

## THE LIABILITY BASES OF COMMON LAW NON-DELEGABLE DUTIES – A REPLY TO CHRISTIAN WITTING

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### I INTRODUCTION

Several judges and academics who have tried to grapple with non-delegable duties in the past have apparently given up when faced with the task of trying to theorise them. For example, Gleeson CJ recently remarked that '[t]he ambit of duties that are regarded as non-delegable has never been defined, and the extent of potential tort liability involved is uncertain'<sup>1</sup> while Ewan McKendrick once resignedly concluded that 'it is impossible to state with any degree of precision the circumstances in which an employer will incur primary liability'.<sup>2</sup> There are even those who have gone so far as to suggest that common law non-delegable duties are beyond rationalisation.<sup>3</sup> But merely saying this does not make them so. Accordingly, there is still a good *academic* case for attempting to provide a clearer understanding of non-delegable duties;<sup>4</sup> and there are two main issues upon which elucidation is most sought. First, there is a series of questions associated with when, where and how non-delegable duties come into being.<sup>5</sup>

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1 *New South Wales v Lepore* (2003) 212 CLR 511, 523 ('*Lepore*').

2 Ewan McKendrick, 'Vicarious Liability and Independent Contractors – A Re-examination' (1990) 53 *Modern Law Review* 770, 772.

3 See *KLB v British Columbia* [2003] 2 SCR 403, [31] where McLachlin CJ averred that there is 'no single common law concept' of non-delegable duty while Glanville Williams once argued that 'the cases are decided on no rational grounds, but depend merely on whether the judge is attracted by the language of non-delegable duty': Glanville Williams, 'Liability for Independent Contractors' (1956) *Cambridge Law Journal* 180, 186. In similar vein, the editors of *Markesinis and Deakin's Tort Law* (5<sup>th</sup> ed, 2003) note (at 597) that 'it is not at all clear when and why the law determines that such non-delegable duties will arise'.

4 See, eg, Transcript of Proceedings, *Leichhardt Municipal Council v Montgomery* (High Court of Australia, Kirby J, 30 August 2006) where Kirby J proclaimed the importance of having 'some theory behind why you have extended [the non-delegable duty concept] in these cases and ... [o]ften academics have more time to look at that sort of question than judges do'. (I am grateful to Neil Foster of Newcastle University, NSW for alerting me to this judicial plea.)

5 See, eg, John Murphy, 'The Juridical Foundations of Common Law Non-Delegable Duties' in Jason Neyers et al (eds), *Emerging Issues in Tort Law* (2007); cf Robert Stevens, 'Non-Delegable Duties and Vicarious Liability' in Jason Neyers et al (eds), *Emerging Issues in Tort Law* (2007).

Then there is a second, no less important, question concerning the kind of liability that is attached to breach of a common law non-delegable duty.

Christian Witting, in an article published last year in this journal,<sup>6</sup> offered a detailed analysis of this second question. But his conclusions on three key points are certainly contestable. These are: that breach of non-delegable duty is an independent tort; that common law non-delegable duties are invariably characterised by the imposition of strict liability; and that non-delegable duties are primarily concerned with the protection of bodily integrity.

This article comprises a response to Witting's arguments and seeks to address his abovementioned claims. My intention is to offer an alternative view on these three matters. More particularly, I shall contend that the better view of non-delegable duties is that they exist as sub-species of various torts, that they do not always involve the imposition of strict liability and that they do not always arise in response to a concern to protect bodily integrity. But it must be conceded at the outset that any explanatory account of the kind or kinds of liability attached to non-delegable duties based on the existing case law requires an exercise in selectivity. This is because the judges are as divided in their views as academics. In some judicial quarters, for example, it has been asserted that liability under a common law non-delegable duty is absolute.<sup>7</sup> In others, it has been suggested that such duties involve a form of strict liability,<sup>8</sup> while a third discernible judicial view is that non-delegable duties involve no more than the 'ordinary' standard of care in the common law of negligence.<sup>9</sup>

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6 Christian Witting, 'Breach of the Non-Delegable Duty: Defending Strict Liability in Tort' (2006) 29 *University of New South Wales Law Journal* 33.

7 See *Commonwealth v Introvigne* (1982) 150 CLR 258, 271 where Mason J spoke of a 'duty to ensure that reasonable care was taken' (emphasis added). In *Lepore* (2003) 212 CLR 511, 532, Gleeson CJ, assessing the impact of this dictum, opined: '[I]n this country, where a relationship of employer and employee exists, if the duty of care owed to a victim by the employer can be characterised as personal, or non-delegable, then the potential responsibility of an employer for the intentional and criminal conduct of an employee extends beyond that which flows from the principles governing vicarious liability. ... It is enough that the victim has been injured by an employee on an occasion when the employer's duty of care covered the victim. The employer's duty to take care, or to see that reasonable care is taken, has been transformed into an absolute duty to prevent harm by the employee'. In the same case, Gaudron J (571) placed a similar interpretation on the import of Mason J's words (although she manifestly disagreed with that approach), while Gummow and Hayne JJ (596-597), in interpreting *Dalton v Angus* (1881) 6 App Cas 740, suggested that for Lord Blackburn, the presence of a non-delegable duty 'transformed a duty to act carefully into a duty to achieve a particular result' (although their Honours did not agree). For a similar, 'absolutist' position, see *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 576-77 (Brennan J); *Honeywill and Stein Ltd v Larkin Bros Ltd* [1934] 1 KB 191, 200 (Slesser LJ on behalf of the whole Court of Appeal).

8 See, eg, *Scott v Davis* (2000) 204 CLR 333, [248] (Gummow J); *Lepore* (2003) 212 CLR 511, 599 (Gummow and Hayne JJ); *McDermid v Nash Dredging and Reclamation Co Ltd* [1987] AC 906, 910, 919 (Lords Hailsham and Brandon respectively).

