CASE NOTE

LEICHHARDT MUNICIPAL COUNCIL v MONTGOMERY*

NON-DELEGABLE DUTIES AND ROADS AUTHORITIES

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[In Leichhardt Municipal Council v Montgomery*, the High Court of Australia was faced with two important questions. It was required to rule on whether a roads authority owes a non-delegable duty to a pedestrian using the road. The Court refused to recognise such a duty. It was also invited to comment upon the fundamental nature of the non-delegable duty. A majority of the Court ruled that the non-delegable duty is not a freestanding tort, but rather a doctrine of strict liability arising in cases of negligence. This case note critiques the model of liability adopted by the Court and argues that the non-delegable duty is best seen as an independent tort of strict liability.]*

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I INTRODUCTION

The non-delegable duty is a form of obligation under which it is said that, although the duty-holder may delegate the performance of a task, they 'cannot "delegate" his duty'.[1] The duty-holder will therefore be legally responsible for any failures in the performance of the task. This is illustrated by the

* (2007) 230 CLR 22 ('*Leichhardt*').

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1 *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, 65 (Lord Thankerton) ('*Wilsons*').

non-delegable obligation of workplace management to provide a safe system of work — it matters not that the workers themselves have the ability to implement such a system and to avoid causing injury.[2]

It has been recognised that the non-delegable duty entails 'stricter obligations on the person who owes another [the non-delegable duty] than are imposed on a similarly positioned person under an ordinary duty of care' in negligence.[3] The obligation requires the taking of positive action, where necessary, in order to avoid harm. Beyond this, however, much about the non-delegable duty has remained in dispute.

The High Court's recent decision in *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 ('*Leichhardt*') sheds some light upon the nature of the non-delegable duty in Australian law and upon the obligation to which it gives rise. In this case, the respondent, Mr Montgomery, fell into a telecommunications pit in the footpath and injured his knee. The non-delegable duty was pleaded in order to establish responsibility on the part of the Council for the acts and omissions of an independent contractor charged with the task of repairing the road. In holding that the roads authority was not liable to the pedestrian, a majority of the High Court held that the non-delegable duty is a doctrine of the law of negligence and that it involves the imposition of strict liability. The Court rejected the view that the non-delegable duty is an independent tort. This case note reviews the Court's decision and argues that it erred in its refusal to recognise the duty as an independent tort.

II FACTS OF THE CASE AND LOWER COURT JUDGMENTS

The appellant was the roads authority responsible for the maintenance of Parramatta Road, Leichhardt, in New South Wales. The respondent, Mr Montgomery, was walking on the footpath adjacent to that road. Under s 4 of the *Roads Act 1993* (NSW) ('*Roads Act*'), the footpath comprised part of the road.[4] The Council had engaged a contractor, Roan Constructions Pty Ltd ('Roan'), to undertake repairs. Part of the specifications for the work required that a carpet covering be placed over the area under repair when work was not being done in order to provide for pedestrian access. In the relevant stretch of footpath, there was a telecommunications pit with a broken cover which had been carelessly concealed with carpet by Roan's employees. The carpet gave way from under Mr Montgomery and he fell into the pit, suffering a serious knee injury.

Mr Montgomery brought actions against both Roan and the Council. The former claim was compromised prior to hearing and Mr Montgomery proceeded with the action against the Council for the balance of his losses. He pleaded both

[2] 'Employers 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, be able to lay down a reasonably safe system of work themselves. Workmen are not in the position of employers': *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, 190 (Lord Oaksey). See also *Kondis v State Transport Authority* (1984) 154 CLR 672 ('*Kondis*').

[3] T R O Boston, 'A Hospital's Non-Delegable Duty of Care' (2003) 10 *Journal of Law and Medicine* 364, 365. See also *Elliott v Bickerstaff* (1999) 48 NSWLR 214, 237 (Giles JA).

[4] See especially *Leichhardt* (2007) 230 CLR 22, 69 (Hayne J).

negligence and breach of a non-delegable duty. The action regarding negligence *simpliciter* was not the subject of any findings either in the District Court[5] or on appeal to the NSW Court of Appeal.[6] This was because both courts accepted that 'the council owed to the plaintiff a non delegable duty of care, notwithstanding the fact that the footpath reconstruction works … were being carried out by a contractor'.[7] This duty was held to have been breached, even though no fault had been proven on the part of the Council. The finding of the Court of Appeal was summarised in these words:

> where a road authority engages a contractor to do work on a road used by the public, such as to involve risk to the public unless reasonable care is exercised, the road authority has a duty to ensure reasonable care is exercised; and the road authority will be liable if the contractor does not take reasonable care. However, the road authority will not be liable for casual or collateral acts of negligence by the contractor …[8]

The appeal to the High Court of Australia was mainly concerned with whether it is correct to apply non-delegable duty principles to hold a roads authority liable for the careless acts of its contractor. In considering this matter, three issues arose for discussion: (1) the impact of the governing statute upon the application of common law rules; (2) the impact of the decision in *Brodie v Singleton Shire Council* ('*Brodie*');[9] and (3) the applicability, on the facts, of non-delegable duty principles.[10] These issues will be considered in turn before a more extended analysis is undertaken of the non-delegable duty.

III THE HIGH COURT'S DECISION

A *Impact of the Governing Statute*

A council is constituted and empowered to act under statute. In this case, the relevant powers were to be found in the *Roads Act*. The Court acknowledged that examination of the statute was required to determine whether its provisions were consistent with the imposition of a common law obligation on the Council. Kirby J agreed with the statement by Gleeson CJ that:

> The common law should define the duty of care to which a roads authority is subject by reference to the nature of the statutory powers given to the authority, and the legislative intendment discernible from the terms in which those pow-

[5] *Montgomery v Leichhardt Municipal Council* (Unreported, District Court of New South Wales, Judge Quirk, 1 December 2004).

[6] *Leichhardt Municipal Council v Montgomery* [2005] NSWCA 432 (Unreported, Mason P, Hodgson and McColl JJA, 8 December 2005).

