Australian and New Zealand Tort and Compensation Researchers and Teachers Network Symposium 2026

Monday 16 February & Tuesday 17 February 2026
Bond University and Online

"Non-delegable duty and intentional torts: *AA v Trustees of the Roman Catholic Church* before the High Court of Australia"

Associate Professor Neil Foster[1]

The doctrine of non-delegable duty ("NDD") is one of the tools used by the common law to impose strict liability on persons and entities for wrongs committed by others acting on their behalf. Unlike the doctrine of vicarious liability, which only applies in relation to the actions of employees (especially since the High Court decision in *Bird v DP (a pseudonym)* [2024] HCA 41; (2024) 419 ALR 552), NDD can apply to wrongs committed by those who are not employees. The classic NDD cases have involved negligence committed by an independent contractor that has caused harm to a victim who is in a relationship of a particular sort with the principal on whose behalf the contractor was acting. One of those categories covers organisations entrusted with the care of children. As such the NDD doctrine would seem to be a good basis for a claim against a school, church or youth club which has undertaken responsibility for young people when they are harmed by abuse. However, the majority of the High Court of Australia previously indicated in *NSW v Lepore* (2003) 212 CLR 511 that intentional torts like battery were excluded from the operation of the doctrine. More recently the High Court has heard an appeal from a decision of the NSW Court of Appeal raising this issue for consideration, and delivered its decision: *AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* [2026] HCA 2 (11 Feb 2026). This paper analyses how the court has now extended the law of NDD to allow intentional tort claims to succeed. It also discusses how, consistently with previous authority, courts should determine the question as to whether intentional torts committed by a contractor should be regarded as occurring "in the course of" executing the relevant contract, to provide a sensible limit on such claims.

Introduction

The principle of non-delegable duty ("NDD"), like that of vicarious liability ("VL"), allows strict liability to be imposed on a "superior" party who has engaged someone to carry out work for them, when that person commits a tort.[2] While this principle has operated for many years in the area of negligent workplace injuries, and in other examples of negligence, more recently the question has been presented: could it be used to hold organisations strictly liable when intentional torts (especially such as sexual battery) have been committed.

A major issue in seeking to provide compensation for those who are the victims of child abuse committed in an institutional context is whether the institutions for whom the perpetrators worked can be held strictly liable (that is, liable without need to show actual fault of the institution). This flows from the fact that many perpetrators are either deceased, or cannot be found, or otherwise are unable to pay full compensation. Of course, where the perpetrator's actions were known or generally foreseeable, and appropriate responses or protections were not in place, then a civil suit based on the actual negligence of the institution may be possible. But, as often has happened, where the perpetrator has concealed their activities and was not known or suspected to be a danger, what is needed is an avenue to

[1] BA/LLB (UNSW); BTh (Moore); DipATh (ACT); LLM (Newc) - Associate Professor of Law, School of Law and Justice, University of Newcastle, NSW, Australia; neil.foster@newcastle.edu.au . This paper is a preliminary draft, comments welcome.
[2] See N Foster, "Convergence and Divergence: the Law of Non-delegable Duties in Australia and the United Kingdom" in A Robertson & M Tilbury *Divergences in Private Law* (Oxford: Hart, 2016), 109-134.

impose strict liability on institutions. But in cases involving abuse committed by clergy, problems have arisen.

The common law of Australia classifies those who undertake paid work for another into only one of two categories: someone who does this is either an employee or an independent contractor. This has been held to be a clearly "binary" choice, with no intermediate common law classification.[3] This raises some difficult questions for religious bodies- it has long been held that ministers of religion are not usually employees, but some churches still seem to want to classify clergy as something other than independent contractors.[4] However that may be, a clear consequence of the "non-employee" status of clergy is that, in Australia, the churches for whom they work cannot be held strictly liable for torts they commit under the doctrine of vicarious liability.

Courts in the UK have been willing to extend vicarious liability to those who are "akin" to employees, but the decision of the High Court of Australia in *Bird v DP (a pseudonym)*[5] now makes it clear that employment is the primary, and arguably the sole, common law relationship grounding vicarious liability.[6]

The alternative doctrine of NDD, however, can apply to wrongs committed by those who are not employees. The classic NDD cases have involved negligence committed by an independent contractor that has caused harm to a victim, who is in a relationship of a particular sort with the principal on whose behalf the contractor was acting. So, in *Kondis v State Transport Authority*,[7] it was established that employees are owed an NDD by employers. Other than the category of schools and pupils noted in more detail below, other well-established Australian categories of relationship where an NDD is owed to a victim of harm are hospitals and patients (*Ellis v Wallsend District Hospital*)[8], occupiers and contractual entrants onto premises (*Calin v Greater Union Organisation Pty Ltd*)[9], occupiers of premises in relation to dangerous activities causing harm to those nearby (*Burnie Port Authority v General Jones Pty Ltd)*,[10] and possibly prison authorities to prisoners (see eg *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs).*[11]

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[3] See eg Gageler & Gleeson JJ in *ZG Operations Australia Pty Ltd v Jamsek* (2022) 275 CLR 254, [2022] HCA 2 ("*ZG v Jamsek*") at [85]: "For the purposes of determining who is an "employee" at common law, the distinction between an employee and an independent contractor is and has always been a true dichotomy." See for the same "binary" point, North and Bromberg JJ in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37 at [173].

[4] For example, in *Bird v DP (a pseudonym)* [2023] VSCA 66, the court noted at [77] that the church argued that Father Coffey was neither an employee nor an independent contractor.

[5] [2024] HCA 41; (2024) 419 ALR 552 ("*Bird"*).

[6] Other relationships were classified as agency or under the heading of "non-delegable duty". See *Bird* at [5] and [48] for clear comments that an employment relationship is essential for vicarious liability to arise. It may be noted that it has long been accepted that the commercial relationship of partnership creates vicarious liability in partners for the wrongs of fellow partners in some circumstances. Partnership as a category of vicarious liability was not explicitly addressed in *Bird*; it may be that since most such cases today rely on specific statutory provisions, such as s 10 of the *Partnership Act* 1892 (NSW), this is now to be regarded as a "statutory vicarious liability" rather than arising under the common law. Or it may simply be that partnership was not at issue in *Bird*.

[7] (1984) 154 CLR 672.

[8] (1989) 17 NSWLR 553.

[9] (1991) 173 CLR 33.

[10] (1994) 179 CLR 520.

[11] [2005] FCA 549 at [209] per Finn J. For a review of these cases, see Foster, "Convergence", above n 2, cited by the Full Court of the Federal Court (Davies, Gleeson and Edelman JJ) in *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* [2016] FCAFC 78 at [64] and in the High Court of Australia by Edelman and

One of these categories covers organisations entrusted with the care of children.[12] As such the NDD doctrine would seem to be a good basis for a claim against a school, church or youth club which has undertaken responsibility for young people when they are harmed.

However, the majority of the High Court of Australia indicated in *NSW v Lepore*[13] that intentional torts like battery were excluded from the operation of the doctrine. The High Court has now handed down its decision on appeal from a decision of the NSW Court of Appeal[14] raising this issue for consideration. The High Court decision is *AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* [2026] HCA 2 (11 Feb 2026) (hereafter, *AA HC*). The decision overturns the previous ruling in *Lepore*.

This paper aims to provide general background to the NDD doctrine, and then to begin to explore the "significant effect" on the common law which that decision will now have.[15]

The paper argues that the majority made precisely the correct decision that the law should be changed to allow NDD to operate in relation to intentional torts (in particular the tort of battery, which is the main tort involved in child abuse cases). The paper also explores how, consistently with previous authority, courts should determine the question as to whether intentional torts committed by a non-employee should be regarded as occurring in the course of executing the relevant contract.

General principles of NDD

Leading up to the decision in *AA* HC, there have been a few recent explanations of the NDD principle in High Court decisions. These comments were offered in cases where the principle did not need to be applied, but they were clearly seriously considered *obiter,* and suggested how the court would deal with the matter when a case required a ruling on the issues (as of course *AA HC* did).

In *CCIG Investments Pty Ltd v Schokman*[16] Edelman and Steward JJ commented by way of overview:

> [70] A non-delegable duty arises where "the nature of the relationship of proximity gives rise to a duty of care of a special and 'more stringent' kind, namely a 'duty to ensure that reasonable care is taken'"[17]. The nature of the relationship, including where there is an undertaking of "care, supervision or control of the person or property of another", is one in which the defendant has assumed the particular responsibility to

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Steward JJ in *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165; [2023] HCA 21, (2023) 97 ALJR 551 at [81] n 175.

[12] *Commonwealth v Introvigne* (1982) 150 CLR 258, and more recently accepted in the UK in *Woodland v Swimming Teachers Association* (sub nom *Woodland v Essex CC)* [2013] UKSC 66, [2014] AC 537.

[13] (2003) 212 CLR 511.

[14] *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* [2025] NSWCA 72. For the transcript of argument see *AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle ABN 79469343054* [2025] HCATrans 53 (7 August 2025).

[15] *AA HC,* per Edelman J at [341]. There were passing comments by Edelman J in *Willmot v Queensland* (2024) 419 ALR 623, [2024] HCA 42 at [112] n 165 which seemed to suggest that liability for intentional torts using NDD was already available so long as a claim was "framed" in terms of a failure of reasonable care. Such framing, it seems, will not be necessary in light of the court's decision discussed here.

[16] (2023) 278 CLR 165; [2023] HCA 21.

[17] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550; *New South Wales v Lepore* (2003) 212 CLR 511 at 598 [254]. See also *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686.