9 See, eg, *Lepore* (2003) 212 CLR 511, [26] (Gleeson CJ), [159], [291], [339] (McHugh, Kirby and Callinan JJ); *Lewis v British Columbia* [1997] 3 SCR 1145, [20] (Cory J); *Commonwealth v Introvigne* (1982) 150 CLR 258, 274-75 (Murphy J). There are examples, too, of English cases suggesting the ordinary negligence standard: see, eg, *Gold v Essex County Council* [1942] 2 KB 293; *Cassidy v Ministry of Health* [1951] 2 KB 343; *Carmarthenshire County Council v Lewis* [1955] AC 549; *Rogers v Night Riders* [1983] RTR 324. See also McKendrick, above n 2, 780.

Happily, in seeking to untangle this mess, it is unnecessary to take seriously those claims that a breach of non-delegable duty will result in absolute liability.<sup>10</sup> This is so for two reasons. First, there has been relatively little judicial support for such a view.<sup>11</sup> Secondly, while the vast majority of that support is to be found in Australian case law, it is notable that in a recent decision of the High Court of Australia there was an overwhelming rejection of the idea that non-delegable duties carry with them the prospect of absolute liability. Some of the judges in that case rejected this notion explicitly,<sup>12</sup> but most did so implicitly by supporting either of the two remaining rival suggestions that either a fault-based or strict liability principle applies.<sup>13</sup> Either way, the idea that absolute liability may be imposed seems now to have been dismantled in the only jurisdiction in which it ever seriously existed.

This leaves the remaining question of whether non-delegable duties should be understood as involving strict liability, as Witting suggests, or whether they sometimes conform to the fault-principle that now predominates in the law of torts. Before addressing this question, however, it is worth noting both its theoretical and practical significance. In terms of theory, the answer to the question will (as Witting correctly identifies) have profound significance for the ongoing debate about whether or not tort law, properly conceived, can ever embrace strict liability principles.<sup>14</sup> But given that my answer to the question is that non-delegable duties frequently (though not always) operate according to the fault principle, it is clear that it has repercussions for those legal theorists who struggle to disentangle non-delegable duties from the vicarious liability principle (which is perhaps the purest example of strict liability within tort law).<sup>15</sup>

Turning to the practical importance of the question, it is in relation to workplace accidents and employers' insurance that the answer will have its greatest significance. This is because the most commonly occurring kinds of non-delegable duties are those owed by employers to their employees to provide a safe place of work etc, and those owed to third parties by a person who employs an independent contractor to perform work on his behalf.

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10 See Witting, above n 6, 47-48 who shares this view.

11 See generally above n 7.

12 See, eg, *Lepore* (2003) 212 CLR 511, [22] (Gleeson CJ): '[A] duty to take reasonable care for the safety of workers cannot be discharged by delegation; but delegation does not transform it into a duty to keep workers free from all harm. A duty to see that reasonable care is taken for the safety of workers is different from a duty to preserve them from harm'. See also Gaudron J at [159] who thought: '[Mason P] appears to suggest that there is an absolute duty to prevent harm to the pupil. If that is what his Honour meant, the formulation cannot be accepted as correct'.

13 Support for fault-based liability is evident in *Lepore* (2003) 212 CLR 511 the speeches of Gleeson CJ ([26]), Gaudron J ([105]), McHugh J ([135]) and Kirby J ([291]). Support for strict liability appears in the joint speech of Gummow and Hayne JJ ([257]).

14 See, eg, Stephen Perry, 'The Impossibility of General Strict Liability' (1988) 1 *Canadian Journal of Law and Jurisprudence* 147.

15 See Murphy, above n 5 on the disentanglement of the two.

## II STRICT VERSUS FAULT-BASED LIABILITY

The question of whether common law non-delegable duties involve strict or fault-based liability is far from easy to answer. This is because of three main factors. To begin with, there is the obvious problem that there exists relatively evenly balanced judicial support for both views throughout the Commonwealth.<sup>16</sup> As such, identifying the ‘correct’ view according to settled authority is an impossible task.<sup>17</sup> Even within individual cases – and leading cases at that, such as *Lepore* – one can find differences of opinion. Secondly, there is a problem of substance since the leading cases are littered with simple, unsubstantiated assertions that liability is either strict or fault-based: there are no real judicial *arguments* about the appropriate form of liability.<sup>18</sup> This makes it inevitable that simply siding with either judicial school of thought will lack the level of explanatory force required to put forward a compelling theory of liability for breach of non-delegable duty.

The third complication in determining whether a breach of non-delegable duty will result in strict or fault-based liability is that the concept of ‘strict liability’ has been given in this context a rather unusual (and inappropriate) meaning that is at loggerheads with a conventional understanding of that term. This misconception requires close analysis and the remainder of this section is devoted to exploring just this, as well as one further, illusion that arises in common interpretations of the case law.

### A Non-Delegability and the Common Illusion of Strict Liability

It is as well to be clear from the outset that what distinguishes the non-delegable duty from the ‘ordinary’ duty of care in negligence is the fact that it is the *discharge of the duty* (as opposed to the duty itself) that is non-delegable. Although a rather basic proposition, this is nonetheless an important one since one thing that comes through repeatedly in the non-delegable duty case law is dicta to the effect that there can be no effective discharge of the duty simply by virtue of having delegated its performance to some third party, no matter how carefully that third party was chosen. At once, then, it becomes apparent that the ecumenically accepted term – non-delegable duty – is in fact a misnomer and that what the courts are really concerned with is the *performance of a duty* and not, per se, the delegation of that duty. As Lord Hailsham observed in *McDermid v Nash Dredging and Reclamation Co Ltd*, the fact that the law imposes a non-delegable duty does not mean that the duty itself ‘is incapable of being the subject of delegation, but only that the employer cannot escape liability if the

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16 Given the relative paucity of judicial analysis of non-delegable duties throughout the Commonwealth, I shall not confine myself to a single jurisdiction in assessing what I consider to be the most instructive cases.