[7] *Leichhardt* (2007) 230 CLR 22, 27 (Gleeson CJ). See ibid [23] (Hodgson JA) for the similar sentiment of the New South Wales Court of Appeal.

[8] *Leichhardt Municipal Council v Montgomery* [2005] NSWCA 432 (Unreported, Mason P, Hodgson and McColl JJA, 8 December 2005) [23] (Hodgson JA). The other members of the Court adopted the reasoning of Hodgson JA: at [1] (Mason P), [37] (McColl JA).

[9] (2001) 206 CLR 512.

[10] This statement reflects the outline of issues by Kirby J in *Leichhardt* (2007) 230 CLR 22, 46–7.

> ers are granted, considered in the light of the purposes for which they are conferred.[11]

Their Honours both found that while the provisions of the *Roads Act* did not altogether preclude liability on the part of the Council, they did not create liability or impose a specific form of duty upon the Council.[12] Thus, it was up to the Court to determine the Council's liability at common law, if any, for injuries caused by the independent contractor to the pedestrian, Mr Montgomery.[13]

B *Impact of the Decision in* Brodie

The earlier decision of the High Court in *Brodie* was the subject of discussion in *Leichhardt* because *Brodie* also concerned a roads authority. In *Brodie*, the Court held that the old common law rule that a roads authority was not liable for nonfeasance, but only for misfeasance, was no longer correct. This was in part a result of the supposed difficulty of drawing a distinction between nonfeasance and misfeasance.[14] Ordinary rules of negligence were to be applied to the conduct of the roads authority.[15] The question in *Leichhardt* was whether *Brodie* was relevant to determining whether or not the Council owed a non-delegable duty to pedestrians.

In its submissions, the Council contended that *Brodie* was inconsistent with the proposition that it had owed a non-delegable duty to Mr Montgomery. The contention was that *Brodie*

> was designed to subsume the liability of roads and highway authorities within the general law of negligence — by inference removing not only exceptional immunities (as expressed in the former highway rule) but also exceptional liability (as contained in the non-delegable duty principle propounded by [Mr Montgomery]).[16]

The High Court held that *Brodie* had no direct relevance to the issue because Mr Montgomery's injuries arose from misfeasance, rather than nonfeasance.[17] The Council had commenced works on the road through its contractor Roan and

[11] Ibid 33 (Gleeson CJ). See also Kirby J: at 47. Hayne J propounded the same principle: at 68. Crennan J adopted the judgments of both Gleeson CJ and Hayne J as her own: at 88.

[12] Ibid 30, 34–6 (Gleeson CJ), 42–4, 47–8 (Kirby J).

[13] Ibid 49 (Kirby J). It should also be noted that the *Civil Liability Act 2002* (NSW) was found to have no direct application to the case. The Act does not apply to proceedings commenced in a court before the commencement of the Act: *Civil Liability Act 2002* (NSW) sch 1 ss 2, 6. That statute did not alter retrospectively, or at all, the common law doctrines that might be applicable to the facts: ibid 41 (Kirby J).

[14] For comment upon the High Court's tendency to denigrate conceptualism, see Christian Witting, 'Tort Law, Policy and the High Court of Australia' (2007) 31 *Melbourne University Law Review* 569, 571.

[15] *Brodie* (2001) 206 CLR 512, 540 (Gaudron, McHugh and Gummow JJ), 604 (Kirby J). Subsequently, legislatures have acted to reinstate the distinction: see, eg, *Civil Liability Act 2002* (NSW) s 45; *Civil Liability Act 2003* (Qld) s 37.

[16] *Leichhardt* (2007) 230 CLR 22, 49 (Kirby J).

[17] Ibid 35 (Gleeson CJ), 42 (Kirby J).

that work had been performed negligently.[18] Cases such as this had never been the subject of a special rule.

By way of further elaboration, Kirby J agreed with the Council's contention that *Brodie* was unlikely to have laid the groundwork for 'an additional, enhanced liability in the form of a non-delegable duty'.[19] However, he held that it could *not* be understood as *precluding* the recognition of a non-delegable duty owed by a roads authority to a road user.[20]

C *Applicability of Non-Delegable Duty Principles*

The High Court's determinations on the effect of the *Roads Act* and the *Brodie* decision helped to clear the way for a principled consideration of whether or not a non-delegable duty should be recognised as owed by a roads authority to a road user. There was unanimous agreement that such a duty ought not to be recognised and that the case was to be governed by ordinary principles of negligence. As such, the case was remitted to the NSW Court of Appeal for further hearing regarding the potential liability of the Council in negligence.[21] The reasons given by the High Court for denying the existence of a non-delegable duty will now be examined.

Gleeson CJ spoke of the non-delegable duty as a doctrine which is pleaded in cases of negligence: '[i]t is a proposition of law concerning the nature or content of the duty'.[22] This duty was said to involve 'a special responsibility … to see that care is taken'.[23] The effect of these statements is that his Honour accepted that, insofar as the non-delegable duty was relevant, it was a doctrine of negligence rather than an independent tort.

Gleeson CJ opined that this 'special' duty came in two prominent types:

1 Strict non-delegability, arising in cases where it was clear that the duty-holder was to act personally and was not to allow others to discharge the duty. This 'would arise, for example, where a power or duty was conferred in terms, or in a context, such that it had to be performed or exercised personally by the repository of the power or duty or, if the repository were a corporation or other legal entity, by that corporation or entity.'[24]
2 'Ordinary non-delegability',[25] arising in cases where the performance of the function could be delegated but where the duty-holder would nevertheless need to 'ensure' that reasonable care was taken and would be liable for any failures on the part of the delegate. The main advantage of ordinary

[18] Ibid 42 (Kirby J).
[19] Ibid 51.
[20] Ibid.
[21] Ibid 76–7 (Hayne J). The rest of the Court agreed with Hayne J: at 36 (Gleeson CJ), 67 (Kirby J), 88 (Callinan J), 88 (Crennan J).
[22] Ibid 27.
[23] Ibid, quoting *Kondis* (1984) 154 CLR 672, 687 (Mason J).
[24] *Leichhardt* (2007) 230 CLR 22, 29.
[25] This terminology is that of the present author, as Gleeson CJ did not give the concept a specific name.