> ensure that reasonable care is taken rather than merely to take reasonable care. The assumption of responsibility is such that the person affected might reasonably expect that the defendant has assumed that higher duty[18]. A core instance of a non-delegable duty at common law, although frequently now provided for by legislation, is the duty that an employer usually owes to employees to provide a safe system of work. That common law duty is "non-delegable and the [employer is] liable for any negligence on the part of its independent contractor [or employee] in failing to adopt a safe system of work"[19].

In *Bird* the plurality (Gageler CJ, Gordon, Edelman, Steward & Beech-Jones JJ) summed up the law in this way:

> [36]… A "non-delegable" or "personal" duty of care is "a duty ... of a special and 'more stringent' kind".[20] It is not merely a duty to take care, but a "duty to ensure that reasonable care is taken";[21] to "ensure that the duty is carried out";[22] or to "procur[e] the careful performance of work [assigned] to others".[23] Liability for breach of a non-delegable duty is therefore direct – not vicarious.[24]
> [37] Such duties of care have been recognised as arising out of relationships of employer and employee;[25] school and pupil;[26] hospital and patient.[27] That list is not exhaustive. Such a duty arises where the nature of the relationship between the defendant and the other person to whom the duty is owed is one where the defendant has assumed particular responsibility to ensure that care is taken, rather than merely to take reasonable care. For example, where the defendant has "undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or [their] property as to assume a particular responsibility for [their] or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised".[28] A "core instance" of a non-delegable duty at common law is the duty that an employer usually owes to employees to provide a safe system of work.[29] Under that non-delegable duty, the employer is liable for any negligence on the part of its independent contractor or employee in failing to adopt a safe system of work.[30]

There was also a broad outline of NDD in *Pafburn Pty Limited v The Owners - Strata Plan No 84674*[31] per Gageler CJ, Gleeson, Jagot & Beech-Jones JJ:

> [20] Generally, a "non-delegable duty" is a type of duty of care which, if owed by a person, means that the person cannot exclude or limit their liability for conduct within the scope of the duty of care causing reasonably foreseeable harm merely by the person exercising reasonable care in arranging for another

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18 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687. See also *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550-552.

19 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 688.

20 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550, quoting *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686. See also *Lepore* (2003) 212 CLR 511 at 530 [25], 551-552 [101], 598 [254]; *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 at 27 [6].

21 *Kondis* (1984) 154 CLR 672 at 686 (emphasis added). See also *Introvigne* (1982) 150 CLR 258 at 270-271; *Burnie Port Authority* (1994) 179 CLR 520 at 550; *Lepore* (2003) 212 CLR 511 at 551-552 [101], 598 [254].

22 *Lepore* (2003) 212 CLR 511 at 565 [144].

23 *Woodland v Swimming Teachers Association* [2014] AC 537 at 573 [5].

24 *Introvigne* (1982) 150 CLR 258 at 271, 275, 279; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 329-330; *Schokman* (2023) 97 ALJR 551 at 567-568 [70]-[73]; 410 ALR 479 at 497-499. See also *Lepore* (2003) 212 CLR 511 at 562 [136].

25 See, eg, *Kondis* (1984) 154 CLR 672.

26 See, eg, *Introvigne* (1982) 150 CLR 258.

27 See, eg, *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542 at 561-562 [59]; *Introvigne* (1982) 150 CLR 258 at 270, 275; *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 601-604.

28 *Lepore* (2003) 212 CLR 511 at 533-534 [35], quoting *Kondis* (1984) 154 CLR 672 at 687. See also, eg, *Burnie Port Authority* (1994) 179 CLR 520 at 550-551; *Schokman* (2023) 97 ALJR 551 at 567 [70]; 410 ALR 479 at 497-498.

29 *Schokman* (2023) 97 ALJR 551at 567 [70]; 410 ALR 479 at 497-498, citing *Kondis* (1984) 154 CLR 672 at 688.

30 *Kondis* (1984) 154 CLR 672 at 688.

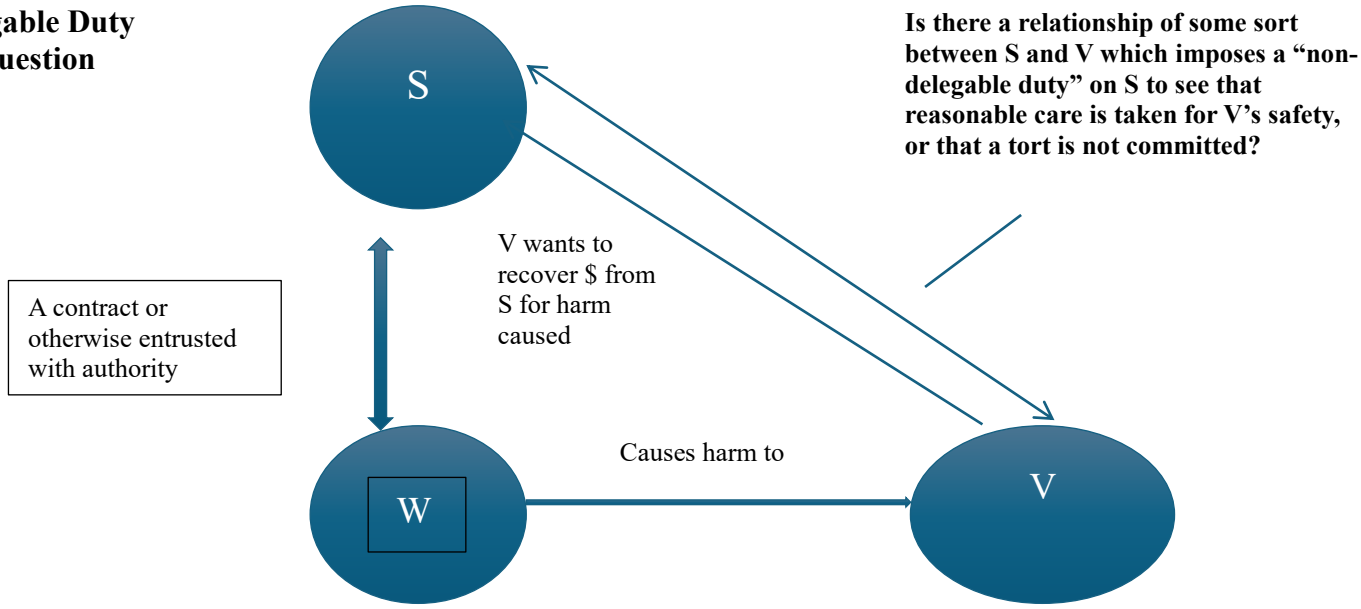
31 [2024] HCA 49; (2024) 99 ALJR 148.

> person to perform the function to which the non-delegable duty of care attaches. That is, although the function to which a non-delegable duty of care attaches is "delegable" in that the person subject to the duty may procure performance of any function within the scope of the duty by another person**, the non-delegable duty is not satisfied merely by the taking of reasonable care by the person subject to the duty**, because the content of the duty is **personally to ensure** that that other person performing the function in fact takes reasonable care.[32] Liability for breach of a non-delegable duty, therefore, is generally considered to be **"direct" or "personal" liability** (because the person subject to the non-delegable duty is taken to have breached that duty by not ensuring that reasonable care was taken by the other person performing the function) **rather than "vicarious" liability** (in which the person is taken to be liable for another person's breach of a duty of care owed by that other person in respect of the relevant act or omission constituting the wrong).[33] In both cases the person subject to the duty is made, by law, "the insurer of some activity even when it is performed by another".[34] (emphasis added)

To distinguish the operation of the NDD principle from vicarious liability, it may be helpful to refer to the diagram below. Assume a wrongdoer W (in later discussion sometimes called a "delegate"), a victim V, and the allegedly liable "superior" party S (sometimes called the "principal"). In cases of ***vicarious liability***, the main question is as to relationship between **S and W**, to determine S's liability (ie is W an employee of S?)

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

The Non-delegable Duty Question



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[32] *New South Wales v Lepore* (2003) 212 CLR 511 at 527-529 [20]-[21]; *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 at 29 [9]. See also *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 270; *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906 at 910; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 350.

[33] *Bird v DP (a pseudonym)* [2024] HCA 41 at [36], [219].

[34] *Scott v Davis* (2000) 204 CLR 333 at 416 [248].

In the UK Supreme Court decision in *Woodland v Essex County Council*[35] Lord Sumption at [15] noted that in a case involving a hospital Lord Denning had adopted this sort of approach (the focus being on the relationship between the victim and the principal):

> Denning LJ considered that the critical factor was **not the hospital's relationship with the doctor or surgeon, but its relationship with the patient**, arising from its acceptance of the patient for treatment.[36] (emphasis added)

Some myths about NDD

Terminology in this area has caused some confusion. The NDD doctrine creates strict liability for a principal whose contractor has harmed a victim to whom the principal owes a "non-delegable duty". Using NDD to hold a principal liable does *not* involve identifying some personal failure of due care by the principal. Gordon J commented on this in *AA HC* at [274]:

> Where a duty-holder is liable for the breach of a non-delegable duty by reason of the conduct of a delegate, there is no requirement that the duty-holder themselves acted negligently. In that sense, the duty-holder's liability is strict.

I commented on some of these issues in an earlier paper.[37] However, it should also be stressed that NDD liability only arises where the delegate has committed a wrong; it is not "absolute" in the sense that *any* harm suffered by a victim while in relationship with the principal can be sheeted home to the duty-holder.

This is what the plurality says in *AA HC* at [31]:

> … Accordingly, it is not right to conceive of the non-delegable duty as imposing absolute liability. Although a non-delegable duty may result in liability being imposed on the duty-holder without personal fault on the part of the duty-holder, **the non-delegable duty-holder cannot be liable for breach of a non-delegable duty unless either the duty-holder personally or the delegate has defaulted** in the taking of reasonable care in respect of the person to whom the duty is owed. Consistent with the view of McHugh J, an intentional criminal act of a delegate which injures the person to whom the duty-holder owes the non-delegable duty is necessarily a failure by the delegate to take reasonable care and therefore a failure by the duty-holder to ensure that reasonable care is taken.