17 But see Witting, above n 6, 34, where Witting fails to acknowledge this roughly even balance of dicta. He goes no further than saying that ‘the contours of BNDD [breach of non-delegable duty] liability are sketchy’ before suggesting that his account is an attempt ‘to provide the explanation that best “fits” the bulk of the case law’.

18 See, eg, the various dicta referenced above nn 8-9.

duty has been delegated and then not properly performed'.<sup>19</sup> In similar vein, and in the same case, Lord Brandon stated that if a non-delegable duty is not fulfilled, it is no defence that the employer 'delegated its performance to a person, whether his servant or not his servant, whom he reasonably believed to be competent to perform it'.<sup>20</sup>

Yet with dicta like this emanating from the House of Lords, it is easy to see how the conclusion might be reached that non-delegable duties furnish an example of tort law imposing strict liability. After all, their Lordships are plainly insisting that it is immaterial how carefully one chooses X to perform on one's behalf an obligation owed to Y so long as, ultimately, that obligation remains unfulfilled. Defensively saying, 'but I chose X as carefully as I could' is rather like saying, 'I didn't act carelessly in attempting to fulfil my obligation'. And when the courts say in response, 'it doesn't matter how carefully you chose X, you are still liable', there is an obvious resemblance to strict liability. But appearances can be deceptive; and the mere existence of this superficial resemblance to strict liability does not mean that liability is in fact strict in all non-delegable duty cases. It simply means that the duty is a personal one, and immutably so. In other words, the fact that a duty is declared non-delegable tells us merely on whom the duty falls, but it says nothing per se about the standard of care that must be met in discharging that duty. As such, the idea of non-delegability can be invoked in order to explain the alternative nomenclature used in this context: namely, that of 'personal duty'. But what it cannot do is explain why such a non-delegable duty should *necessarily* carry with it the prospect of strict liability.

Witting sought to fill that explanatory gap by noting of one of the leading cases concerning an employer's duty towards his workmen<sup>21</sup> that:

[a]lthough 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 [breach of a non-delegable duty] is a tort of strict liability.<sup>22</sup>

But this seems a rash conclusion because the plausibility of Witting's claim necessarily turns upon the presupposition that the repeated references in that case to a requirement of reasonable care were references to reasonable care on the part of a delegate, not the employer. Yet as Lords Thankerton and Maugham made clear respectively, and as Witting himself quotes them as saying, 'it is the *duty of the master to use due care* in the provision of a reasonably safe system'<sup>23</sup> and there is 'a *duty on the employer to take reasonable care*'.<sup>24</sup> In case there should be any lingering doubt as to the person with whom the duty to take reasonable care rests, it is useful to examine another case concerning an employer's non-

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19 [1987] AC 906, 910.

20 Ibid 919.

21 *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57.

22 Witting, above n 6, 38 (emphasis in original).

23 *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, 66 (emphasis added).

24 Ibid 86 (emphasis added).

delegable duty towards his employees: *General Cleaning Contractors Ltd v Christmas*.<sup>25</sup>

This case is significant for present purposes because there was no intermediate party involved. It was a two-party case involving only an employee and his employers. As such, any reference to the need for reasonable care had to be a reference to employers' duty to take such care. And as Earl Jowitt opined, 'the appellants were to blame in not taking all reasonable steps to see that the system of work ... was made as safe as possible';<sup>26</sup> while Lord Oaksey suggested that 'the common law demands that employers should take *reasonable care* to lay down a *reasonably safe* system of work'.<sup>27</sup> The duty could hardly have been expressed in more negligence-like (and thus fault-based) terms.

A useful insight into why so many (not just Witting) have succumbed to the temptation to correlate the non-delegability of a duty with strict liability was provided in *Lepore*, a case which concerned child sexual abuse at the hands of a teacher. There, Gleeson CJ helpfully made the point that liability under a non-delegable duty need not necessarily be strict in this way:

[T]he existing authorities on personal or non-delegable duties ... [disclose an] increased stringency ... [which lies] not in the extent of the responsibility undertaken (reasonable care for the safety of the pupils), but in the inability to discharge that responsibility by delegating the task of providing care to a third party or third parties.<sup>28</sup>

If this is right – and I suggest that it is – then there is no necessary antithesis between saying, on the one hand, that a duty cannot be fulfilled adequately by delegating its performance to a carefully selected contractor, while claiming on the other that the question of whether there has in fact been a breach must be judged according to the usual standard of care based on the conduct of the reasonable person. The first proposition, properly understood, relates only to the locus of a non-delegable duty, whereas the second concerns the form of liability. I suggest that the mistake that Witting and others have made is to treat the inability of the duty holder to shift this locus, by careful selection of staff in three-party cases, as the basis for the claim that there '*must* be ... a strict liability tort' at play.<sup>29</sup> Just because one cannot discharge a duty by delegation does not, per se, preclude the possibility that one may adequately discharge it in some other way.

Now, of course, if the standard of care under a non-delegable duty (at least in these cases) was governed by no more than the familiar reasonable person test, then an interesting question arises as to why some duties under the law of negligence should be singled out for special treatment and made non-delegable.<sup>30</sup> For Witting, the answer is that '[t]he BNDD is a special tort doctrine, the primary

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25 [1953] AC 180.