> non-delegability is that it has the 'practical effect of outflanking the general rule that a defendant is not vicariously responsible for the fault of an independent contractor'.[26]

Gleeson CJ acknowledged that these categories of the non-delegable duty are not necessarily exhaustive, and that further categories might be recognised by the High Court in the future.[27]

With respect to the ordinary non-delegable duty, Gleeson CJ further opined that:

> A 'special' responsibility or duty to 'see' or 'ensure' that reasonable care is taken by an independent contractor, and the contractor's employees, goes beyond a duty to act reasonably in exercising prudent oversight of what the contractor does. In many circumstances, it is a duty that could not be fulfilled. How can a hospital ensure that a surgeon is never careless? … One of the things that is special about this duty is that it is a duty to do the impossible.[28]

This passage reflects his Honour's opinion that a non-delegable duty imposes a standard of care that is so high as to amount to strict liability. As a result, he suggested that the non-delegable duty doctrine should properly be seen as involving the 'imposition upon a defendant of a special kind of vicarious responsibility'.[29] Vicarious liability is, of course, a doctrine of strict liability.[30]

On the facts, Gleeson CJ held that there was nothing in the terms of the *Roads Act* which created strict non-delegability.[31] His Honour also rejected the proposition that the case involved ordinary non-delegability, stating that the roads authority was subject to 'a duty to exercise reasonable care' only.[32] Gleeson CJ noted a potential problem with finding a non-delegable duty concerning the onerous obligation that it would entail for the Council. The potential arose for an obligation to supervise that would extend to the most minute details of the contractor's operations: '[t]o speak of a local council having a duty to ensure that such an apparently low-level and singular act of carelessness does not occur is implausible.'[33] His Honour concluded that the duty which applied was the *Brodie* duty of care in negligence. This was a duty to take reasonable care, which could be adapted to the circumstances of each case.[34] His Honour did not

26 *Leichhardt* (2007) 230 CLR 22, 29.

27 Ibid 31–3. In England, at least, a non-delegable duty exists based upon authorities such as *Dalton v Angus* (1881) 6 App Cas 740, 829 (Lord Blackburn). Gleeson CJ referred to earlier views of Mason J, who classified this type of case as one of nuisance: at 206, referring to *Kondis* (1984) 154 CLR 672, 682. Another category (no doubt overlapping with that previously mentioned) involves extra-hazardous activities. Although Gleeson CJ conceded that road works could involve extra-hazardous activities, that category of case was not presently relevant: *Leichhardt* (2007) 230 CLR 22, 33.

28 *Leichhardt* (2007) 230 CLR 22, 34–5.

29 Ibid 35.

30 *New South Wales v Lepore* (2003) 212 CLR 511, 522 (Gleeson CJ), 560 (Gaudron J), 581 (Gummow and Hayne JJ) ('*Lepore*').

31 *Leichhardt* (2007) 230 CLR 22, 30.

32 Ibid 36.

33 Ibid 35.

34 Ibid 36.

elaborate upon what this duty involved, other than to note that the 'content of a requirement of reasonable care adapts to the circumstances, unlike the content of a requirement to ensure that care is taken.'[35]

In his detailed analysis of the non-delegable duty issue, Kirby J considered two models of the duty recently propounded by academic authors:

1 Strict liability independent tort: Kirby J rejected this author's model, which envisions the non-delegable duty as an independent tort of strict liability.[36] Under this model, a non-delegable duty tort exists separately from negligence and has its own distinctive elements. This model was seen as inconsistent with the 'prevailing view in Australia'.[37]

2 Variable-fault subspecies of existing torts: Kirby J held that the non-delegable duty is 'something other than a discrete tort.'[38] It is a form of obligation which exists as a 'subspecies' within a range of other torts.[39] The duty is 'affirmative' in nature, meaning that it requires active measures to be taken in order to avoid the causation of harm.[40] Liability arises where duty-holders fail to take such action. Kirby J endorsed Gaudron J's explanation in *New South Wales v Lepore* ('*Lepore*')[41] that non-delegable duties are affirmative obligations imposed in circumstances where an activity puts vulnerable individuals at exceptional risk, and where responsibility for injuries can be imputed to the person undertaking those activities.[42] The fault requirement that it encompasses is variable — the court might require proof of fault to the negligence standard, to a higher standard or may impose strict liability — depending upon the circumstances.[43]

Kirby J pointed out that the High Court had not previously expanded the range of accepted non-delegable duties to cover the relationship between a roads authority and road user.[44] Unlike the recognised recipients of non-delegable duties, road users do not constitute a closed class of persons whose identity is ascertainable in advance and there is not the degree of vulnerability that exists with respect to the hospital patient, employee and school pupil.[45] A further problem was that the doctrine is 'subject to an indeterminate qualification in the case of casual or collateral acts of negligence'.[46]

35 Ibid.
36 Ibid 51 fn 121 (Kirby J), citing Christian Witting, 'Breach of the Non-Delegable Duty: Defending Limited Strict Liability in Tort (2006) 29 *University of New South Wales Law Journal* 33.
37 *Leichhardt* (2007) 230 CLR 22, 51 (Kirby J).
38 Ibid, citing John Murphy, 'The Liability Bases of Common Law Non-Delegable Duties — A Reply to Christian Witting' (2007) 30 *University of New South Wales Law Journal* 86, 99.
39 *Leichhardt* (2007) 230 CLR 22, 52 (Kirby J).
40 Ibid 51–2, citing Murphy, 'Liability Bases of Common Law Non-Delegable Duties', above n 38, 97.
41 (2003) 212 CLR 511, 551–3.
42 *Leichhardt* (2007) 230 CLR 22, 64.
43 Ibid 52.
44 Ibid 59–60.
45 Ibid 65–6.
46 Ibid 61.