Hence the liability can be described as "strict" (attaching to the duty-holder whether or not they were personally at fault), but not "absolute" (not arising merely because some harm has been suffered).

One consequence of the above, especially the "strict liability" point, is those courts who have in the past examined a breach of NDD by considering what was done, or should have been done, by the principal have been in error.[38]

In *Rail Corporation New South Wales v Donald; Staff Innovations Pty Ltd t/as Bamford Family Trust*[39] Beazley ACJ commented:

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[35] Above, n 12
[36] Citing *Cassidy v Ministry of Health* [1951] 2 KB 343.
[37] Above, n 2 at 111-112.
[38] For one example, see *Placer (Granny Smith) Pty Ltd v Specialised Reline Services Pty Ltd* [2010] WASCA 148, discussed in Foster (2016) above n 2 at 125-126.
[39] [2018] NSWCA 82.

> [225] Staff Innovations was Mr Donald's employer and as such, it owed him a non-delegable duty of care, which it accepted. This was so notwithstanding that it hired his services out to Rail Corp and thus had not devised the system of work under which Mr Donald was required to work or been directly responsible for its implementation. In this regard, where a non-delegable duty of care is owed, the person or entity owing the duty will be **liable regardless of any personal fault on their part, provided that the plaintiff establishes that the damage or injury "was caused by lack of reasonable care on the part of someone … within the scope** of the relevant duty of care": *TNT Australia Pty Ltd.* (emphasis added)

For a more recent comment to the same effect, in a case where an employee of a labour hire firm was injured when working under the supervision of a "host", see *Synergy Scaffolding Services Pty Ltd v Alelaimat*[40], where Simpson AJA (Meagher and Kirk JJA agreeing) observed:

> [102] Generally, it has been accepted that the reasoning in *Kondis* to the effect that an employer cannot escape liability for injuries negligently inflicted on an employee by an independent contractor **applies equally to injury negligently inflicted by a client to whom the employer (a labour-hire company) has contracted the services of the employee**. … Indeed, it has been said that the duty of an employer in such cases may be greater — see *Christie* at [67], where Mason P said that the very fact that employees are despatched to external venues and placed under the *de facto* management of outsiders will, in some cases, have the practical effect of requiring the employer to take additional measures by way of warnings or training in order to discharge its continuing common law duty of care to employees.[41]
>
> …
>
> [106] In labour-hire arrangements, it is **no answer** to a claim by an employee injured by the negligence of the contracting party for the employer to **say that it took what steps it could** to ensure that the contracting party acted reasonably in the provision of a safe system of work. Nor is it an answer to say that the employer company did not have the opportunity to intervene to prevent the injury (although that consideration, too, may be highly material to the apportionment of liability between the employer and the non-employer). If the contracting party is negligent then, notwithstanding that the employer has taken steps to satisfy itself that the contracting party will provide a safe system of work, the employer will be liable to the injured employee as a joint tortfeasor with the non-employer.

In another case where an allegation of NDD formed part of a claim for damages for child sexual abuse, the plurality of the High Court (Gageler CJ, Gordon, Jagot and Beech-Jones JJ) in *Willmot v Queensland*[42] said at [49]:

> Recalling that a "non-delegable" or "personal" duty of care is "a duty ... of a special and 'more stringent' kind"[43] and not merely a duty to take care, but a "duty to ensure that reasonable care is taken";[44] to "ensure that the duty is carried out";[45] or to "procur[e] the careful performance of work [assigned] to others",[46] there is no question about what steps the State took or could reasonably have taken to prevent the alleged harm. Put another way, Ms Willmot's claims of breach **do not call for an inquiry into the adequacy of the steps taken by the State** to ensure that reasonable care was taken for Ms Willmot's

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[40] [2023] NSWCA 213.

[41] The reference to *Christie* is a reference to the decision in *TNT Australia Pty Ltd v Christie* (2003) 65 NSWLR 1; [2003] NSWCA 47 (NF).

[42] (2024) 419 ALR 623, [2024] HCA 42.

[43] *Bird v DP (a pseudonym)* [2024] HCA 41 at [36]-[37]. See also *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550, quoting *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686; *New South Wales v Lepore* (2003) 212 CLR 511 at 530 [25], 551-552 [101], 598 [254]; *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 at 27 [6].

[44] *Kondis* (1984) 154 CLR 672 at 686 (emphasis added). See also *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 270-271; *Burnie Port Authority* (1994) 179 CLR 520 at 550; *Lepore* (2003) 212 CLR 511 at 551-552 [101], 598 [254].

[45] *Lepore* (2003) 212 CLR 511 at 565 [144].

[46] *Woodland v Swimming Teachers Association* [2014] AC 537 at 573 [5].

> safety while she was in foster care, at the Girls' Dormitory, or in the care of her relatives while away from Cherbourg. As Mason J observed, even in the context of a non-delegable duty owed by school authorities, "the duty is not discharged by merely appointing competent teaching staff and leaving it to the staff to take appropriate steps for the care of the children. It is a **duty to ensure that reasonable steps are taken** for the safety of the children, a duty the performance of which cannot be delegated."[47]

It would also be an error to suppose that NDD is merely a part of the law of negligence. As we will see, there is still some difference of approach within the High Court on this issue. But I argue that we cannot simply regard NDD as a part of the tort of negligence alone. Rather, it seems that the better view is that it is a *principle of strict liability* for a *separate* tort committed by the actual tortfeasor, usually a contractor engaged by the principal to carry out some task, or to supervise the victim in some way. That separate tort will, it is true, often be the tort of negligence; but NDD has been applied to other tort actions, such as the action for breach of statutory duty.[48]

For example, if a statutory duty to ensure safety is cast upon the occupier of premises, and if an employee is injured due to a breach of that duty, the occupier cannot avoid liability in a breach of statutory duty action, by noting that the breach was due to the actions of a contractor.[49] Indeed, if the duty is a strict duty, not requiring demonstration of fault, then there will be liability for the actions of the contractor, even if the contractor is not at fault.[50]

But where NDD liability is imposed for the tort of negligence, it will be necessary to show that the contractor was at fault in breaching a duty of care. See for example the comments of Mason J in *Kondis v State Transport Authority,*[51] noting that NDD imposes liability for a failure of due care by someone else, not simply for failure to produce a particular "state of affairs". His Honour refers to the principle in these terms:

> the respondent's duty to provide a safe system of work was non-delegable and the respondent was liable for **any negligence on the part of its independent contractor** in failing to adopt a safe system of work. (emphasis added)[52]

Nor is NDD a tort action itself. Kirby J in *Leichhardt Municipal Council v Montgomery*[53] rejected any suggestion that NDD was itself a separate tort action; see paras [71]-[73], where he accepts the views put forward in an article by John Murphy[54]:

> [W]hile 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. … [N]on-delegable duties have in common *only* the fact that they are all premised upon an affirmative duty arising out of an assumed responsibility … their *necessary* juridical connections end there.

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47 *Introvigne* (1982) 150 CLR 258 at 269-270; see also 271-272, 279.

48 For discussion of this action generally, see N Foster "The Merits of the Civil Action for Breach of Statutory Duty" (2011) 33 *Sydney Law Review* 67-93.

49 See *Braham v J Lyons & Co Ltd* [1962] 3 All ER 281, per Lord Denning MR at 283E-F.

50 See K Stanton et al *Statutory Torts* (London, Sweet & Maxwell, 2003) at [8.027], and *Hosking v De Havilland Aircraft Co Ltd* [1949] 1 All ER 540, cited there. See also *Clerk & Lindsell on Torts,* 20th ed (London, Sweet & Maxwell, 2010) at [6-58].

51 *Kondis v State Transport Authority* (1984) 154 CLR 672.

52 *Kondis,* ibid, at 688. See also Deane J, agreeing with the judgment of Mason J at 694, citing Windeyer J in *Voli v Inglewood Shire Council* (1963) 110 CLR 74, at 95.

53 (2007) 230 CLR 22; [2007] HCA 6.

54 See J Murphy, "The Liability Bases of Common Law Non-Delegable Duties- A Reply to Christian Witting" (2007) 30 *UNSW Law Jnl* 86-102.

NDD in relation to children

One of the classic examples of the application of the NDD principle, as noted above, is the rule that a duty of care owed by schools to their pupils is non-delegable. This was established in Australia in *Commonwealth of Australia v Introvigne*.[55] The Commonwealth had contracted with the State of NSW to provide teachers for a school in the ACT. When a student was injured to due lack of appropriate supervision in the playground, the High Court held that the Commonwealth was in breach of a non-delegable duty of care, and could be held strictly liable for the harm caused by a contracted teacher.[56] In Australia *Introvigne* has been applied in other cases involving schools, either general schools or "school-like" activities where children learn other skills.

