy, in the sense of the right to decide for oneself to the exclusion of others.'¹⁶⁶ Again, the law offers substantial protection for the bodily integrity of other persons who have no ability to exercise (and may never acquire) the ability to plan for life and make decisions.¹⁶⁷ This list of persons includes the unconscious and the insane.

Each of the rules mentioned in the preceding paragraphs points to the contestability of fault doctrines designed to protect autonomy and to place the interest of personal autonomy above the interest that persons have in bodily integrity. In many instances, the law places an overriding importance upon the protection of physical being. This occurs when the law compensates the injured plaintiff in circumstances where the defendant either has not chosen to harm the plaintiff or has acted inadvertently.

The foregoing argument provides the basis for acceptance of a responsibility base in tort law independent of fault.¹⁶⁸ The argument focuses not upon deficiencies of character or fault in the process of liability attribution, but upon the loss to the plaintiff. This is an argument in favour of outcome responsibility. Outcome responsibility recognises that 'being responsible in law and ordinary life is not [necessarily] the same as being at fault or to blame'.¹⁶⁹ But the model of outcome responsibility presented here does not depend – in the way that the well-known theories of Honoré¹⁷⁰ and Perry¹⁷¹ do – on notions of agent regret.¹⁷² Its legitimacy rests, rather, upon an ordering of protected interests.

Humans are communal beings; they are dependent upon each other for their survival. There is a sense in which the failure to offer repair for the bodily injury of another is a denial of community, a denial of care and a threat to human flourishing. It is a threat to the survival of both the defendant and the plaintiff. Bodily integrity is important to all persons. The reasonable person in the position of the defendant is able to appreciate that his or her interactions with others are

165 It is the view of some that this is not a sufficient reason for protection of the neonate. Thus, it has been said that '[i]t is the beginning of the life of the person, rather than of the physical organism, that is crucial so far as the right to life is concerned': Helga Kuhse and Peter Singer, *Should the Baby Live? The Problem of Handicapped Infants* (1994) 133. In the view of these authors, life begins when the infant develops a self-awareness: at 138.

166 Ian Kennedy and Andrew Grubb (eds), *Principles of Medical Law* (1998) 184. See also Eekelaar, above n 153, 171.

167 A feature of the law's protection of the incompetent adult is that a court will endeavour to respect the *known* wishes of the person. Thus, the court will not act upon the principle of necessity where it is known, for example, that the patient has refused certain treatment: Kennedy and Grubb (eds), above n 166, 228.

168 See also Meir Dan-Cohen, 'Responsibility and the Boundaries of the Self' (1992) 105 *Harvard Law Review* 959. Dan-Cohen states (and I agree) that 'volition is one ground of responsibility, but not the only ground': at 961.

169 Honoré, above n 143, 530.

170 Ibid.

171 Stephen Perry, 'The Moral Foundations of Tort Law' (1992) 77 *Iowa Law Review* 449.

172 See Christopher Kutz, 'Responsibility' in Jules Coleman and Scott Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) 548, 558–64.

ongoing in nature. The defendant's security might be just as much dependent upon liability for bodily injuries as is that of plaintiff.

E The Avoidability Criterion

The preceding argument provides justification for eschewing a fault criterion in BNDD cases. It argues that there might be no need for a plaintiff to prove that the harm that he or she suffered as a result of a particular interaction was a result of a failure to take care by the defendant. But, as the last paragraph foreshadows, the inter-temporal dimension is important in justifying liability without fault. In this section, it will be argued that BNDD liability can be seen as consistent with the avoidability criterion, seen as applying to the conduct of activities over time rather than to isolated interactions. It is this ability to avoid the causation of harm in the conduct of continuing activities that provides courts with additional justification for attempting to regulate activity by use of strict liability.

In Stephen Perry's view of responsibility practices, 'the human condition is such that everyone must choose to act in some way or other. Given that everyone must be active, no moral consequences can attach to action per se'.¹⁷³ Courts must have good reasons before intervening in the affairs of agents. According to Perry, liability in tort should arise only where the defendant has the capacity to avoid the harm in question.¹⁷⁴ Capacity is built not upon choice, as such, but upon the ability to foresee the possibility that the defendant's conduct might cause harm to others. '[T]he point about making foreseeability a requirement of responsibility for physical harm is that an agent is unable to avoid harm unless he or she can foresee it.'¹⁷⁵

Yet Perry's notion of capacity is complex. Capacity means the general ability to foresee a result and to take action to avoid it, rather than the need for actual foresight.¹⁷⁶ This, ostensibly, is the product of two factors: the need to avoid irresolvable disputes about the actual state of the defendant's mind and the desire of the law to encourage persons to exercise their capacity for foresight and care.¹⁷⁷

In the absence of [this kind of objective] foreseeability, the harm is simply the unfortunate upshot of an interaction between two persons. There is no reason in justice to shift the loss from where it fell, since there is no basis for morally attributing the harm to one party rather than the other.¹⁷⁸

The presence of a general capacity to avoid harm is not necessary to the defendant's responsibility.¹⁷⁹ Whereas the 'paradigm' of legal responsibility is said to rest upon faulty decision making, Perry argues that the law is justified in

173 Stephen Perry, 'Risk, Harm and Responsibility' in David Owen (ed), *Philosophical Foundations of Tort Law* (1995) 321, 342.