Kirby J also considered that there were significant policy justifications for the rejection of a non-delegable duty in the present case:

> The general rule is that the principal is not liable for the wrongs done by an independent contractor or its employees. It is not easy to see why an exception should be specifically carved out allowing the person injured to recover from a roads authority in addition to the normal rights that the person enjoys against the independent contractor posited as the effective cause of the wrong.[47]

Finally, Kirby J endorsed sentiments similar to those of Gleeson CJ regarding the practical difficulty entailed by the recognition of a non-delegable duty with respect to the kind of activity in which Roan's employees were engaged. The Council, his Honour suggested, 'could not have anticipated every minor and unpredictable act of carelessness on the part of any of Roan's employees without effectively, or actually, performing the work itself, using its own employees.'[48] This would have entailed a real danger of undermining the raison d'être of the use of independent contractors, which resides in the ability to take advantage of technical expertise or a special capacity to do the work.[49]

Hayne J was of the view that there are 'many difficulties that lie behind adopting principles cast in terms of non-delegable duties.'[50] He opined that 'the doctrinal roots of non-delegable duties are anything but deep or well established.'[51] It is 'a doctrine, or series of doctrines, lacking any single unifying and principled explanation.'[52]

His Honour accepted that a non-delegable duty is a form of strict liability.[53] This was apparent from the fact that the non-delegable duty required the duty-holder to 'ensure a particular result'.[54] 'Though cast in terms of "duty", the principle is one of strict liability for the conduct of another. It is, therefore, nothing but an exception to ordinary rules of vicarious liability.'[55] This view was similar to that held by Gleeson CJ, but opposed to Kirby J's view of the non-delegable duty as encompassing a variable fault requirement. Nevertheless, Hayne J noted that strict liability is no longer in favour in the High Court.[56] Ultimately, his Honour thought that there would be little point in creating a new category of non-delegable duty applicable to the activities of roads authorities. The ordinary rules of negligence, as stated in *Brodie*, would therefore apply.[57]

The final substantive judgment was delivered by Callinan J, who also held that a roads authority does not owe a non-delegable duty to a road user. His Honour doubted that 'there has ever been an entirely sound basis for a principle of

47 Ibid 58.
48 Ibid 66.
49 Ibid.
50 Ibid 75.
51 Ibid 76.
52 Ibid.
53 Ibid 70.
54 Ibid.
55 Ibid 76.
56 Ibid 74–5.
57 Ibid 76.

non-delegability'.[58] The doctrine was said to be of an unsatisfactory nature. The boundaries of liability were ill-defined, especially with respect to the exception for 'merely casual or collateral' negligence.[59] This is a reference to the fact that liability arises only for damage that is sufficiently related to the activities of the duty-holder — although reasonable minds might differ as to what these are. Callinan J fortified his conclusions by noting that 'recent authority of this court leans strongly against non-delegability and absolute [sic] liability in tort cases'.[60]

IV *LEICHHARDT* IN PERSPECTIVE

The most immediate issue for the High Court to determine in *Leichhardt* was whether a non-delegable duty should be recognised in circumstances concerning a roads authority and a pedestrian using an ordinary city street. The Court held that no non-delegable duty ought to be recognised and there can be little doubt about the defensibility of this position. I submit that the judges were right to notice qualitative differences between subsisting non-delegable duty categories and the position of the pedestrian. Such differences include: first, the lesser degree of control exercised by the roads authority over the general condition of the road compared with, for example, the degree of control a hospital has with respect to medical procedures;[61] and, secondly, the greater ability of the pedestrian to avoid dangers created on the roadway compared with a patient undergoing a medical procedure (especially when anaesthetised). In general, pedestrians are not as vulnerable to harm as anaesthetised hospital patients.

Undoubtedly, it would have been a significant step for the High Court to introduce a non-delegable duty in circumstances where the special highway rule had recently been abolished,[62] and where the obligation inherent in the non-delegable duty may have exposed the Council to a massive extension of liability for trips, falls and the like. One might even suppose that the imposition of a non-delegable duty would have been overturned quite quickly by the legislature.[63]

Another important issue that the Court was invited to rule upon concerned the fundamental nature of the non-delegable duty. This was a matter which attracted a substantial amount of agreement among members of the High Court in the earlier case of *Burnie Port Authority v General Jones Pty Ltd* ('*Burnie Port Authority*').[64] In that case, Mason CJ, Deane, Dawson, Toohey and Gaudron JJ held that the non-delegable duty is a 'special "personal" … duty of care under

58 Ibid 87.

59 Ibid 84. See above n 8 and accompanying text.

60 *Leichhardt* (2007) 230 CLR 22, 87.

61 See generally *Elliott v Bickerstaff* (1999) 48 NSWLR 214, 245 (Giles JA); *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553, 601–5 (Samuels JA); *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542, 561–2 (Reynolds JA); *Cassidy v Ministry of Health* [1951] 2 KB 343, 365 (Denning LJ).

62 *Brodie* (2001) 206 CLR 512.

63 This is especially so given the recent implementation of the *Civil Liability Act 2002* (NSW) and corresponding legislation in other states.

64 (1994) 179 CLR 520.

the ordinary law of negligence',[65] and that the degree of care required 'necessarily varies with the risk involved'.[66] However, the consensus in *Burnie Port Authority* has been undermined by two subsequent developments: the expression of competing views about the features of the non-delegable duty in *Lepore*;[67] and the abandonment of the *Burnie Port Authority* approach to determining duties of care in negligence in *Sullivan v Moody*.[68] The diversity of views in *Lepore* reflects the general disarray which has characterised the law of non-delegable duties across the Commonwealth.[69]

In *Leichhardt*, different majorities can be found to support a number of propositions about the non-delegable duty. First, each of the judges indicated that the non-delegable duty was a 'principle' of the law of tort rather than a freestanding tort.[70] Secondly, Gleeson CJ, Hayne and Crennan JJ supported the view that the non-delegable duty is similar in its effect to vicarious liability,[71] but goes further by permitting the principal's liability for the torts of others to be extended to encompass the defaults of an independent contractor.[72] Thirdly, and relating to the second point, Gleeson CJ, Hayne and Crennan JJ were of the view that the non-delegable duty involves the imposition of strict liability.[73] This contrasts with the obligation arising in negligence which requires no more than the taking of reasonable care. These views represent a departure from *Burnie Port Authority* in so far as they recognise the uniform strictness of the liability created.