In *Fitzgerald v Hill*[57] the Queensland Court of Appeal held that the decision in *Introvigne* could be extended slightly to cover the situation of a child injured in a recreational activity while under the supervision of a business owner. In *Harris v Trustees of the Roman Catholic Church for the Archdiocese of Sydney*[58] the Plaintiff was a student at a Roman Catholic school who had gone on a school ski-ing excursion. It was alleged that the ski instructor had been careless, leading to his injury, and that the school was liable due to its non-delegable duty for the carelessness of the ski instructor. Elkaim SC DCJ confirmed that on authority of *Introvigne* the school owed a non-delegable duty- see [117].[59]

In the UK recognition of this duty to pupils took a bit longer, but the non-delegable duty principle was held there to apply to schools and pupils in *Woodland v Swimming Teachers Association*.[60] The local authority conducting a school was held liable for carelessness of a contracted swimming instructor when a pupil was harmed due the instructor's carelessness. Lord Sumption provided an analysis of factors he thought should be considered in deciding whether an NDD should be held to apply:

> [23] (1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.
> (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren.
> (3) The claimant has no control over how the defendant chooses to perform those obligations, i.e. whether personally or through employees or through third parties.
> (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the

[55] (1982) 150 CLR 258 ("*Introvigne*").
[56] The careless teacher was not an employee of the Commonwealth, and hence vicarious liability could not be invoked.
[57] [2008] QCA 283.
[58] [2011] NSWDC 172.
[59] This decision went on appeal sub nom *Perisher Blue Pty Limited v Harris* [2013] NSWCA 38, but not on the NDD point, which seems clearly correct. Application for special leave to the High Court was declined: *Perisher Blue Limited v Harris and Anor* [2013] HCATrans 252 (11 October 2013), again with no reference to the NDD issue.
[60] (Sub nom *Woodland v Essex CC)* [2013] UKSC 66, [2014] AC 537 ("*Woodland*").

> purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it.
> (5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

There seems little doubt, on the basis of the authorities noted here, and the application of the *Woodland* criteria, that a church or other religious body, operating activities which involve looking after children, assumes a non-delegable duty in doing so. Hence it would be clear that carelessness in managing a youth club, or a youth excursion to the snow, or some similar activity, could give rise to strict liability for the church based on carelessness of those running the activity, even if they were not employees.[61] This analogy, as noted below, was accepted by the majority of the High Court in *AA HC*, also applying a number of the factors set out by Lord Sumption in *Woodland*.

Hence perhaps it is not surprising that over the last few years the question has arisen- if a church could be liable for carelessness by, say, its volunteer (or contracted) youth leader- why would it not be liable for intentional acts of sexual battery commited by that youth leader? The issue of course has been made all the more urgent in light of the horrifying occurrences of clerical child abuse (along with abuse committed in other institutions) unveiled by the Royal Commission into Institutional Responses to Child Sexual Abuse.

NDD in *Lepore*

This question was raised in *NSW v Lepore*,[62] where the majority of the High Court rejected possible NDD in relation to the intentional tort of battery. There it was claimed that a young person had been abused by an employed teacher on school premises during school hours. A decision in favour of the plaintiff had been handed down in the NSW Court of Appeal on the basis of non-delegable duty.[63]

In the High Court a majority of the court approached the question as one of vicarious liability (the alleged perpetrator being an employee). But in the course of ruling that there might be vicarious liability for an intentional tort, a majority of the court made comments excluding NDD liability for intentional torts.[64]

In dissent from that ruling were McHugh J and Kirby J, for differing reasons. McHugh J held, agreeing with the NSW Court of Appeal, that a school owes its pupils a non-delegable duty of care which is breached even by intentional wrongdoing by a teacher- [136]. Kirby J, while

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[61] There was a recent decision rejecting an NDD being owed by the NSW Department of Education in relation to harm caused to a young disabled student who had been taken in school hours, by a school bus, to a horse-riding activity: *Cook v Riding for the Disabled Association (NSW)* [2024] NSWSC 1332 at [94]. With respect, I think the ruling was incorrect and that, in case very similar to *Woodland* and *Harris*, the NDD ought to have been recognised.
[62] (2003) 212 CLR 511.
[63] *Lepore v New South Wales* (2001) 52 NSWLR 420 per Mason P & Davies AJA (Heydon JA dissenting).
[64] See Gleeson CJ at [38]; Gummow & Hayne JJ at [265]; Callinan J at [339] agreeing with Gleeson CJ. It seems, while not entirely clear, that Gaudron J also agreed with the majority on this point- see her comment at [105]: "Thus, to describe the duty of a school authority as non-delegable is not to identify a duty that extends beyond taking reasonable care to avoid a foreseeable risk of injury". In *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165; [2023] HCA 21 at [78] Edelman and Steward JJ describe the decision of Gaudron J in *Lepore* at [102]-[105] as supporting the view that "liability could arise based upon a non-delegable duty". However, it seems uncertain, in light of this quote, whether that would extend to commission of an intentional tort.

refusing to formally rule on the issue (as he thought the case should have decided solely on the vicarious liability ground), on the question of "whether intentional wrongdoing can form the basis of a finding of breach of a non-delegable duty" commented at [293] "my approach…prima facie… would be no different in relation to non-delegable duties" (ie, apparently, "no different to" his approach to the issue of vicarious liability). Since at [309]-[314] that approach is clearly that there *can* be vicarious liability for intentional wrongdoing; it seems that Kirby J would count as a vote in favour of the proposition that there can be breach of an NDD as a result of intentional wrongdoing.

In the result, the High Court subsequently accepted that *Lepore* stood for the proposition that NDD is not applicable to intentional tort actions: see *Prince Alfred College Inc v ADC*:[65]

> [3] This Court considered issues of this kind in *New South Wales v Lepore*[66], a case involving the sexual abuse of a child by a teacher at a school. The Court held, by a majority, that a school's non-delegable duty of care with respect to a pupil did not extend to the intentional criminal conduct of a teacher, in the nature of sexual abuse[67].

Reasons for recognising NDD liability for battery

The holding from *Lepore* on this point was criticised in academic commentary since the decision was handed down. It was characterised as "indefensible" by Stevens.[68] It was also contradicted by the persuasive decision of the UK Supreme Court in *Armes v Nottinghamshire County Council*,[69] where Lord Reed commented explicitly on the intentional tort point as follows:

> [51] **Nor am I able to agree that a non-delegable duty cannot be breached by a deliberate wrong**: see, for example, *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, a bailment case which was treated as a case of non-delegable duty in *Woodland*, para 7.[70] (emphasis added)

Some support for applying NDD in cases of intentional wrongdoing, prior to *AA HC*, can also be found in the judgment of Edelman and Steward JJ in *CCIG Investments Pty Ltd v Schokman* ("*Schokman*")[71]. Their Honours commented:

> [81] There is an obvious identity between the relevant factors to consider in this area of "vicarious liability" and the common factors relied on in establishing a non-delegable duty such as care, supervision, and control. Indeed, the focus in the principal joint judgment in *Prince Alfred College Inc* upon factors of "authority, power, trust, control and the ability to achieve intimacy with the victim"[72] has led leading writers in this field to make observations to the effect that in Australia "it might now be argued that imposing liability for breach of a non-delegable duty of care in cases of child sexual abuse is more appropriate than vicarious liability".[73]

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[65] (2016) 258 CLR 134.

[66] (2003) 212 CLR 511; [2003] HCA 4.

[67] *New South Wales v Lepore* (2003) 212 CLR 511 at 534-535 [36]-[39], 598-601 [254]-[263], 609-610 [292]-[295], 624 [340].

[68] *Torts and Rights* (Oxford: OUP, 2007) at 122-123.

[69] [2017] UKSC 60.

[70] Lord Hodge, who dissented in *Armes* on a vicarious liability point, agreed with Lord Reed on the NDD issue; see [75]: "Liability under a non-delegable duty is, in effect, a liability to guarantee that others provide all reasonable care and, **it may well follow, abstain from deliberate tortious behaviour."** (emphasis added)

[71] (2023) 278 CLR 165; [2023] HCA 21.

[72] [2016] HCA 37; (2016) 258 CLR 134 at 160 [81].

[73] Beuermann, "Vicarious Liability in Australia", in Giliker (ed), *Vicarious Liability in the Common Law World* (2022) 73 at 98. See also Foster, "Convergence and Divergence: The Law of Non-Delegable Duties in

Use of the NDD doctrine in cases of clergy child abuse, it was argued, would provide a more coherent and limited ground for recovery which would be only a slight development of the doctrine as it now stands, as pointed out in the Federal Court Full Court decision of *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd*.[74] That the application of the NDD doctrine in such cases would be preferable to the continued expansion of the law of vicarious liability was a view that was supported by a number of academic commentators.[75]

As mentioned above, there was a very interesting passage in the judgment of Edelman J in *Willmot v Queensland*[76] which seemed to suggest that liability for intentional torts using NDD was already available so long as a claim is "framed" in terms of a failure of reasonable care:

> [112] Ms Willmot's claim for damages (including exemplary damages, however the claim is pleaded[77]) is based upon an asserted non-delegable duty of care owed to her as a person who "was a State Child or was subject to the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld)". A non-delegable duty is a direct duty which is not merely to take reasonable care but to ensure that reasonable care is taken in relation to a person or to their property.[78] The non-delegable duty **can be breached by a defendant's or a third party's intentional wrongdoing**,[79] although one formal view would require that breach of the non-delegable duty be pleaded as, or formally based upon, a failure by the defendant or the third party to take reasonable care rather than their intentional act of wrongdoing.[80] On that formal view, the abuses alleged by Ms Willmot would be a failure by the alleged perpetrators of the abuse to take reasonable care, with the effect that there would be a breach of the State of Queensland's duty, irrespective of whether the State of Queensland itself took all due care; it did not ensure that care was taken…

However, in the same case there was a much more cautious comment made by Gleeson J at [192]:

> In a case such as this, there is an issue about whether the non-delegable duty extends to the prevention of intentional criminal conduct by the third party (bearing in mind that the existence of such a duty was denied by five Justices in *New South Wales v Lepore*[81]).

Australia and the United Kingdom", in Robertson and Tilbury (eds), *Divergences in Private Law* (2016) 109 at 132.

[74] [2016] FCAFC 78 at [64].