174 Ibid 341.

175 Ibid 343.

176 Following Honoré, above n 143, 550–1.

177 See Gardner, above n 6, 117–18, 120. Gardner's point is that reasonableness obligations in negligence require that the duty-holder should *try* to be careful.

178 Perry, 'Risk, Harm and Responsibility', above n 173, 343.

179 *Nettleship v Weston* [1971] 2 QB 691.

imposing liability for both ‘culpable’ and ‘non-culpable’ fault. ‘Culpable’ fault involves the *knowing* subjection of another to a substantial risk of harm.¹⁸⁰ ‘The existence of culpable fault in bringing about [a] loss tips the balance in a fairly decisive way, but the idea of a comparative inquiry can be extended to cases where fault in that sense is not present.’¹⁸¹

Fault in the non-culpable sense is the failure to live up to an objectively set standard of conduct ‘shaped by liberal conceptions of fairness and autonomy’.¹⁸² How is this standard of conduct derived? According to Perry, the objective standard is shaped by recognising that risks arising in the course of an interaction between persons are likely to have been jointly created by both the defendant and the plaintiff. The standard of care formulated will look to ‘accepted patterns of interaction between persons, these patterns indicating the appropriate levels of risk which each person to the interaction can impose on the other’.¹⁸³

Obviously, this conception of fault is greatly diluted. It extends far beyond the kind of fault that many theorists would insist upon in order to ground tort liability. Fault depends upon a failure to adhere to ‘accepted patterns of interaction’. But behind Perry’s conception of fault lies another important idea – that of avoidability. Ordinarily, the avoidability criterion is thought of as applying to specific instances of harm-doing rather than with respect to longer-term activities or types of activity.¹⁸⁴ Yet, it is suggested that the recognition of strict liability non-delegable duties does not undermine the avoidability criterion, but applies it – and with great cogency – to certain ongoing activities.¹⁸⁵

Hospitals and schools operate in perpetuity; demand for their services is invariant to changes in consumer tastes and preferences. Similarly, land owners require that neighbouring occupiers provide lateral support on a continuing basis. While patterns of employment are apt to change, the fact of employment and the general need for safety in the workplace give rise to ongoing concerns. The activities of hospitals, schools and employers, and the provision of lateral support, involve large numbers of persons, repetitive tasks and, in the first three of these cases, a high degree of organisation.¹⁸⁶ The activities give rise to accidents occurring with predictable regularity.¹⁸⁷ The incidence of injuries can

180 Perry, ‘The Moral Foundations of Tort Law’, above n 171, 486.

181 Ibid 509.

182 Stephen Perry, ‘The Distributive Turn: Mischief, Misfortune and Tort Law’ in Brian Bix (ed), *Analysing Law* (1998) 141, 158.

183 Ibid 161.

184 Stephen Perry, ‘Tort Law’ in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (1996) 57, 76; Perry, ‘The Moral Foundations of Tort Law’, above n 171, 503–7; Honoré, above n 143, 548.

185 *Cassidy v Ministry of Health* [1951] 2 KB 343, 360 (Denning LJ noted that hospitals cannot themselves perform operations upon patients, but have the power of dismissal over the medical staff who do undertake the treatment). See also *Konradi v United States*, 919 F 2d 1207, 1210 (1990) (Posner J); *Bazley v Curry* [1999] 2 SCR 534, 558 (McLachlin CJC); *New South Wales v Lepore* (2003) 212 CLR 511, 601–2 (Gummow and Hayne JJ); Keating, ‘The Idea of Fairness’, above n 2, 1267. Cf Mari Matsuda, ‘On Causation’ (2000) 100 *Columbia Law Review* 2195, 2211–12.

186 Cf Keating, ‘The Idea of Fairness’, above n 2, 1332 (identifying like characteristics in claims involving manufacturer defendants).

187 Ibid 1333.

be foreseen and (to some degree) estimated in advance.¹⁸⁸ However, unlike the case of enterprise liability, the activities in question are not confined to the 'industrial economy'. The profit motive does not loom large and does not provide an overriding basis for the recognition of non-delegable duties.