However, the decision in *Leichhardt* is unlikely to be the last word upon the matter. It is a decision by a bench of five, rather than seven, justices of the High Court. Three of the five justices who sat on the case will retire by March 2009 (these being Gleeson CJ, Kirby and Callinan JJ).[74] Moreover, support amongst the sitting justices for the compound proposition that the non-delegable duty is a doctrine of strict liability similar to vicarious liability was not universal.

65 Ibid 552.

66 Ibid 554.

67 (2003) 212 CLR 511. Judgments in this case were somewhat incoherent. However, Gummow and Hayne JJ clearly conceived of the non-delegable duty as invoking strict liability: at 599.

68 (2001) 207 CLR 562. For commentary on this case, see Witting, 'Tort Law, Policy and the High Court of Australia', above n 14; Christian Witting, 'The Three-Stage Test Abandoned in Australia — Or Not?' (2002) 118 *Law Quarterly Review* 214.

69 This is the subject of express comment in *Leichhardt* (2007) 230 CLR 22, 37–8 (Kirby J).

70 Ibid 27 (Gleeson CJ, describing the duty as 'concerning the nature or content of the duty of care'), 52 (Kirby J, describing the duty as a 'sub-species' of 'particular torts'), 75–6 (Hayne J, describing the duty as a 'principle'), 83–4, 87–8 (Callinan J, describing the duty as a 'principle').

71 Ibid 29, 34–5 (Gleeson CJ), 70 (Hayne J). The view that the non-delegable duty is nothing other than a 'fictitious guise' for vicarious liability was propounded, inter alia, by John G Fleming, *The Law of Torts* (9th ed, 1998) 434.

72 *Leichhardt* (2007) 230 CLR 22, 27, 29 (Gleeson CJ), 76 (Hayne J). See also Kirby J at 40–1.

73 Ibid 29 (Gleeson CJ, Crennan J agreeing), 70 (Hayne J).

74 Callinan J retired on 1 September 2007, while Gleeson CJ must retire by 30 August 2008 and Kirby J by 18 March 2009: George Williams, 'Discerning Judge of Character', *The Australian* (Australia), 7 July 2007, 24. Callinan J has been succeeded by Kiefel J, who was appointed on 3 September 2007: *Current Members of the High Court*, High Court of Australia (2007) <http://www.hcourt.gov.au/kiefelj.htm>.

V EXPLORING THE NON-DELEGABLE DUTY[75]

The decision in *Leichhardt* puts forward a number of propositions about the non-delegable duty which lend themselves to comment. These are: (1) that the non-delegable duty is a subspecies of the tort of negligence; (2) that the non-delegable duty is a doctrine of strict liability which permits the principal's liability for the torts of another to be extended to encompass the defaults of an independent contractor; and (3) that the non-delegable duty is justified by the duty-holder's 'assumption of responsibility' (a matter to be explained below). Although all of these propositions are arguable, it will be submitted below that the Court erred in its determination of the fundamental nature of the non-delegable duty except to the extent that it recognised the duty as imposing strict liability. The preferable view of the case law is that the non-delegable duty is an independent tort of strict liability, which finds its rationale in the protection of bodily integrity.

A *The Non-Delegable Duty as a Tort Doctrine*

As stated previously, there was majority support in *Leichhardt* for the view that the non-delegable duty exists as a subspecies of extant torts. Gleeson CJ discussed the non-delegable duty as a doctrine of the law of negligence. His Honour also alluded to a different set of non-delegable duty cases relating to dangerous activities and the use of land, but did not consider it necessary to comment upon them further.[76] Kirby J accepted that the non-delegable duty arose in cases of negligence and nuisance. In so doing, he adopted the reasoning of academic writer John Murphy.[77] Under this conception, the non-delegable duty is said to encompass a superadded obligation of care.[78] Thus, Murphy asserts that:

> 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, 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.[79]

[75] Many of the ideas explored in this Part were developed at length in Witting, 'Breach of the Non-Delegable Duty', above n 36.
[76] *Leichhardt* (2007) 230 CLR 22, 31–3.
[77] Ibid 51–2. Murphy is the current editor of the influential English treatise *Street on Torts* (12th ed, 2007).
[78] Murphy, 'Liability Bases of Common Law Non-Delegable Duties', above n 38, 95.
[79] Ibid 99–100.

Contrary to the view of the majority in *Leichhardt*, there is a strong argument that the non-delegable duty is an independent tort with its own elements.[80] This is supported by evidence that the non-delegable duty 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.[81] The obligation that it imposes is tightly defined, arising primarily in cases of hospital and patient,[82] school authority and pupil,[83] employer and employee,[84] and occupier and neighbour.[85] In contrast to the position in negligence, the duty-holder cannot pass responsibility for fulfilling the duty to another person.[86] Additionally, breach of the non-delegable duty only gives rise to an action for personal injuries,[87] except in the case of a failure to provide lateral support.[88] Liability in the latter case is founded upon the *substantial risks* of personal injury that arise from the undermining of building foundations.[89] Furthermore, the non-delegable duty cases do not give rise to the wide problems of remoteness which occasionally plague the law of negligence.[90]

The non-delegable duty can also be distinguished from the tort of nuisance. Obligations arise not only in cases of neighbouring occupiers, but also in a number of other contexts. Unlike private nuisance, there is no question of balancing benefit and burden in cases where one occupier interferes with the land of another. The non-delegable duty is also non-derogable, its obligations being strictly enforced.[91] Moreover, whereas liability for private nuisance only

80 See Witting, 'Breach of the Non-Delegable Duty', above n 36, 37–48.

81 The general nature of the duty of care is attested to by the Court's formulation of tests for identifying duties of care: see *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 622–9 (Kirby J).