[75] See the Beuermann and Foster articles cited in *Schokman*, above n 73; also D Tan, "For judges rush in where angels fear to tread…" (2013) 21/1 *Torts Law Jnl* 43-58, at 57; Paula Giliker, "Analysing Institutional Liability for Child Sexual Abuse in England and Wales and Australia: Vicarious Liability, Non-Delegable Duties and Statutory Intervention" (2018) 77(3) *Cambridge Law Journal* 506–535; J Maxwell, "Liability of Educational Institutions for Child Abuse" (2019) 93 ALJ 477; Francis Santayana, "Vicarious liability, non-delegable duties and the 'intentional wrongdoing problem'" (2019) 25/2 *Torts Law Journal* 152-183; Laura Griffin and Gemma Briffa, "Still Awaiting Clarity: Why Victoria's New Civil Liability Laws For Organisational Child Abuse Are Less Helpful Than They Appear" (2020) 43/2 *UNSWLJ* 452 (esp pp 475-479).

[76] Above n 42

[77] See *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 9-10 [22]. See also *New South Wales v Lepore* (2003) 212 CLR 511 at 572 [162].

[78] *Bird v DP (a pseudonym)* [2024] HCA 41 at [36] and the authorities cited.

[79] *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, discussed in *Port Swettenham Authority v T W Wu & Co (M) Sdn Bhd* [1979] AC 580 at 591, *Armes v Nottinghamshire County Council* [2018] AC 355 at 375 [51], and *Bird v DP (a pseudonym)* [2024] HCA 41 at [52].

[80] *New South Wales v Lepore* (2003) 212 CLR 511 at 601 [265]. Compare at 572 [162].

[81] (2003) 212 CLR 511 at 533 [34], 547 [79], 552-553 [103]-[105], 562 [134], 601-603 [264]-[271], 624 [340].

It was apparent that the court needed to formally decide whether it would over-rule *Lepore* on this point.

The court declined to revisit this question in *Prince Alfred*,[82] holding that they had not been presented with enough material to justify disturbing the prior holding in *Lepore* that NDD could not apply to intentional torts. Just as in *Prince Alfred* the court responded to widespread uncertainty about the test applicable to vicarious liability claims involving intentional torts following *Lepore*, the court was under pressure to resolve this issue of NDD. Change to the law, it was argued, would be of potential benefit to survivors of historical clerical child abuse, as even the generally beneficial changes made in State law extending the law of vicarious liability in targeted ways, to allow actions against non-employees,[83] do not usually apply where the abuse happened prior to the commencement of the amendments.[84] This clarification was all the more necessary since *Bird* confirmed that the common law of vicarious liability in Australia does not attach liability to denominational institutions for abuse committed by clergy.

In deciding whether to depart from its own previous decisions, relevant questions that fall to be considered by the High Court were outlined by French CJ in *Wurridjal v Commonwealth of Australia*:[85]

1. Whether the earlier decision rested upon a principle carefully worked out in a significant succession of cases.
2. Whether there was a difference between the reasons of the Justices constituting the majority in the earlier decision.
3. Whether the earlier decision had achieved a useful result or caused considerable inconvenience.
4. Whether the earlier decision had been independently acted upon in a way which militated against reconsideration, as in the *Second Territory Senators Case.*[86]

As will be noted below, the majority addressed these issues in *AA HC* and held that the earlier decision in *Lepore* should be over-turned on this point. Briefly, the arguments in favour of over-turning were as follows.

The High Court has clearly recognised NDD as a form of strict liability for wrongs committed by contractors in *Introvigne,* in *Kondis v State Transport Authority*[87] and in *Burnie Port Authority v General Jones Pty Ltd*.[88] But in none of those cases was it necessary to find that NDD could not apply to an intentional tort.

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[82] *Prince Alfred,* [36].
[83] See, for example, the extended statutory vicarious liability introduced by ss 6G and 6H of the *Civil Liability Act* 2002 (NSW) ("CLA 2002"); see also ss 49I and 49J *Civil Liability Act* 2002 (Tas).
[84] See the commencement provisions for ss 6G and 6H noted above: liability will only apply "in respect of child abuse perpetrated after the commencement of that section" in 2018 (see CLA 2002 Sched 1 item 44). It seems that the law of the ACT is different now- see the *Civil Law (Wrongs) Act* 2002 (ACT), s 114BA, which applies Part 8A of that Act, relating to institutional child abuse, to all claims, whenever the events occurred. This would include the parts of the Act that create liability for those "akin to employees"- see s 114BC.
[85] (2009) 237 CLR 309; [2009] HCA 2 at [69] (French CJ), citing the earlier decision in *John v Federal Commissioner of Taxation* [1989] HCA 5; (1989) 166 CLR 417 at 438-439.
[86] Ibid.
[87] *Kondis v State Transport Authority* (1984) 154 CLR 672.
[88] (1994) 179 CLR 520.

There was indeed a difference between the reasons of the Justices constituting the majority in *Lepore* on the issue of NDD. The formal order of the court in that case was that the appeal against the NSW Court of Appeal decision in Mr Lepore's favour on the basis of NDD be allowed, but that he should be allowed to replead his claim based on vicarious liability. Kirby J, who joined in the order of the court for a new trial,[89] declined to support liability based on NDD simply on the basis that it was not necessary to so decide in a case where employees were involved (where vicarious liability should be the issue). Hence there was a difference in his reasons from those of other Justices in the majority.

There seems to have been no independent action by Parliament or other bodies relying on the NDD holding in *Lepore*. Indeed, the Royal Commission into Institutional Child Abuse actually recommended, in its report on *Redress and Civil Litigation*, the introduction of what would be in effect a statutory non-delegable duty for abuse on institutions caring for vulnerable children.[90] While in the end this recommendation has been translated by Parliaments into a statutory extension of vicarious liability,[91] the fact remains that this statutory extension is mostly applicable to cases of child abuse occurring after commencement of the amendments.[92] Hence there would be real benefit to victims of historical child abuse in a ruling that churches and other institutions owe a common law non-delegable duty to those children for whom they accept responsibility. Such a ruling would allow this principle to be applied to historic cases of abuse by clergy and other representatives of such institutions.

The NSW appeal in *AA*

The issues came to a head in the decision of the NSW Court of Appeal in *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA*,[93] where here were some comments from Leeming JA about whether there should be a possible non-delegable duty for intentional torts.

The case involved a claim of child sexual abuse by Father Ronald Pickin, who was then a priest (or an assistant priest)[94] in Wallsend, near Newcastle. The claim initially succeeded on the basis of vicarious liability, but once *Bird* had been handed down by the High Court that ground of liability could no longer be supported.

The main claim was then based on personal negligence by church authorities, but on review of the evidence a majority of the Court of Appeal (Bell CJ & Leeming JA) held that there was no duty of care owed by church authorities which had been breached, as the relevant behaviour of the offender was not foreseeable. Leeming JA also concluded that the trial judge had misinterpreted the evidence and said that the decision had to be overturned on the facts.

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[89] *Lepore*, [334].
[90] *Royal Commission into Institutional Responses to Child Sexual Abuse*, Redress and Civil Litigation Report (2015) at 483-493.
[91] See Part 1B of the *Civil Liability Act* 2002 (NSW), added by the *Civil Liability Amendment (Organisational Child Abuse Liability) Act* 2018 (NSW).
[92] Above, n 84. (See that note for the exception in the ACT.)
[93] [2025] NSWCA 72 (15 April 2025) ("*AA CA"*).
[94] There was some discussion in the Court of Appeal about the difference it would have made if his true status was clearer, but in the end the majority of the court in *AA HC* held that a concession by the Diocese that he was a full priest in charge should be accepted- see the plurality at [60]-[63].

Leeming JA, *obiter* (as the claim was being rejected on other grounds), went on to comment briefly about the possible application of the NDD doctrine to the case. He noted correctly that the Court of Appeal could not choose to change the law laid down by the High Court in *Lepore*, so that even if they were minded to, the claim could not succeed at the moment- see [160]-[162]. He then offered his views on the question as to whether there ought to be a change.

With the greatest of respect, I always found his Honour's reasons for saying that NDD should not be extended to intentional torts unpersuasive. One reason offered was that "the common law has long disfavoured strict liability"- [166]. I note however the following comments of one of Australia's most respected common law judges, Windeyer J in *Benning v Wong*:[95]

> There is certainly **no presumption in the common law against strict liability**. Actions for negligence dominate the work of common law courts today, mainly because railway trains, motorcars and industrial machinery have so large a place in men's lives. But to regard negligence as the normal requirement of responsibility in tort, and to look upon strict liability as anomalous and unjust, seems to me to mistake present values as well as past history. In an age when insurance against all forms of liability is commonplace, it is surely not surprising or unjust if law makes persons who carry on some kinds of hazardous undertakings liable for the harm they do, unless they can excuse or justify it on some recognized ground.

Edelman J at [342] in *AA HC* agreed:

> There is nothing unusual or anomalous about the imposition of strict liability (ie liability in the absence of fault) in the law of torts for infringement of the rights of others.