26 Ibid 189.

27 Ibid 189-90 (emphasis added). Although Witting does not cite them, both Lord Reid (at 194) and Lord Tucker (at 195) expressly viewed the employer's duty in terms of a requirement to take *reasonable care*.

28 *Lepore* (2003) 212 CLR 511, 530.

29 Witting, above n 6, 38.

30 See Murphy, above n 5, for my own answer to this question, and for an alternative account of *when*, but not *why*, such duties are imposed, see Stevens, above n 5.

purpose of which is the protection of bodily integrity'.<sup>31</sup> But this view is difficult to accept because it fails to explain a number of important non-delegable duty cases.

First, there are the twin lateral support cases of *Bower v Peate*<sup>32</sup> and *Dalton v Angus*<sup>33</sup> in which defendant landowners failed to give continued lateral support to the houses owned by the plaintiffs on adjoining land. In relation to these cases, Witting argues that '[a]lthough 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 [non-delegable duty] cases are protective of bodily integrity'.<sup>34</sup> But this reasoning appears unfounded, first because the plaintiffs' awareness of the lack of support could be said to undermine the claim that they were at 'serious risk of personal injury'; and more fundamentally because they are widely accepted to be nuisance cases, which, for that very reason, have nothing to do with (risks of) personal injury.<sup>35</sup>

In addition, however, there are two further cases that Witting, in a single footnote, dismisses somewhat summarily as being either 'aberrant' or otherwise explicable in terms of vicarious liability.<sup>36</sup> These are the cases of *Morris v CW Martin & Sons Ltd*<sup>37</sup> and *Lloyd v Grace, Smith & Co*<sup>38</sup> which respectively concerned the theft of the plaintiff's mink stole and the fraudulent conveyance of the plaintiff's property. However, the truth is that both cases are readily explicable in terms of non-delegable duty.<sup>39</sup> In *Morris*, both Lord Denning MR and Salmon LJ explicitly treated the case as one of non-delegable duty.<sup>40</sup> Only Diplock LJ saw it as a case of vicarious liability.<sup>41</sup> Similarly, while *Lloyd* is open to various interpretations, it is notable that in a roughly contemporaneous note of the case written in the *Law Quarterly Review*, Frederick Pollock interpreted the case as turning on the personal duty of the employer,<sup>42</sup> an interpretation since echoed by several of the judges in *Lepore*.<sup>43</sup>

None of these cases were primarily concerned with the protection of bodily integrity. But, at most, this means only that Witting's rationale for grounding the putative strictness of liability in non-delegable duty cases is flawed. It does not mean either that the protection of bodily integrity is not sometimes a good reason for the imposition of strict liability *or* that some of the non-delegable duty cases he deals with do not exhibit strict liability. As we have already seen, judicial and

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31 Witting, above n 6, 49.

32 (1876) 1 QBD 321.

33 (1881) 6 App Cas 740.

34 Witting, above n 6, 36.

35 See *Hunter v Canary Wharf Ltd* [1997] AC 655.

36 Witting, above n 6, 59 fn 191.

37 [1966] 1 QB 716 ('*Morris*').

38 [1912] AC 716 ('*Lloyd*').

39 See Murphy, above n 5 for a full analysis of these cases.

40 *Morris* [1966] 1 QB 716, 727, 738 respectively.

41 Ibid 737.

42 (1913) 29 *Law Quarterly Review* 210, 210.

43 *Lepore* (2003) 212 CLR 511, 555-556 (Gaudron J) and 593 (Gummow and Hayne JJ).

academic opinions differ on that matter. And it is that very matter to which I now turn.

## B What the Leading Cases Really Tell Us

It is perhaps easy to read too much into the fact that, in the leading Commonwealth non-delegable duty cases, liability seems invariably to have been imposed. Some, for example, might find attractive the argument that, notwithstanding the uncertain dicta in those cases, the remarkable absence of any defendants who have escaped liability is an indication of the presence of strict liability. Certainly, in the absence of any more plausible explanation, it is difficult to understand why the leading cases so consistently reveal examples of instances where liability has been imposed. Furthermore, the idea that it is a matter of mere coincidence is intuitively unappealing. An important task, then, is to explain why liability has been so unfailingly imposed in these major non-delegable duty cases.

Let us start with the early English case of *Pickard v Smith*<sup>44</sup> where the defendant was the occupier of a refreshment room and coal cellar on a railway platform. The accident that occurred in that case was caused by virtue of the trap door to the cellar being left open by a coal merchant who had been delivering coal. In deciding the case, Williams J placed considerable emphasis upon the danger that had been created by leaving open the trap door. He said: ‘the defendant, having ... caused danger, was bound to take reasonable means to prevent mischief ... and the fact of his having intrusted it to a person who also neglected it, furnishes no excuse’.<sup>45</sup> This insistence on the creation of risk was a theme that was readily taken up in subsequent English cases involving non-delegable duties,<sup>46</sup> and during the early to middle part of the 20<sup>th</sup> century the English courts began to insist on the presence of an ‘exceptional’ or ‘abnormal’ risk before they would hold a non-delegable duty to exist.<sup>47</sup> And while this emphasis on exceptional risk waned considerably in the years following the decision of the House of Lords in *Read v Lyons*<sup>48</sup> (in which their Lordships quashed the idea that a special rule of strict liability attached to ultra-hazardous activities), it never entirely disappeared.<sup>49</sup>

In Australia, the cases reveal a marked reluctance on the part of the judiciary to invoke the language of abnormal risk. Perhaps they did this in recognition of the fact that, for the purposes of establishing a non-delegable duty, there is no

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44 (1861) 10 CB (NS) 470.

45 Ibid 480.

46 See, eg, *Bower v Peate* (1876) 1 QBD 321, 326 (Cockburn CJ); *Tarry v Ashton* (1876) 1 QBD 314, 320 (Lush J); *Dalton v Angus* (1881) 6 App Cas 740, 831 (Lord Watson); *Hughes v Percival* (1883) App Cas 443, 446 (Lord Blackburn).