82 *Elliott v Bickerstaff* (1999) 48 NSWLR 214, 245 (Giles JA); *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553, 601–2 (Samuels JA); *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542, 561–2 (Reynolds JA); *Cassidy v Ministry of Health* [1951] 2 KB 343, 365 (Denning LJ).

83 *Commonwealth v Introvigne* (1982) 150 CLR 258.

84 *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906 ('*McDermid*'); *Wilsons* [1938] AC 57; *Kondis* (1984) 154 CLR 672.

85 *Dalton v Angus* (1881) 6 App Cas 740, 829 (Lord Blackburn); *Bower v Peate* (1876) 1 QBD 321; *Burnie Port Authority* (1994) 179 CLR 520.

86 *McDermid* [1987] AC 906, 919 (Lord Brandon); *Wilsons* [1938] AC 57, 84 (Lord Wright), 88 (Lord Maugham).

87 This is an inference to be drawn from the nature of the claims made in each of the non-delegable duty cases cited in this note (the lateral support cases aside). The inference is strengthened considerably by the re-characterisation of a small number of cases involving property damage, such as *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716; *Lister v Hesley Hall* [2002] 1 AC 215, 224–6 (Lord Slynn).

88 In such cases, claims have been made for damage to property: see, eg, *Bower v Peate* (1876) 1 QBD 321.

89 One notes, however, that a risk of injury is not the same as actual injury: Stephen Perry, 'Risk, Harm, Interests, and Rights' in Tim Lewens (ed), *Risk: Philosophical Perspectives* (2007) 190. The underlying contention of the present author is that the courts are desirous of eliminating risks of personal injury because these might manifest themselves as personal injury.

90 Undoubtedly this is because of the narrow definition of the duty in these cases.

91 For further support of the view that the non-delegable duty involves a 'distinct basis for … liability', see, eg, John Davies, 'Tort' in Peter Birks (ed), *English Private Law* (2000) vol 2, 517.

gives rise to damages for interference with property,[92] the non-delegable duty, as previously stated, ordinarily permits damages for personal injury only.

It is apparent that the non-delegable duty evolved as a *supplement* to ordinary claims in negligence and nuisance.[93] It can be pleaded in circumstances where those actions are *not* available.[94] However, being supplementary in nature, it is unsurprising to find that the kinds of obligations to which it gives rise are *derived* from those evident in actions of negligence and nuisance. For example, the non-delegable duty to ensure the physical safety of hospital patients often arises in circumstances where negligence cannot be pleaded because of the plaintiff's inability to prove that someone was at fault, whether it was hospital management, employee medical practitioner or consultant specialist.[95]

B *Strict Liability*

The next issue concerns the importance of fault in establishing the breach of a non-delegable duty. The obligation in non-delegable duty cases is often described in terms of a requirement that the defendant ensure reasonable care is taken by the wrongdoer.[96] According to Kirby J in *Leichhardt*, this phrase essentially denotes the duty as an affirmative one, requiring that action be taken where necessary in order to avoid the causation of injury.[97] This means that liability is imposed for omissions — in contrast to the position in cases of ordinary negligence[98] — so that the onus is upon the duty-holder to take action so as to 'ensure' the avoidance of injury.

A majority of the High Court in *Leichhardt* held that the non-delegable duty gives rise to strict liability. There is much to support this view,[99] including the history of the duty.[100] Early cases on the non-delegable duty involved attempts to circumvent rules of vicarious liability and were consistent with a willingness to

92 *Hunter v Canary Wharf Ltd* [1997] AC 655, 692 (Lord Goff); R P Balkin and J L R Davis, *Law of Torts* (3rd ed, 2004) 490; Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (5th ed, 2003) 472; Paula Giliker and Silas Beckwith, *Tort* (2000) 231–2; Michael A Jones, *Textbook on Torts* (8th ed, 2002) 356; W V H Rogers, *Winfield and Jolowicz on Tort* (16th ed, 2002) 522–3; Francis Trindade, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (4th ed, 2007) 175.

93 Witting, 'Breach of the Non-Delegable Duty', above n 36, 39.

94 See, eg, *Cassidy v Ministry of Health* [1951] 2 KB 343.

95 Ibid, where the plaintiff failed at trial to prove any negligence on the part of the hospital but on appeal the hospital was found to have breached its non-delegable duty to give proper treatment to the patient.

96 *Leichhardt* (2007) 230 CLR 22, 27 (Gleeson CJ), 63 (Kirby J), 68 (Hayne J). See also *Hughes v Percival* (1883) 8 App Cas 443, 446 (Lord Blackburn); *Blackwater v Plint* [2005] 3 SCR 3, 24 (McLachlin CJC); *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 332 (Brennan J), 368 (McHugh J); *Kondis* (1984) 154 CLR 672, 686 (Mason J); *Commonwealth v Introvigne* (1982) 150 CLR 258, 269 (Mason J).

97 *Leichhardt* (2007) 230 CLR 22, 65.

98 See *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 443 (Gibbs CJ), 478 (Brennan J), 502 (Deane J).

99 See Witting, 'Breach of the Non-Delegable Duty', above n 36, 46–7. See also Davies, above n 91, 516–17; Panel of Eminent Persons, *Review of the Law of Negligence: Final Report* (2002) 167 ('*Ipp Report*').