There are suggestions by Leeming JA, repeated from various sources, that NDD is a "disguised" form of vicarious liability- [166]. The recent careful analyses of this area in the High Court, in both *Schokman* and *Bird*, did not at all support this view.[96]

Leeming JA also suggested that, since there is now a statutory form of vicarious liability under the CLA, extension of NDD would be somehow inappropriate:

> [168] What is more, any such duty would be incoherent with statute. For conduct committed after 2018, the *Civil Liability Act* imposes vicarious liability for such conduct upon a proper defendant, but subject to a presumption of breach if an individual associated with the organisation perpetrates child abuse, unless the proper defendant establishes that it took reasonable precautions: s 6F(3). That statutory response, and in particular the defence of reasonable precautions, cannot be reconciled with a non-delegable duty which of its nature is strict. Axiomatically, if the common law recognises a non-delegable duty, then it must apply at all times, including after 2018 when s 6F(3) commenced. In this country, judge-made law cannot be altered prospectively: *Ha v New South Wales* (1997) 189 CLR 465 at 503-504; [1997] HCA 34; *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333; [2019] HCA 29 at [55]; cf *In re Spectrum Plus Ltd (in liq)* [2005] 2 AC 680; [2005] UKHL 41 at [40]-[42] and *Samsoondar v Capital Insurance Company Ltd* [2020] UKPC 33 at [13]; [2021] 2 All ER 1105 (illustrating that the position in the United Kingdom is less absolute). To my mind, this consideration tells dispositively against the existence of a non-delegable duty.

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[95] (1969) 122 CLR 249 at 304.

[96] See the comments of Edelman and Steward JJ in *CCIG Investments Pty Ltd v Schokman* [2023] HCA 21, (2023) 97 ALJR 551 at [71], where the reference to NDD being a "disguised" form of vicarious liability is in a paragraph introduced by the sentence: "Non-delegable duties are commonly, but **unfortunately**, described by invoking the language of "vicarious liability"." (emphasis added)

But there is nothing odd about a common law rule allowing liability to be established in cases where a statutory rule does not, even where the statute and common law deal with the same facts. We need only refer as one example to the decision holding that a "common law" defence of illegality can apply even if the statutory defence under s 54 of the *Civil Liability Act* 2002 does not apply, in *Bevan v Coolahan* [2019] NSWCA 217, eg at para [53] (per Leeming JA.)

The clash that would occur if NDD were accepted, his Honour said, would be that a claim based on the statutory liability under s 6F of the *Civil Liability Act* 2002 (NSW) would be subject to a defence that "reasonable precautions" were taken, whereas the liability under NDD would not allow such a defence. But that phenomenon is not uncommon (different tort claims giving rise to different outcomes, depending on the elements of the tort or relevant defences.) And to not extend NDD would leave victims of some historical child abuse perpetrated prior to 2018, where the church did not breach its general duty of care, without a remedy.

The High Court decision in *AA*

The decision of the High Court on appeal was handed down on 11 February 2026: *AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* [2026] HCA 2. The court by majority overturned its previous ruling in *Lepore* and held that there can be strict liability based on non-delegable duty for an intentional tort of battery.

The majority decisions involve a joint judgment of Gageler CJ, Jagot and Beech-Jones JJ ("the plurality") and separate judgments from Gordon J and Edelman J, agreeing with the plurality though with a slightly different take on some of the issues. Steward and Gleeson JJ dissent in separate judgments.

The most significant holdings of the majority are well summed up early in the plurality judgment:

> [2] For the following reasons the Diocese is liable to AA for breach of a non-delegable common law duty of care it owed to AA in 1969. The duty the Diocese owed to AA in 1969 was a duty to a child to ensure that while the child was under the care, supervision or control of a priest of the Diocese, as a result of the priest purportedly performing a function of a priest of the Diocese, reasonable care was taken to prevent reasonably foreseeable personal injury to the child.

Foreseeble harm, they add at [3], included harm "from an intentional criminal act of the priest or a third party (including an act of sexual abuse of the child)."

As a result, the decision in *Lepore* had to be over-turned ([4]). They make it clear at [6] that there is a majority of the court (the plurality, Gordon & Edelman J, and including Steward J for the first, even though he dissented in the result) for two propositions (footnotes from the original):

> that a non-delegable common law duty of care requires that the duty-holder has undertaken the care, supervision or control of the person or property of another, or is so placed in relation to that person or their property as to assume a particular responsibility for their or its safety.[97] Further, we and Gordon J

[97] *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687. See our reasons at [13], [16], the reasons of Gordon J at [271]-[273], Edelman J at [334], [343]-[345], [348], and Steward J at [408].

> and Edelman J agree that a non-delegable duty may be breached by the intentional conduct of the duty-holder or their delegate.[98]

As well as these key rulings on NDD, there are also comments on the fact finding by the Court of Appeal, and a holding that the *Civil Liability Act* 2002 (NSW) ("CLA") applies to limit a damages award. In this paper I will leave those issues to one side, save to note briefly that the majority were quite critical of Leeming JA's overturning of factual decisions by the trial judge, and to also mention that there may be wider implications of the way that s 3B of the CLA is dealt with in the future.[99]

The key point, of course, is that NDD can extend to intentional torts. This is frankly acknowledged by Edelman J to be a major change:

> [341] The overruling of *Lepore* will have a **significant effect upon the common law in this country,** including upon proceedings concerning historic sexual abuse, such as this case. Any legal entity—including any unincorporated organisation like the Diocese that is required to be treated as a legal entity—which assumes responsibility to ensure that reasonable care is taken of another's person or property (goods or land) will be liable if a third party intentionally causes injury to that other person or their property within the scope of the responsibility assumed. (emphasis added)

(1) General operation of NDD

An important preliminary point is that the general operation of the NDD principle had already been spelled out in *Schokman* and *Bird*, as already noted above. In *Schokman* Edelman and Steward JJ had noted that NDD arose where there was a relationship between the victim and the "principal" where there is an undertaking of "care, supervision or control of the person or property of another", or in which the defendant "has assumed the particular responsibility to ensure that reasonable care is taken rather than merely to take reasonable care".[100] The careful characterisation of three different types of strict liability for the wrongs of other provided by their Honours in *Schokman* (distinguishing agency, "true" vicarious liability, and non-delegable duty)[101] was cited with general approval by the majority in the later decision of *Bird.*[102]

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[98] See our reasons at [4], [15]-[51], the reasons of Gordon J at [278]-[287], and Edelman J at [334], [336]-[341].
[99] A very important paragraph of Edelman J's decision, para [401], seems to contradict the view taken in NSW since the decision in *Zorom Enterprises v Zabow* (2007) 71 NSWLR 354 at [13]-[14] that damages awarded against an employer vicariously liable for an intentional tort, where the actual tortfeasor is excluded from the damages limits of the CLA by s 3B, are also not subject to those damages limits. In other words, employers who are vicariously liable for intentional wrongdoing by employees may well be able to reduce the damages they would otherwise have to pay. In *AA HC*, the application of the CLA limits to NDD liability meant that the damages awarded to AA were reduced from $636,480 awarded by the trial judge, to $335, 960 under CLA limits. The key issue is that s 3B only excludes the operation of damages limits from an action for intentional harm or sexual assault "committed by that person" (ie, the person being sued.) Certainly in the NDD case liability is imposed not because the Diocese itself committed the harm directly, but for failing to ensure its delegate priest did not commit the harm. While other members of the court agreed with the application of the CLA limits to an NDD claim, only Edelman J in *obiter* directly cast doubt on the authority of *Zorom* as it relates to vicarious liability.
[100] Above, n 16 at [70].
[101] See ibid, paras [48]-[53]; extract in H Luntz, D Hambly, K Burns, J Dietrich, N Foster, G Grant, & S Harder, *Luntz & Hambly's Torts: Cases, Legislation and Commentary* (10th ed; Sydney: LexisNexis, 2026) at [16.1.2C].
[102] Above, n 5, at [30]-[31], nn 10-14. Detailed consideration of non-delegable duty was not provided in that decision, as the NDD doctrine had not been pleaded initially- see eg *Bird* [42]-[43]. But there was general acceptance of the three forms of strict liability for the wrongs of others in the paragraphs noted.

The plurality and the other members of the majority generally agree as to when an NDD will arise. Whether or not the NDD arises will often depend on whether or not the relationship between the principal and the victim has been previously found to be appropriate. The main recognised categories (as noted above) are schools and pupils; hospitals and patients; employer and employees; and the slightly more nebulous *Burnie Port Authority* category of occupiers of land allowing or creating dangerous activities on land which creates a foreseeable risk to those outside the land.[103]

However, given that formally there had been no previous finding that a church owed an NDD to a child participating in its activities, it was necessary to spell out the circumstances in which an NDD would arise where not clearly supported by prior authority.

The plurality hold that the already recognised NDD owed by schools to their pupils (in Australia in *Introvigne*, in the UK in *Woodland)* should be incrementally extended to a church which invites children to join its activities (see the discussion at [110]-[113].) The duty flows not only from the vulnerability of children, but from the fact that they are within the scope of the priest's duties: [114] "under the care, supervision or control of a priest of a diocese as a result of the priest having purportedly performed a function of a priest of the diocese." It may be noted that a number of factors put forward by Lord Sumption in *Woodland* are mentioned as relevant.

Key factors that are referred to include vulnerability of the victim of harm (whether or not they are able to protect themselves), and control exercised by the principal over the circumstances of the victim. Where the victim is vulnerable to harm, and the principal has undertaken the care, supervision or control of the victim and hence assumed a responsibility for their safety, then it seems likely that there will be an NDD.

The plurality note that of course "it should go without saying that children, as a class, are particularly vulnerable to harm from a lack of reasonable care by adults" (at [101]). But more needed to be shown:

> [105] Mere vulnerability, like reasonable foreseeability, is a necessary but not a sufficient condition for the imposing of a non-delegable duty in this context. An important further consideration is whether it can be said that in 1969 the Diocese had assumed or undertaken a particular or special responsibility in respect of the safety of children where the persons ordinarily responsible for the child (in the case of AA, his father and stepmother) might reasonably expect such care for the child to have been taken.