47 See, eg, *Honeywill & Stein v Larkin Bros* [1934] 1 KB 191, 200 (Slesser LJ on behalf of the Court of Appeal).

48 [1947] AC 156. See Murphy, above n 5 for other possible reasons why the insistence on ‘exceptional risk’ fell into relative disfavour.

49 See, eg, *Darling v Attorney-General* [1950] 2 All ER 793; *Home Office v Dorset Yacht* [1970] AC 1004, 1035 (Lord Morris).

especial normative significance attached to risk creation,<sup>50</sup> or perhaps it was in recognition of Weinrib's point that 'all doing involves some risk that someone else will suffer' so naturally '[t]ort law cannot forbid the creation of risk without thereby forbidding action itself'.<sup>51</sup> Or maybe it was with one eye on the decision in *Read v Lyons*,<sup>52</sup> or perhaps simply because they had the foresight to envisage (and thus sought to avoid) the near-impossible task of drawing a clear line between 'normal' and 'abnormal' risk at some point in the future. Whatever their reason, we can certainly detect in the leading Australian cases a preference for emphasising the peculiar vulnerability of the plaintiff. For example, in *Burnie Port Authority v General Jones Pty Ltd*, five members of the High Court of Australia stressed the plaintiff's 'special dependence and vulnerability',<sup>53</sup> while in *Lepore* Gleeson CJ suggested that '[i]n cases where the care of children, or other vulnerable people, is involved, it is difficult to see what kind of relationship would not give rise to a non-delegable duty of care'.<sup>54</sup> Gaudron J was clearly of the same mind in that case.<sup>55</sup>

As we shall see shortly, however, the election to highlight especial vulnerability has the same effect as focusing upon either abnormal risk or an ultra-hazardous activity. They both help to create the illusion that, in certain cases best seen as negligence cases, liability is strict. But this is to get ahead of ourselves. We must first identify the presence of these factors throughout the substantial body of non-delegable duty case law.

If we consider various classic examples of a non-delegable duty – such as the duty owed by an employer to his employees,<sup>56</sup> by a health authority to hospital patients<sup>57</sup> or by an education authority to school children<sup>58</sup> – we can see in each case the presence of especial vulnerability. Employees in the workplace, patients in hospital beds and children at single-teacher schools all have in common the fact that they find themselves in an environment the safety of which is controlled by some other person in whom they are required to place some measure of trust and reliance. Even if we turn to the various non-classic, but equally well established, categories of non-delegable duty – that is, where the defendant was in control of an abnormally dangerous person, or an abnormally dangerous thing<sup>59</sup> – we can again see the presence of either abnormal risk or heightened vulnerability. And while these facets of the cases are of no normative

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50 See Murphy, above n 5 for reasons why.

51 Ernest Weinrib, 'Understanding Tort Law' (1989) 23 *Valparaiso University Law Review* 485, 518.

52 [1947] AC 156.

53 (1994) 179 CLR 520, 551 (Mason CJ, Deane, Dawson, Toohey, and Gaudron JJ) ('*Burnie Port*'). This is also what underpinned the original promulgation of the criterion of 'assumed responsibility' in the speeches of Lords Reid, Morris and Devlin in *Hedley Byrne & Co Ltd v Heller* [1964] AC 465, 486, 503 and 528-9.

54 *Lepore* (2003) 212 CLR 511, 534.

55 *Ibid* 559-60.

56 *Wilsons and Clyde Coal Co v English* [1938] AC 57.

57 *Gold v Essex County Council* [1942] 2 KB 293.

58 *Commonwealth v Introvigne* (1982) 150 CLR 258; *Lepore* (2003) 212 CLR 511.

59 See *Burnie Port* (1994) 179 CLR 520, 527 where welding equipment was used in close proximity to a flammable material that burns with what the majority described as 'extraordinary ferocity'.

significance for the purposes of establishing a non-delegable duty,<sup>60</sup> they nonetheless provide the key to understanding why so much confusion has arisen as to whether these non-delegable duty cases furnish examples of strict or fault-based liability.

The specific use of identifying abnormally high risks or vulnerability is tied to the fact that these factors operate generally within the 'ordinary' law of negligence to raise the standard of reasonable care to the point where it becomes almost impossible to distinguish strict and fault-based liability. The point can be illustrated by invoking the famous case of *Nettleship v Weston*<sup>61</sup> where there was clearly a higher-than-usual risk of a driving mishap. The plaintiff was an amateur driving instructor without dual controls. For that reason, he was more than usually vulnerable, and the defendant was a learner driver taking only her third lesson. In that case, the standard of care imposed – the standard of the ordinary, reasonable driver – turned out to be so high that it was in fact impossible for such a novice to meet its requirements. Accordingly, while the case is generally cited as a classic example of the objective nature of the fault-based standard in negligence, it is nonetheless readily described, on its facts, as a case of strict liability. Indeed, going one step further, Peter Birks even suggested in more general terms that:

the reality of the common law of negligence is that it imposes what is in effect strict liability for bad practice ... It sets an objective standard of competence to define bad practice, but does not ask whether the particular defendant was in fact worthy of reproach for the particular incident in which he fell below that standard.<sup>62</sup>

Bearing this in mind, it is suggested that what often masquerades as strict liability in cases of non-delegable duty can in fact be understood in terms of the usual fault principle. It is simply that the requisite standard of care has been raised to the point where the distinction between the two is imperceptible. A justification for such a high standard of care in these cases is, as we have already noted, readily available in the fact that many of the recognised categories of non-delegable duty involve very high risks and/or especially vulnerable plaintiffs. This has recently been confirmed in the English Court of Appeal with Brooke LJ saying, in *Bottomley v Todmorden Cricket Club*, that 'the traditional common law response to the creation of a special danger is not to impose strict liability but to insist on a higher standard of care in the performance of an existing duty'.<sup>63</sup> And it seems a matter of good sense that he should say so. After all, few would argue that care ought not to be of the highest order where the well-being (perhaps, lives) of, say, hospital patients or very young school children is at stake, especially when it is empirically verifiable that higher-than-usual risks of abuse are part and parcel of running a children's home.<sup>64</sup>

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60 See Murphy, above n 5.