100 See, eg, *Leichhardt* (2007) 230 CLR 22, 76 (Hayne J); *Lepore* (2003) 212 CLR 511, 599–600 (Gummow and Hayne JJ). See also S Waddams, *Dimensions of Private Law* (2003) 104–5.

impose liability without personal fault.[101] The non-delegable duty was recognised, and continues to be recognised, in cases related to the strict liability[102] tort of nuisance.[103] The strictness of the liability is clearer still from the fact that the duty-holder can be held liable despite having taken reasonable care in the delegation of a task to another person. Taking reasonable care in such circumstances often means selecting the right person to actually perform the function. If such care is taken and yet the duty-holder is made liable, the effect is the imposition of strict liability. This is especially obvious in cases where 'management' is either incompetent to assess technical work standards or divorced geographically from the actual performance of the task in question.[104]

In *Leichhardt*, even Kirby J was prepared to accept that non-delegable duties can involve strict liability.[105] This means he accepted that liability can arise in some cases without the need for an inquiry into fault. Liability arises from the mere fact that injury to the plaintiff was caused by the task for which the defendant was responsible.

Some might find the notion of strict liability arising in cases of negligence to be incoherent. However, this assumes that negligence is a tort which depends upon fault in the doer, rather than in the doing of an activity. This assumption is viewed as erroneous by influential tort scholars. For example, Jules Coleman opined that

> [w]hether tort liability is strict or imposed on the basis of fault, it is not normally defeasible by excuses designed to establish the absence of moral or other fault in the doer (i.e., culpability defeating excuses). Thus, the standard of fault in torts is that of fault in the doing …[106]

Standards of care are set objectively and there is always the possibility that persons subject to obligations will not be able to reach the standards which are set. Tony Honoré argues persuasively that these are cases which effectively involve strict liability.[107] While this may be the effect, negligence claims obviously involve a judicial inquiry into fault, whereas strict liability torts and vicarious liability involve no such inquiry. Conceptually, there would seem to be little advantage in attempting to accommodate distinctive rules of strict liability within the tort of negligence.

The more contentious proposition attracting majority support in *Leichhardt* deals with the relationship between the non-delegable duty and vicarious liability. Gleeson CJ and Hayne J, with whose judgments Crennan J concurred, were of the view that the non-delegable duty extends the reach of vicarious

101 D Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) 181–4. See also Waddams, above n 100, 80–106.

102 See *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 367 (McHugh J).

103 See, eg, *Bower v Peate* (1876) 1 QBD 321; *Dalton v Angus* (1881) 6 App Cas 740; Murphy, 'Liability Bases of Common Law Non-Delegable Duties', above n 38, 98–101 (recognising the continuing validity of the 'nuisance' cases).

104 See, eg, *McDermid* [1987] AC 906.

105 (2007) 230 CLR 22, 52.

106 Jules L Coleman, *Risk and Wrongs* (1992) 333–4.

107 Tony Honoré, *Responsibility and Fault* (1999) 14.

liability.[108] However, it is submitted that this is an erroneous view. Time and again, courts have stressed that the non-delegable duty gives rise to personal liability in the duty-holder.[109] This was emphasised in *Leichhardt* by Kirby J. His Honour observed that non-delegable duties are 'personal' and 'not derivative' in nature.[110] The duty-holder is the person required to ensure that proper systems, processes or procedures for avoiding injury are put into place. It is for this reason that the duty-holder might be made liable for the acts of employees, independent contractors or those acting gratuitously.[111] Moreover, the non-delegable duty cannot be confined to cases involving three parties, as can vicarious liability. It can also be pleaded in cases where there is no intermediate party who can be blamed for the commission of a tort, allowing liability to be brought home to the duty-holder.[112] Even in the three party cases, the plain intention of the courts is to make irrelevant the questions of authorisation which remain central to vicarious liability.[113]

C *Justifications for the Non-Delegable Duty*

The final issue that requires comment concerns the justifications for the imposition of non-delegable duties. Justifications should explain not only those cases in which liability has been recognised, but also those in which it has not. This has proven a source of difficulty for the High Court of Australia. Aside from the employer's vicarious liability, the common law has favoured the imposition of liability upon those most closely responsible for the causation of harm. Indeed, Kirby J held that 'persons should not ordinarily be liable to others in tort without fault of some kind on their own part'.[114]

The High Court's previously expounded justifications for recognising non-delegable duties, given in *Burnie Port Authority*,[115] have little explanatory value.[116] In that case, Mason CJ, Deane, Dawson, Toohey and Gaudron JJ held that non-delegable duties arise in circumstances where

108 *Leichhardt* (2007) 230 CLR 22, 35 (Gleeson CJ), 70 (Hayne J).

109 See, eg, *Scott v Davis* (2000) 204 CLR 333, 416 (Gummow J); *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 330 (Brennan CJ), 350 (Toohey J), 369 (McHugh J), 402 (Kirby J); *McDermid* [1987] AC 906, 910 (Lord Hailsham); *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, 190 (Lord Oaksey), 194 (Lord Reid); *Wilsons* [1938] AC 57, 70 (Lord Thankerton), 75 (Lord Macmillan), 80, 83–4 (Lord Wright), 88 (Lord Maugham). Cf *Kondis* (1984) 154 CLR 672, 687 (Mason J).

110 *Leichhardt* (2007) 230 CLR 22, 54.

111 See, eg, Jones, above n 92, 420.

112 See, eg, *General Cleaning Contractors Ltd v Christmas* [1953] AC 180; J P Swanton, 'Non-Delegable Duties: Liability for the Negligence of Independent Contractors' (Pt I) (1991) 4 *Journal of Contract Law* 183, 187–8.

113 *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, a case involving no intermediary or employee causing injury. Compare this to the position in vicarious liability: *Bazley v Curry* [1999] 2 SCR 534, 559 (McLachlin J); *Lepore* (2003) 212 CLR 511, 591 (Gummow and Hayne JJ).

114 *Leichhardt* (2007) 230 CLR 22, 60 (Kirby J).