On the facts this was shown by the actions of the Diocese in placing Father Pickin in charge of the Roman Catholic parish, and performing the functions of a parish priest: such enabled Pickins

> [115]…to meet AA and to invite AA to the presbytery and resulted in AA accepting that invitation and AA's parents permitting him to go. It was that relationship which enabled Fr Pickin to assume he had control over AA to the extent that AA would not try to physically prevent Fr Pickin from carrying out the sexual assaults. It was that relationship which enabled Fr Pickin to assume AA would not be able to tell anyone about the sexual assaults. It was that relationship which meant that AA felt that he had no choice but to return to the presbytery when Fr Pickin invited him to do so until AA simply "couldn't go any more". Accordingly, the presence of AA at the presbytery enabling the sexual assaults that Fr Pickin inflicted on

[103] See the discussion in the plurality judgment at [15]-[17] noting schools, employers, and *Burnie Port Authority*. See also the list of established categories of NDD per Gordon J at [271].

> AA at the presbytery resulted from the purported performance by Fr Pickin of his functions as a priest of the Diocese.

The plurality are careful to rule out other possible formulations of the claim- liability did not merely arise because AA was "in the care of" a priest (it was essential that the care resulted from him carrying out the role he had been given as a priest by the Diocese)- see [116]. Nor would it be correct to frame the duty in terms of a duty to avoid allowing injury to be caused by a priest in a diocesan property- [117]. The duty applied to all types of personal injury, and it might apply outside property owned by the Diocese if there was an excursion of some sort organised by the priest. Indeed, it would also extend to a case where a priest intentionally permitted a third person to harm a child.

The formulation of the NDD is found at the end of this discussion, in para [122]:

> [T[he Diocese owed a duty to a child to ensure that while the child was under the care, supervision or control of a priest of the Diocese, as a result of the priest purportedly performing a function of a priest of the Diocese, reasonable care was taken to prevent reasonably foreseeable personal injury to the child. The scope of this duty extended to the harm caused to AA by the Diocese failing to ensure that reasonable care was taken against the foreseeable risk of personal injury to AA, including from the intentional infliction of such injury by the Diocese's own delegates, specifically priests, and by third parties.

However, one of the differences between the plurality on the one hand, and Gordon and Edelman JJ on the other, is the view of the plurality that even a non-Catholic child who joined in these activities would have been owed this NDD:

> [119] A child being under the care, supervision or control of a priest of a diocese as a result of the priest purportedly performing a function of a priest of the diocese effectively maintains the requisite connection between the relationship of a diocese and a child without other arbitrary and illogical limitations. A child under the care, supervision or control of a priest of a diocese as a result of the priest purportedly performing a function of a priest of the diocese **may or may not be a "child of the parish**" in the sense that the child may or may not live in the parish. Residence or non-residence in a parish, however, is a purely arbitrary distinction. Similarly, a child may or may not be Catholic but may still be under the care, supervision or control of a priest of a diocese as a result of the priest purportedly performing a function of a priest of the diocese. When the proper rationale for the non-delegable duty is exposed, there is **no basis for discriminating between Catholic and non-Catholic children** in this context.

With the exception of this point, **Gordon J** generally agreed with the above approach to framing the duty, as can be seen from her Honour's summary of her ruling:

> [162]…the Diocese owed a non-delegable duty – a duty to ensure that reasonable care was taken to avoid the risk of personal injury to child parishioners in the care of a priest of the Diocese at the presbytery. The facts of this case fall within the scope of that duty because AA, as a child parishioner who was taught to respect and obey priests, was specially vulnerable; the Diocese undertook the care of AA in circumstances where the Diocese appointed Father Pickin to a parish and expected and required him to engage with young people as part of his ministry; the Diocese made the presbytery available to Father Pickin to perform that ministry; and AA's parents entrusted the care of AA to Father Pickin. The Diocese breached that duty to ensure that reasonable care was taken when Father Pickin assaulted AA.

A key difference, however, is her Honour's view that this duty is limited to "child parishioners", in the sense of a child of a Roman Catholic family within the parish area. Her Honour argued that the law ought to develop only incrementally, and that all that needed to be decided here was that a relevant NDD arose towards "child parishioners" like AA, who were being supervised in the physical premises supplied to the priest- see [300]. Edelman J would also have limited the assumed duty he described to child parishioners- see [372].

With respect to those members of the court, the plurality view is more persuasive. While of course there would be no NND liability "for a random act of sexual assault against a child to whom he was a stranger" (Edelman J, at [388]), it would seem to be plausible that at least a part of the authority given to priests was to evangelise the wider community, and that Father Pickin would have been expected to welcome attendees who were not Roman Catholic parishioners to the events he ran in his house.

As noted above, these limits are not laid down by the plurality, and hence there is at least a majority of those supporting the order of the court that these are not essential for the NDD to arise.

Another point worth noting from Gordon J is her comment that NDD is not itself a part of the law of negligence. In my view this is correct, though it needs careful unpacking. Her Honour says at [276] that

> A non-delegable duty based on the undertaking of care, supervision or control generally arises "prior to and independently of the particular conduct alleged to constitute a breach of that duty"[104] and extends to the kind of harm against which the duty-holder assumes a duty to protect. That being so, **reasonable foreseeability of the risk of harm is not relevant to determining the existence of the duty**, which springs from the undertaking and the relationship between the duty-holder and the plaintiff.[105]

I would add a minor qualification. The existence of an NDD, established by prior authority or by the "undertaking and relationship" involved, will always involve a finding at that previous stage that foreseeable harm may be committed to an alleged victim in some way due to the circumstances of the relationship. Thus, we know that in general employees are vulnerable to employers misusing their authority. But the point being made, however, is that where the NDD duty has been found to exist on the basis of prior authority, there is no need to go further and identify, in addition, foreseeability of a specific type of harm. Of course, as her Honour adds, foreseeability becomes relevant when we are addressing whether the delegate was at fault (the issue of breach). But it does not need to be separately addressed in determining whether an NDD arises.

I think the situation is similar to the question of the existence of a duty of care in general in the ordinary law of negligence. There are some cases where a duty will only arise when foreseeability of harm can be explicitly shown at the duty stage. But for cases where authority already provides that a duty exists (such as the employer/employee case, or doctor/ patient) then there is no need to factor in foreseeability at the duty stage of the analysis. The question of foreseeability as a matter going to duty will already have been resolved by the prior authorities spelling out that a duty exists in this type of case.

Similarly, when we are dealing with NDD, a ""special" kind of common law duty of care in negligence" (plurality, [21]), the existence of the duty is determined either by past authority or by the application of the NDD criteria of vulnerability and assumption of care, and it is not necessary to separately address foreseeability.

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[104] *Lepore* (2003) 212 CLR 511 at 564 [141], citing *Richards v Victoria* [1969] VR 136 at 140.
[105] See *Lepore* (2003) 212 CLR 511 at 564 [141], citing *Richards* [1969] VR 136 at 139-140 and *Victoria v Bryar* (1970) 44 ALJR 174.

I also agree with Gordon J when she goes on to note that a finding of NDD does not require a prior finding of an "ordinary" duty of care. At [277] her Honour notes some comments to that effect from a prior case (*Hollis v Vabu*) were *obiter* (that case not involving the NDD issues). She then goes on:

> …the better view is that a non-delegable duty is not subsumed into and does not necessarily depend on the law of negligence. It is an alternative formulation of a duty that depends on establishing the necessary undertaking of care, supervision or control and the vulnerability of the plaintiff.

This comment is, I think, consistent with the framing noted above of NDD as a "special kind of common law duty of care" by the plurality. It is a special kind because it does not require a *separate* finding of foreseeability at the duty stage. The duty created relies on the different factors of vulnerability and undertaking. The content of the duty (unpacked at the breach stage) is not only "to exercise reasonable care" (though in all NDD's the principal must do that), but rather also includes "to see that reasonable care is exercised" by a delegate.

As against these comments of Gordon J, we may note the following fairly stark remark by the plurality at [140]: "a non-delegable duty is a creature of the law of negligence". The remark is made as part of a comment that the Ipp Report had been mistaken in saying that a breach of a non-delegable duty is not "negligence"- see para [139]. It seems some more work is needed on unpacking the differences between Gordon J and the plurality at this point.

To summarise, in my view, authorities establish an "ordinary" duty of care in a number of relationships and circumstances- employer/employee, doctor/patient, occupier/entrant to land, manufacturer/consumer, motorist/road user, school/pupil. There are other circumstances outside these established categories where a duty will be owed, of course, but in those situations it will usually be necessary to provide a foreseeability analysis at the duty stage. But in the established ordinary cases, no separate inquiry into foreseeability is needed.

However, a **subset** of the established duty cases are those where the law says that a non-delegable duty is owed. The main examples are those mentioned already- employer/employee, hospital/patient, school/pupil. To this we might add a subset of the "occupier" category, as there is authority for the duty owed by an occupier to a contractual entrant to be an NDD, and also in this we may add that the duty owed by prison authorities to their prisoners has been suggested to be an NDD. We can of course now add, following *AA HC*, the relationship between a church (or other religious group) and young people it includes in its programs and activities. In this subset of duty examples in the tort of negligence, the content of the duty is to see that *reasonable care is taken* by any delegate entrusted with carrying out the care or protection of others.

It should be noted that the above seems to describe the way that NDD works in the area of negligence. It is arguable that the NDD principle may apply in other areas. As noted previously, there are cases indicating that in some cases of breach of statutory duty, the duty holder may be held liable for breach of a statute commited by a contractor entrusted with carrying out work. (It may be argued that cases where an occupier of land is held liable for carelessness of a contractor who has undermined a neighbour's land is an example of NDD being applied to the tort of nuisance.)

The judgment of **Edelman J** spends time on the difference between a duty of care "imposed" by the law, and one "assumed" by the defendant- see from [342]. The duty here was "assumed" by the church accepting responsibility for children it was in contact with. A

consequence of a duty being "assumed" rather than imposed is that, depending on the circumstances of the assumption, there may be liability for failing to act to protect those who are the subject of the undertaking. He concluded, in agreement with the plurality and Gordon J, that an NDD arose here.