61 [1971] 2 QB 691.

62 Peter Birks, 'The Concept of a Civil Wrong' in David Owen (ed), *Philosophical Foundations of Tort Law* (1995) 45.

63 [2004] PIQR P18, [50] (quoting Mason J in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 30).

64 See Jane Wangmann, 'Liability for Institutional Child Sexual Assault: Where Does *Lepore* Leave Australia?' (2004) 28 *Melbourne University Law Review* 169, 178.

But so much for theory. Let us now test this hypothesis against the effect of three seminal decisions on non-delegable duty: *Wilsons and Clyde Coal Co v English*,<sup>65</sup> *Commonwealth v Introvigne*<sup>66</sup> and *Burnie Port*.<sup>67</sup> In relation to *Wilsons*, it is relatively uncontroversial that an employer's duty to provide a safe place of work etc is a duty within the law of negligence and there are certainly valuable indicators to support such a view. So, for example, despite Witting's assertion that contributory negligence cannot *in theory* apply to any case in which it is alleged that an employer has broken his non-delegable duty towards his employee, it is in fact clear from the authorities that this partial defence may well be raised in this context.<sup>68</sup> Equally, the case of *Cook v Square D Ltd*<sup>69</sup> provides a rare example of an employer *not* being held liable even though a non-delegable duty was in operation. In that case, an employee working in Saudi Arabia was injured while engaged at a dangerous workplace. The English Court of Appeal held that the employers, who were 8000 miles away, were not responsible for every day-to-day event in the workplace. The central question was whether the defendants had done what a reasonable employer should do in order to set up, operate and monitor a safe system of work. The principles in operation are neatly captured in the following dictum taken from another case concerning an employer's liability:

Whether the servant is working on the premises of the master or on those of a stranger, that duty is still the same; but ... its performance and discharge will probably be vastly different in the two cases. The master's own premises are under his control: if they are dangerously in need of repair he can and must rectify the fault at once if he is to escape the censure of negligence. If, however, a master sends his plumber to mend a leak in a respectable private house, *no one could hold him negligent* for not visiting the house himself to see if the carpet in the hall creates a trap.<sup>70</sup>

So far as the *Introvigne* principle (enshrining a non-delegable duty towards children in a children's home or school) is concerned, there is support from elsewhere in the Commonwealth for the assertion that the relevant duty is owed in accordance with the law of negligence. In England, for instance, it is clear that the negligence rules on limitations of actions will apply to an action against the employer of a child abuser engaged within the context of a children's home or school. Thus, while the person who actually perpetrated the abuse may well escape liability years later when the children are old and mature enough to sue (given the absolute six-year time limit on actions for trespass to the person), the employer who, in breach of his non-delegable duty, negligently failed to prevent the abuse may still be sued within the law of negligence (given the extendable time limit for such actions).<sup>71</sup>

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65 [1938] AC 57 ('*Wilsons*').

66 (1982) 150 CLR 258.

67 (1994) 179 CLR 520.

68 See, eg, *McGarvey v Eve NCI Ltd* [2002] EWCA Civ 374.

69 [1992] ICR 262. But note that the incident in *McDermid v Nash Dredging and Reclamation Co Ltd* [1987] AC 906 also took place abroad. Are the distinctions made between the two cases convincing? See *Cook v Square D Ltd* [1992] ICR 262, 270-1 (Farquharson LJ).

70 *Wilson v Tyneside Window Cleaning Co* [1958] 2 QB 110, 121 (Pearce LJ) (emphasis added).

71 *Limitations Act 1980* (UK) s 2.

Finally, as regards the principle espoused in *Burnie Port*, most of what the majority had to say in that case was an attempt to justify the abandonment of the *strict liability* rule in *Rylands v Fletcher*<sup>72</sup> in favour of the creation of a non-delegable duty in such scenarios where the non-delegable duty was perceived to fall within the general law of negligence. The following statement is typical of the kinds of thing that were said in that case:

The result of the development of the modern law of negligence has been that ordinary negligence has encompassed and overlain the territory in which the rule in *Rylands v Fletcher* operates.<sup>73</sup>

Thus, to conclude, it seems that the only material respect in which cases like *Wilsons*, *Commonwealth v Introvigne* and *Burnie Port* differ from the more ‘usual’ kinds of negligence is that the performance of the duty in those three cases was treated as non-delegable. Furthermore, this difference can easily be explained and justified once one appreciates that *all* non-delegable duties are predicated upon affirmative duties arising out of what is generally termed, for all its linguistic imperfections, an ‘assumption of responsibility’.<sup>74</sup> Making just this point in *Lepore*, Gaudron J began by identifying the need for an assumption of responsibility then proceeded thus:

There is another feature of ... a non-delegable duty of care which should be stressed. It is that the relevant duty can be expressed positively and not merely in terms of a duty to refrain from doing something that involves a foreseeable risk of injury ... Once the relevant duty is stated in those terms it is readily understandable that the duty should be described as non-delegable.<sup>75</sup>

However, just because the affirmative duty arising out of an assumption of responsibility is non-delegable, does not render its breach incapable of being judged according to the usual fault-based standard in negligence law. Thus it was in *Burnie Port* that the majority noted that ‘[i]n *Kondis v State Transport Authority* ... in a judgment with which Deane J and Dawson J agreed, Mason J identified some of the principal categories of case in which *the duty to take reasonable care under the ordinary law of negligence is non-delegable*’.<sup>76</sup>

### III WHAT THE OTHER CASES TELL US

Thus far, I have attempted to do no more than reconcile a good many of the leading non-delegable duty cases with the ordinary law of negligence. In particular, I have tried to show that simply because a duty cannot be delegated does not mean that it carries with it the prospect of strict liability. In purely

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72 (1868) LR 3 HL 330.