115 (1994) 179 CLR 520, 550–2 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

116 The reasons that have been given for imposing non-delegable duties have been described as 'very general' in nature: *Leichhardt* (2007) 230 CLR 22, 63 (Kirby J). See also *Scott v Davis* (2000) 204 CLR 333, 417, where Gummow J observed that the *Kondis* criteria, as accepted in

> the person on whom [the duty] is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised.[117]

In *Leichhardt*, Kirby J adopted similar reasoning, hanging his justificatory hat upon the concept of the 'assumption of responsibility'.[118] A frequently quoted interpretation of the phrase 'assumption of responsibility' is that of Lord Steyn in *Williams v Natural Life Health Foods Ltd*, who opined that '[t]he touchstone of liability is not the state of mind of the defendant. … [T]he primary focus must be on things … done by the defendant'.[119] Murphy believes that 'the creation of an exceptional risk can be invoked to justify the imputation to the defendant of an "assumed" responsibility if the defendant does not voluntarily undertake such a duty'.[120]

In answering these claims, it is worth noting that the concept of an 'assumption of responsibility' has been plagued by difficulty in cases of negligence.[121] The very fact that an *assumption* of responsibility may be *imputed* to the duty-holder indicates that the concept does not rest upon any subjective intention or desire of the duty-holder. Indeed, one might wonder why the duty-holder would want to assume any kind of responsibility outside contract towards injured persons. It seems that the best explanation of why liability is imposed in non-delegable duty cases concerns something other than the duty-holder's attitude (real or imputed) regarding their 'responsibility'. Liability depends upon matters external to the duty-holder's state of mind; it depends upon the circumstances in which they act. Indeed, the cases can be explained by pointing to the external circumstances which invariably prevail.

The 'assumption of responsibility' rationale does not explain satisfactorily why it is that non-delegable duties are recognised in the four accepted categories involving hospitals, school authorities, employers and occupiers[122] but not, for example, in cases of motor vehicle owners and pedestrians.[123] Each of these cases could be seen to answer the *Burnie Port Authority* criteria. To the extent

Burnie Port Authority, are 'historically descriptive but not normatively predictive'. His Honour noted that 'many other cases not decided on that basis also may have answered the criteria': at 417. See also *Elliott v Bickerstaff* (1999) 48 NSWLR 214, 240 (Giles JA).

117 *Burnie Port Authority* (1994) 179 CLR 520, 551, quoting *Kondis* (1984) 154 CLR 672, 687 (Mason J).

118 (2007) 230 CLR 22, 64.

119 [1998] 2 All ER 577, 835. This passage was quoted in John Murphy, 'Juridical Foundations of Common Law Non-Delegable Duties' in Jason W Neyers, Erika Chamberlain and Stephen G A Pitel (eds), *Emerging Issues in Tort Law* (2007) 385.

120 Murphy, 'Juridical Foundations of Common Law Non-Delegable Duties', above n 119, 386.

121 I have previously concluded that the concept has little real meaning divorced from the circumstances of an injurious interaction and that, in negligence cases, it is necessary to examine the factual features linking the parties (formerly denominated as the inquiry into 'proximity'): see Christian Witting, *Liability for Negligent Misstatements* (2004) 174.

122 See above nn 82–4.

123 For a similar comment, see Glanville Williams, 'Liability for Independent Contractors' [1956] *Cambridge Law Journal* 180, 185.

that it has any explanatory depth, the assumption of responsibility rationale is over-inclusive. The result is that the analysis of non-delegable duty cases needs to be more detailed.

Although liability for the breach of a non-delegable duty does not always conform to ideals of agent-focused responsibility, the form of liability embodied within it can be justified.[124] It is submitted that the primary purpose of liability is the protection of bodily integrity. The four accepted categories of non-delegable duty all involve situations in which activities potentially give rise to personal injuries, although this is not their only distinctive characteristic. Protection is strict because courts have chosen to favour such protection over the exercise of autonomy by the defendant. This choice is fortified by the important fact that non-delegable duty-holders are engaged in ongoing activities (offering medical services, educational services, organising work, and occupying land) and can, over time, act to avoid risks of harm through the introduction of appropriate systems, processes and procedures.[125] A similar rationale could not easily be applied to the case of the vehicle-owner who allows another to drive their vehicle. The ongoing nature of the activities in the non-delegable duty cases provides the opportunity to reduce risks and justifies a wider temporal focus than that employed in cases of fault-based liability.

VI CONCLUSION

In *Leichhardt*, the High Court of Australia was faced with two important questions. First, it was required to rule on whether a roads authority owes a non-delegable duty to a pedestrian using the road. The Court held that a roads authority owes only the ordinary duty of care in negligence to road users. It has been demonstrated that this position is defensible given the lesser degree of vulnerability suffered by the road user than is typical in non-delegable duty cases involving, inter alia, hospital patients and schoolchildren.

Secondly, the Court was invited to comment upon the nature of the non-delegable duty. The Court has potentially assisted in the clarification of the law in this area, with a majority opting to view the non-delegable duty as a tort doctrine giving rise to strict liability. The Court ruled that the duty is *not an independent tort*; it must be pleaded as part of an action in negligence (or nuisance).

This case note has argued that the non-delegable duty is best seen as an *independent* tort of strict liability. The non-delegable duty has been recognised in order to provide a powerful incentive to duty-holders to take proper precautions and to put in place systems, processes and procedures that avoid the causation of injury to persons. It represents an attempt to impose strict liability upon the

[124] See Witting, 'Breach of the Non-Delegable Duty', above n 36, 48–59.

[125] For a discussion of relevant policy issues, see Jennifer H Arlen and W Bentley MacLeod, 'Beyond Master–Servant: A Critique of Vicarious Liability' in M Stuart Madden (ed), *Exploring Tort Law* (2005) 113, where it is argued that 'organizations able to optimally regulate their agents' care-taking should be held directly liable for their agents' torts whenever individual tort liability alone cannot ensure that agents and principals bear the full cost of agents' torts'. The authors discussed the ability of the organisation to regulate activity: at 120.

duty-holder where the duty-holder has, over the longer term, an important capacity to protect bodily integrity.[126]

[126] Witting, 'Breach of the Non-Delegable Duty', above n 36, 57–9.