Ultimately, the duty-holder in BNDD cases will have the option of avoiding the kind of activity in question and, thus, the causation of harm, if a high degree of safety cannot be maintained.¹⁸⁹ The iteration of the need to avoid the causation of harm to protected persons and the strictness with which liability is imposed provide powerful incentives for taking precautions and for putting in place the necessary systems, processes and procedures. The BNDD cases indicate an attempt to impose strict liability upon the duty-holder where he or she has, over the longer run, this important capacity to protect bodily integrity.¹⁹⁰

The hospital that performs surgical procedures upon the anaesthetised patient and the school authority that enforces the attendance of children at the school illustrate this well. These institutions conduct activities on a mass scale, on an ongoing basis and are given the responsibility of 'ensuring that care is taken'. Their obligations cover the bodily integrity of their constituents rather than the integrity of their physical property or their economic interests.¹⁹¹ If the plaintiff hospital patient or school pupil is injured, the defendant will not escape liability on the basis that any failure in care was that of a delegate. Liability will also arise in cases where there is no delegate, but where the failure is entirely that of the duty-holder in not putting in place proper systems, processes or procedures which would have ameliorated the risks of physical injury. The situation is analogous with respect to employers and occupiers of land.

V CONCLUSION

The aim of this article has been to provide a convincing explanation of the BNDD and to justify its form and operation.

It has been submitted that the BNDD is an independent tort with its own elements. This claim is supported by evidence that the BNDD can be distinguished from negligence in a number of ways. The non-delegable duty is not a general duty of care that might be imposed upon parties who are true strangers to each other. The obligation that it imposes is tightly defined. By contrast to the position in negligence, the duty-holder cannot pass responsibility for its fulfilment onto another. Breach gives rise to an action for personal injuries only, except in the case of a failure to provide lateral support. Liability arises in the latter case on the basis of the substantial risks of personal injury that result

188 Ibid 1354.

189 A related idea appears in Matsuda, above n 185, 2211–12.

190 *New South Wales v Lepore* (2003) 212 CLR 511, 599–600 (Gummow and Hayne JJ).

191 Aberrant cases *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 (theft of a mink stole) and *Lloyd v Grace, Smith and Co* [1912] AC 716 (fraudulent conveyance of land) have been interpreted as cases of vicarious liability: *Lister v Hesley Hall Ltd* [2002] 1 AC 215, 224–6 (Lord Steyn). Cf Murphy, 'The Juridical Foundations of Common Law Non-Delegable Duties', above n 39 (defending these as cases of BNDDs).

from the undermining of building foundations. Furthermore, the BNDD cases do not give rise to wide problems of remoteness which occasionally plague the law of negligence. The BNDD can also be distinguished from the tort of nuisance. Obligations arise not only in cases of neighbouring occupiers, but in a number of other contexts. Unlike private nuisance, no question arises of balancing benefit and burden in cases of one occupier interfering with the land of another. The non-delegable duty is non-derogable.

The non-delegable duty has evolved as a *supplement* to ordinary claims in negligence and nuisance. It can be pleaded in circumstances where either one or both of those actions is/are not available. But being supplementary, it is not surprising to find that the kinds of obligation to which it gives rise are derived from those evident in actions of negligence and nuisance. The example was given of the non-delegable duty to ensure the physical safety of hospital patients. This obligation often arises in circumstances where negligence cannot be pleaded because of the plaintiff's inability to prove that someone, whether hospital management, employee, practitioner or consultant specialist, was at fault.

It has been submitted that the BNDD is a tort of strict liability. This is suggested by the simple fact that it applies in some cases which are analogous to those in nuisance. It is clearer still from the way in which the three-party cases, analogous to vicarious liability, have been determined. The duty-holder can be held liable despite having taken care in the delegation of the task to another. Whilst it has not been necessary for the courts to determine whether strict liability arises in two-party cases, this is the preferable view. It is preferable because it ensures consistency in the law and ensures that injured claimants are not disadvantaged by the need to prove fault where an obligation arises and a casual connection to injury can be proved.

It has been submitted also that the BNDD is different from vicarious liability. Courts have stressed that the BNDD gives rise to personal liability in the duty-holder. He or she is the person required to ensure that proper systems, processes or procedures for avoiding injury are put into place. Moreover, the BNDD cannot be confined to three-party cases. It arises in cases where there is no intermediate party who can be blamed for the commission of a tort, liability for which is then brought home to the duty-holder. Even in the three-party cases, the plain intention of the courts is to make irrelevant to liability questions of authorisation, which remain central to vicarious liability.

Although liability for the BNDD does not always conform to ideals of agent-focused responsibility, it can be justified nevertheless. The primary purpose of liability is the protection of bodily integrity. Protection is strict because courts have chosen to favour such protection over the exercise of autonomy. This choice is fortified by the fact that duty-holders are engaged in ongoing activity and can, over time, act to avoid the causation of harm through the introduction of appropriate systems, processes and procedures.