73 *Burnie Port* (1994) 179 CLR 520, 547 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

74 See Murphy, above n 5, for full discussion of what is meant by ‘assumption of responsibility’ in this context and why this label is preferable to others such as ‘imputed guarantee’ (suggested by Stephen Waddams in his book, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (2003) 104). But note in particular that it helps explain otherwise difficult cases such as *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 and *Lloyd* [1912] AC 716.

75 *Lepore* (2003) 212 CLR 511, 552-53. See Murphy, above n 5, for an elaboration upon the juridical foundations of non-delegable duties.

76 (1994) 179 CLR 520, 550 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) (emphasis added).

linguistic terms it makes no sense to equate non-delegability of duty with strictness of liability. A more accurate description of what is at play is captured by the alternative name for a non-delegable duty: namely, a 'personal duty'. I have also argued that the remarkably consistent imposition of liability in the leading non-delegable duty cases is also a misleading indication of the presence of strict liability. The explanation, I suggest, rather than being a matter of mere coincidence, is to be found in the fact that the ordinary law of negligence takes proper account of the presence of especial risks and vulnerabilities in order to impose a very high standard of care in classic non-delegable duty cases. As a matter of juridical orthodoxy, then, the liability is fault-based (even if, in reality, the difference between the standard actually imposed and conventional strict liability is non-existent).

But all of this only takes us so far. For just because we can explain many of the leading cases in terms of the ordinary law of negligence requiring a very high standard of care does not mean that we can also account for the principles at play in a number of other, significant non-delegable duty cases in which it is demonstrably clear that the law of negligence has no role at all to play. A good example is the private nuisance case of *Bower v Peate* in which Cockburn CJ held a principal liable for his independent contractor's act of withdrawing support from the buildings of the neighbouring plaintiff despite an absence of personal fault on the part of the defendant. In classic non-delegable duty terms, he said:

a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise ... is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else.<sup>77</sup>

Another good example is the public nuisance case of *Tarry v Ashton* in which a heavy lamp had been erected in such a position that it overhung a public pavement. When it later fell upon and injured a passing pedestrian due to the poor state of repair that it was kept in, the jury specifically found that there had been no personal negligence on the part of the defendant. Even so, Lush J held in the familiar language of non-delegable duty that:

A person who puts up or continues a lamp in that position, puts the public safety in peril, and it is his duty to keep it in such a state as not to be dangerous; and he cannot get rid of the liability for not having so kept it by saying he employed a proper person to put it in repair.<sup>78</sup>

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77 *Bower v Peate* (1876) 1 QBD 321, 326. See also the very close echoes in *Dalton v Angus* (1881) 6 App Cas 740, 831 where Lord Watson said that 'in cases where the work [done] is necessarily attended with risk, [the defendant] cannot free himself from liability by binding the contractor to take effectual precautions'; *Spicer v Smea* [1946] 1 All ER 489, 495 where Atkinson J said that 'where danger is likely to arise unless work is properly done, there is a duty to see that it is properly done'.

78 *Tarry v Ashton* (1876) 1 QBD 314, 320. Cases like *Noble v Harrison* [1926] 2 KB 332 which involve latent defects in tree branches that overhang the highway and which seem to insist on proof of personal negligence on the part of the owner or occupier can arguably be distinguished on the basis that they do not involve some artificially created danger to the public which would justify the imputation of an affirmative duty to keep the public safe. See Murphy, above n 5 for an elaboration of the idea that such factors must be present before a non-delegable duty will be recognised.

Clearly, cases such as *Bower v Peate* and *Tarry v Ashton* are irreconcilable with any suggestion that non-delegable duties *always* involve negligence liability, and some other explanation of the *truly strict liability* that was imposed in those cases must be found. In my opinion, the explanation is a rather simple. But first I should like to recap on a couple of things. First, I have already shown that a number of well established categories of non-delegable duty exist otherwise than as a sub-species of the law of negligence. *Bower v Peate* and *Tarry v Ashton* are prominent examples. Secondly, it also seems clear – at least to the judges who have decided the major cases – that the non-delegable duty is something other than a discrete tort. For while the courts may not always have said exactly what they think a non-delegable duty is, they have at least been consistent in refraining from any claim that it is a freestanding tort. But neither of these propositions precludes the following observation: namely, that non-delegable duties have in common *only* the fact that they are all premised upon an affirmative duty arising out of an assumed responsibility (generously conceived)<sup>79</sup>, and that their *necessary* juridical connections end there.