> [385] In summary then, the objective circumstances from which any undertaking and assumption of responsibility by the Diocese might be inferred include: (i) the Diocese delegating the control of the presbytery to a priest over whom the Diocese exercised extreme control, including over aspects of his appointment, duties, responsibilities, and priorities; (ii) the Diocese inviting the heightened trust placed by child parishioners in priests, with corresponding degrees of substantial control by priests over those children; (iii) the Diocese encouraging and expecting priests to engage with children in the community; and (iv) the Diocese permitting the presbytery to be used by a priest for that engagement. These circumstances irresistibly invite the inference that the Diocese objectively undertook to ensure that **reasonable care for child parishioners would be taken**, at least where those children entrusted themselves to the care and control of a priest—a delegate of the Diocese's mission to engage with youth—with delegated control over the presbytery and power to invite child parishioners into the presbytery and to exercise control over them in that place.

All members of the majority seem to accept that an act of intentional harm like battery, can be an example of reasonable care not being taken. See the comments of the plurality at [18]-[19], eg at [19] discussing comments in *Burnie Port Authority*: "Their Honours were not suggesting that liability in negligence cannot apply to intentional acts or intentional acts intended to cause harm." The example given there is the somewhat forgotten decision of *McInnes v Wardle*[106], where a landowner was held liable under NDD principles for the action of his contractor in illegally lighting a fire which then spread to a neighbour's land. The case provides support for the view that there can be NDD for an illegal act (though it might be noted that the contractor did not actually intend to cause the fire to harm the neighbour.)

Similarly, Edelman J at [339]:

> It must be accepted today that a duty to take reasonable care can be breached by conduct involving the intentional infliction of harm.

Steward J, while in dissent, held that there was a non-delegable duty which included a duty to "take reasonable care" to prevent abuse by priests- see [447]. However, since his Honour said at [408] that he did not need to review *Lepore*, presumably this did not include NDD liability for the actual acts of battery. And he took the view that in this case the duty would only apply to officially organised "Church events" and hence did not apply to actions in the priest's home- again, at [447].

Gleeson J dissented for a number of reasons. At [470] she said that the relationship between the Diocese and AA was not relevantly analogous to existing NDD cases (in particular, rejecting an analogy with the duty owed by schools). She also commented there that assaults of the kind alleged were not an "expected risk" of the activities of the Diocese.

(2)Application of NDD to intentional torts

Here there are two key issues: why should NDD extend to intentional wrongdoing? And if it should, can *Lepore* be over-ruled?

[106] (1931) 45 CLR 548.

All of the majority decisions critique the reasoning offered in *Lepore,* of course. At [31]-[49] there is a careful analysis by the plurality of the factors put forward in *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-440 to justify overturning a previous High Court decision, and the plurality conclude that overturning is justified taking all these matters into account:

> [50] The exclusion of an intentional criminal act from a non-delegable duty of care established by *Lepore* reflected judicial policy choices which are unable to be sustained consistently with principle, have not led to any useful result but rather have created incoherence in the common law, and have not been independently acted upon. For these reasons *Lepore*, to the extent it decided that a non-delegable duty to ensure that reasonable care is taken cannot apply to an intentional criminal act, **should be overturned**.

"Collateral Negligence" and the course of the contract

Now that is has been decided that the NDD principle can be used in relation to intentional torts, there will need to be some further guidance on the circumstances in which liability will be attached to a principal, taking into account the connection of the wrongdoing with the contractual or other obligations that have been undertaken. It is of course well accepted that an employer is only vicariously liable for wrongs committed by an employee "in the course of employment".[107] There must be a similar limitation on the liability of a principal for a wrong committed by a contractor, where the principal has a non-delegable duty. However, the precise scope of the limitation has been unclear.

The limitation has sometimes been stated (in negligence cases) to be that the principal will not be liable for "collateral negligence" of a contractor. The sense of this seems to be that there is some negligence of a contractor that would be outside the "scope of the obligation" undertaken by the principal to the person who was harmed. But defining this limit seems difficult, and some of the older cases offered to illustrate are arguably no longer be valid. Take the case of *Padbury v Holliday & Greenwood Ltd*,[108] where a principal was held not responsible for harm caused by a hammer falling from a window ledge onto a pedestrian, the carelessness of the contractor in leaving the hammer being said to be "collateral" to the task of installing a window.

But why this was so, is not clear. If the person harmed *was* an employee to whom the employer owed a non-delegable duty, the carelessness of another workplace participant does not seem "outside the scope" of the contractual undertaking. Surely carelessness in handling tools is the sort of thing that is entirely foreseeable. On the other hand, it may be that the person injured was simply a passing pedestrian, in which case this does not seem to be a case of non-delegable duty.

Sachs LJ made a similar point in *Salsbury v Woodland*[109], referring to the contrasting results in *Padbury* (no liability where a tool dropped) and another decision, *Walsh v Holst & Co Ltd*[110] where liability was established.

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[107] See *Prince Alfred*.
[108] (1912) 28 TLR 494 (CA).
[109] *Salsbury v Woodland* [1970] 1 QB 324.
[110] *Walsh v Holst & Co Ltd* [1958] 1 WLR 800.

The whole concept is criticised for its lack of clarity by Callinan J in his judgment in *Leichhardt Municipal Council v Montgomery.*[111]

Beuermann suggests that, if her theory that NDD is based on "conferred authority" is correct, then the scope of liability should be limited to circumstances where the (ostensible) authority conferred by the employer or other party is being exercised.[112] This seems to be to be a good test which would give the right result, so long as not read too narrowly. So, for example, in a case of intentional child abuse, if intentional torts may be sued upon in NDD, then child abuse by a teacher would be covered so long as it occurred within the overall "authority" relationship established. There would be liability where the wrongdoer was generally exercising authority that had been conferred on them by the principal, but perhaps not where the abuse occurred in a context unrelated to that role.

Santayana also wrestles with a definition of "collateral negligence", and suggests that NDD liability should be imposed "where the harm inflicted on the victim by the delegate is the very thing likely to happen if the duty is not discharged".[113]

What can we take on this issue from the High Court decision in *AA?* There are helpful comments provided as to "scope" which may provide guidance. The plurality comment at [48]:

> [T]he fact of the harm being the result of an intentional criminal act may be relevant to satisfaction of the pre-conditions to liability. In the case of a non-delegable duty of care, the pre-condition is the existence of a relationship of the relevant kind and **the harm being of a foreseeable kind within the scope of legal responsibility created by that relationship**. In the case of vicarious liability, the pre-condition is the act causing harm being within the course of the employee's employment. In neither case does the quality of the act as an intentional criminal act, as a matter of logical inevitability, take the act outside the applicable pre-condition of potential liability

Edelman J said at [360]:

> Just as disputes arise about the existence and scope of expressly assumed contractual duties, so too can disputes arise about the **existence and scope of duties** that are said to arise from an undertaking that is inferred from a defendant's words or conduct. The scope of any assumed duty from an undertaking in the law of torts is derived in the same way as the scope of any assumed duty is derived from an undertaking in the law of contract. In either case, an inference is drawn of "the nature of liability that, in light of the parties' agreement, the parties might fairly be regarded as having contemplated and been 'willing to accept'".[114] That inference must be drawn from all the relevant circumstances.

This is an area where more work will be needed.

Conclusion

In my view the High Court were correct in the *Bird* decision to decline to extend the stage 1 test for vicarious liability to the nebulous category of those "akin to employees". Such an extension, as has already been seen in the UK, would have run a serious risk of distorting

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[111] [2007] HCA 6; 230 CLR 22 at [179].
[112] C Beuermann, "Tort law in the employment relationship: A response to the potential abuse of an employer's authority" (2014) 21/3 *Torts Law Jnl* 169-194, at 182.
[113] Francis Santayana, "Vicarious liability, non-delegable duties and the 'intentional wrongdoing problem'" (2019) 25/2 *Torts Law Journal* 152-183.
[114] *Elisha v Vision Australia Ltd* (2024) 99 ALJR 171 at 184 [48]; 421 ALR 184 at 198.

other aspects of the common law. But the High Court has now taken a better approach by recognising that a non-delegable duty owed to specific classes of vulnerable victims of harm extends to seeing that intentional harm is not committed against those victims, in addition to seeing that reasonable care is exercised for their safety. This liability should be limited by the necessary qualification that the wrong must be committed in the course of executing the relevant contract or carrying out the supervision of the victim entrusted by the principal.

One area which is not directly addressed in *AA HC* is the application of these principles to circumstances creating an NDD which do not relate to the care of children. Should a hospital be held strictly liable if a volunteer patient carer (or a contracted cleaner) abuses a vulnerable patient? Should an employer be held strictly liable for an assault on an employee committed by a contractor? Judgments will need to made about the "scope of engagement" of these persons and whether their actions were connected with the undertaking made by the principal parties. Considerations relevant to vicarious liability for such actions committed by employees, will no doubt be relevant to issues around liability for contractors or non-employees generally given delegated authority.

It might perhaps be necessary in future to develop a principle that could be expressed only to apply to the specific class of "highly vulnerable" victims (such as children or perhaps prisoners) within the overall class of persons who are owed an NDD. Such a limit might avoid unforeseen consequences in extending liability to others such as workplace participants, or contractual entrants onto land.

But for the moment, this important but incremental change to the common law relating to highly vulnerable persons placed under the authority of others, has a real potential now to provide justice for victims of institutional child abuse who could not otherwise succeed in a claim for common law damages, and is to be welcomed.