This leaves open the way to view non-delegable duties, as I do, as arising within a range of torts, in each case as a sub-species of one or other parent tort. Thus, I would suggest that a non-delegable duty may arise as a sub-species of negligence law in the guise of an employer's duty towards his employee (as in *Wilsons*); or as a sub-species of the law of private nuisance (as in *Bower v Peate*); or even as a sub-species within the law of public nuisance (as in *Tarry v Ashton*). But these categories are not exhaustive and non-delegable duties cannot be entirely confined to tort law (though, of course, it is within tort law that they most commonly arise). So, for example, although I have not dealt with it in any great depth above, it is also possible for a non-delegable duty to arise within the law of bailment. For as Lord Denning MR said in one such case:

If the master is under a duty to use due care to keep goods safely and protect them from theft and depredation, he cannot get rid of his responsibility by delegating his duty to another. If he entrusts that duty to his servant, he is answerable for the way in which the servant conducts himself ... [n]o matter whether the servant be negligent, fraudulent or dishonest.<sup>80</sup>

But mostly, non-delegable duties will arise as sub-species of extant torts. And once it is recognised that while non-delegable duty X is a sub-species of the law of negligence, and non-delegable duties Y and Z are better seen as sub-species of other torts, it becomes possible to explain why in some cases liability is truly strict while in others it is, at least theoretically, fault based. It makes eminently good sense, for example, that where a non-delegable duty arises within a strict liability tort, such as private nuisance, it should carry with it the prospect of strict liability to the same extent that nuisance law generally does. And where, by contrast, a non-delegable duty arises within a fault based tort, such as negligence,

79 See Kit Barker, 'Unreliable Assumptions in the Modern Law of Negligence' (1993) 109 *Law Quarterly Review* 461 for criticism of the use the term 'assumed responsibility' to cover cases that in reality turn upon the imputation of responsibility.

80 *Morris v Martin & Sons Ltd* [1966] 1 QB 716, 725. See also the support for this approach in the judgment of Salmon LJ (740-741) and the general approval of the decision in *Port Swettenham Authority v TW Wu & Co Sdn Bhd* [1979] AC 580.

it again makes good sense that the liability associated with the breach of that particular non-delegable duty should be judged according to the usual fault-based standard in negligence.

It is a failure to appreciate these categorical divisions that seems to lead Witting to conclude both that breach of a non-delegable duty amounts to an independent tort, *and* that this will necessarily involve the imposition of strict liability. His reasoning on both matters seems highly questionable. In relation to the first claim, he contends that:

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. 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.<sup>81</sup>

It is inherent in this excerpt that his first suggestion as to independence is not an especially strong one: namely, that the strongest suggestion from the lateral support cases comes from something that was not said. Just because in many run-of-the-mill negligence cases there is no need to discuss causation or breach (because, say, they have been conceded) does not make those cases any less negligence cases than *Bower v Peate* was a nuisance case. The implication that this is not a particularly strong suggestion of the existence of an independent tort of breach of non-delegable duty can be traced to the very next sentence which begins by the admission that a stronger basis for his argument exists. But even this second basis – the fact that BNDD can be pleaded in a range of circumstances not involving neighbouring landowners – is itself a rather weak one for it does not confirm the *positive* fact that breach of a non-delegable duty is an independent tort; it merely provides support for a *negative* proposition: namely, that non-delegable duties ‘are not restricted to the kinds of case in which nuisance arises’.

In relation to the second matter associated with Witting’s failure to appreciate the categorical divisions that exist along the lines of extant torts, he argued as follows:

With respect to the common law, some of the earliest BNDD cases indicate a strict liability pedigree. *Tarry v Ashton* 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 ‘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’. 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.<sup>82</sup>

But the problem with this analysis is that his claim as to a long-standing pedigree of strict liability in non-delegable duty cases ultimately hinges on the strictness of liability in public nuisance. The reason he sidelines the negligence of

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<sup>81</sup> Witting, above n 6, 42 (citations omitted).

<sup>82</sup> Ibid 40-41 (citations omitted).

the gas fitter as an immateriality is precisely because ‘public nuisance [as opposed to the independent tort of BNDD he claims to be at play] is recognised as being a tort of strict liability’. In short, he seems to support my point that the reason why strict liability was imposed in that case is because it was a non-delegable duty that arose within the law of public nuisance. But at the very least, his willingness to associate the presence of strict liability in *Tarry v Ashton* with the fact that this is the usual form of liability in *public nuisance* neither demonstrates the pedigree of strict liability within an independent tort styled ‘breach of non-delegable duty’, nor grounds that tort’s existence.

#### IV CONCLUSION

The kind of liability that is imposed upon breach of a non-delegable duty has been one aspect of the common law that has been remarkably under-theorised. Over the years, judges from around the Commonwealth have shown themselves to be remarkably at sea in relation to non-delegable duties. They have offered a range of conflicting views as to the foundations of such duties, and they have been unable or unwilling to put forward any theoretically compelling account of the kind of liability that results from their breach. In this article, I have attempted to address only the latter question as a direct response to Witting’s analysis of it. I have suggested that non-delegable duties ought not to be seen as a distinct species of tort, but rather as a series of sub-species of existing categories of civil wrongs with the strictness of liability in each case being dependent ultimately upon the nature of liability attaching to the parent tort (or other wrong). It is a simple conclusion. But sometimes it is worth spelling out what should seem obvious, for sometimes the obvious eludes us. Yet why it should have done so for so long is unclear given that a valuable clue as to what governs the liability in cases involving non-delegable duties was supplied by Brennan J in the *Burnie Port* case:

The extent of the duty ... depends on the nature of the liability which would attach if the injurious consequences of the authorized act were not prevented: a duty to take reasonable care ... when the only tortious liability would be for negligence; a higher duty when the tortious liability would be for nuisance.<sup>83</sup>

#### V POSTSCRIPT

Although the analysis put forward in this article is still far from widely accepted among the academic community, it is at least gratifying and reassuring in equal measure that it should have been so enthusiastically endorsed and adopted by Kirby J in his Honour’s judgment in *Leichhardt Municipal Council v*

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83 (1994) 179 CLR 520, 577-78.

*Montgomery*.<sup>84</sup> It is hoped that in the fullness of time it will come to be seen as the orthodox view that has thus far eluded us.

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84 (2007) 233 ALR 200.