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Non-delegable Duty of Care: Woodland v Swimming Teachers Association and Beyond

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Abstract

The subject of non-delegable duty of care has troubled Judges and jurists alike. This article examines the recent *Woodland* case, where the UK Supreme Court attempted to provide a comprehensive and coherent legal framework.

Scenario

When tort law imposes upon a person (the employer or, perhaps more accurately, the principal)[1] a duty of care, he may either perform that duty himself or engage another (a representative) to do it for him. In the latter situation, if the representative fails to act with care, the question arises whether the principal will be held liable for the representative's negligence.

On this issue, the main focus is on whether the representative is an employee or an independent contractor. If the representative is an employee, then the principal is liable, vicariously, to the victim for the tort of the employee if the tort was committed in the "course of employment". If the representative is an independent contractor, assuming the principal had acted with care in the selection of the contractor, the principal bears no liability for the contractor's negligence; the proper delegation of the duty to the contractor discharges the principal from his duty.

However, there are situations where Courts have held that the principal's duty to the victim is non-delegable and that where the representative acts without due care, the principal is in breach of his personal duty towards the victim. In the past, outside of the category of extra-hazardous activity, there was no unifying framework of principles or criteria to determine if the duty was non-delegable. In the UK Supreme Court decision of *Woodland v Swimming Teachers Association and others*,[2] Lord Sumption JSC, who delivered the leading judgment, crafted such a framework. This article explains and comments on his lordship's schematic, as well as on other perplexing questions in this area of law.

Facts and Decisions

The claimant, a student, was injured whilst attending swimming classes. Although swimming was part of the school curriculum, it was conducted not by the school directly, but through an independent contractor. One of the defendants[3] was the school[4] and, in this regard, the claimant's submission was that the school owed her a non-delegable duty of care to ensure her safety while she was attending swimming lessons. The trial Judge struck out the claim and the Court of Appeal, by a 2-1 majority, affirmed the trial Judge's decision.

On further appeal, the Supreme Court unanimously allowed the appeal and held, on the facts of the case, that the school owed the claimant a non-delegable duty and could have been in breach of that duty.[5]

Judgment of Lord Sumption

Lord Sumption began by noting that, generally, liability in tort required a personal[6] breach of duty by the defendant and was fault-based.[7] The law ordinarily does not impose personal liability "for what others do or fail to do".[8] The "one true exception"[9] to this rule is where vicarious liability applies.

Then, turning to non-delegable duty, he observed[10] that although English law did not provide a single theory to explain when or why non-delegable duties exist, two broad categories can be found. The first is where the defendant engaged a contractor to perform an "inherently hazardous" or "extra-hazardous" activity or operation; swimming instruction, he thought, was not such an activity. The second category, according to his lordship, has three critical characteristics:

1. An antecedent relationship between the defendant and the claimant;

2. A positive duty on the part of the defendant to protect a class of persons against a particular class of risks; and

3. The duty is personal to the defendant, in that the work is delegable, but the duty remains with him.

His lordship then surveyed the origins of the doctrine of non-delegable duty and considered various concepts used in the development of the law, such as assumption of responsibility, vulnerability and dependence, special relationship, protective custody, control and, even, "material increase in risk",[11] citing authorities from UK and Australia.

Before setting out the appropriate legal framework, Lord Sumption reiterated[12] that he was fully aware that non-delegable duty is inconsistent with fault-based principles and is exceptional. There was, in his words, a need "to prevent the exception from eating up the rule".[13] He also remarked that the difference between an ordinary duty of care and a non-delegable duty must be more than a question of degree. In particular, whether a duty is delegable does not simply depend on the degree of risk involved in the activity. The ordinary principles of negligence already provide an appropriate response to the matter of risk – that is, the greater the risk, the higher the standard of care expected.

He then declared[14] that it was time to recognise the underlying principle identified by Lord Greene MR in *Gold v Essex County Council*[15] and Denning LJ in *Cassidy v Ministry of Health*[16] as well as the factors discussed in the Australian cases.[17]

In *Gold v Essex*, Lord Greene had asserted the following broad principle of liability:[18]

> Once [the extent of the obligation assumed] is discovered, it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person, whether a servant or agent to discharge it on his behalf….

In a similar vein, in *Cassidy*, Denning LJ was of the view that hospital authorities are liable for the doctor's negligence in treating the patient, and "[i]t does not matter whether the contract under which he was employed was a contract of service or a contract for services".[19]

Drawing from the underlying principle and Australian jurisprudence, Lord Sumption held that non-delegable duty is imposed where five defining features are present:

1. The claimant is especially vulnerable or dependent on the protection of the defendant against the risk of injury;

2. There is an antecedent relationship between the claimant and the defendant (independent of the negligent act or omission):

a. which places the claimant in the custody, care or charge of the defendant; and

b. from which one can impute to the defendant the assumption of a positive duty to protect the claimant from harm;[20]

3. The claimant has no control over whether the defendant performs his obligations personally or through employees or third parties;

4. The defendant has delegated to a third party a function which is an integral part of the positive duty and the third party is exercising the defendant's custody and care of and control over the defendant; and

5. The third party has been negligent[21] in the performance of the very function delegated to him and not just in some collateral respect.

He also explained that while the defendant's control over the claimant is essential, his control over the environment is not.[22]

Lord Sumption then cautioned against imposing unreasonable financial burdens on those providing critical public services and said that a non-delegable duty should be imputed to schools only so far as it would be fair, just and reasonable to do so. However, he was confident that where the criteria of his framework are satisfied, the imposition of a non-delegable duty would not cast an unreasonable burden, and his reasons included[23] the following:

1. There is a long-standing policy of the law to protect the vulnerable and dependent persons and it is wholly reasonable that a school should be answerable for the careful exercise by its delegate;

2. Parents entrust their children to a school in reliance of the school's ability to look after them and have no influence over the arrangements that the school make in discharging its functions;

3. The non-delegable duties of a school are not open-ended but are constrained by important limitations such as that the functions are ones for which the school had "assumed a duty", and are performed generally in school hours and on school premises (extra-curricular activities outside school hours are not covered); and

4. (Implicitly) the increase of outsourcing has necessitated closer judicial scrutiny of delegation.

Applying his framework to the facts of the case, Lord Sumption concluded[24] that the school owed the claimant a non-delegable duty as it had assumed a positive duty of protective care and custody of the student, and the teaching of swimming, an integral part of the school's function, and the control of the student were delegated to a contractor, who was negligent in performing that very function.

In Singapore, Lord Sumption's non-delegable duty framework was recently approved of and applied by the High Court in *BNM v National University of Singapore*.[25] In that case, the estate of a deceased employee, who drowned whilst swimming at a pool belonging to his employer sued the employer[26] in tort, and one of the issues was whether the employer's duty to provide qualified lifeguards was delegable. Justice Quentin Loh found that most of the elements in Lord Sumption's framework were missing in the case before him and hence the duty was delegable.

Judgment of Baroness Hale

Baroness Hale DPSC delivered a concurring judgment.[27] She began by noting[28] that while the common law is a dynamic instrument, its growth should not be unbridled and unprincipled. Rather, growth should proceed with caution, incrementally and consistently with some underlying principle. Also, distinctions drawn by the law should "make sense to ordinary people" and, to quote Lord Steyn in *Frost v Chief Constable of South Yorkshire Police*,[29] should not produce an imbalance "which might perplex the man on the underground". Looking at the case at hand, she felt that the public might well be perplexed if one student could sue her school for injuries sustained during a negligently conducted swimming lesson while another could not.

Her ladyship illustrated by comparing, hypothetically, three 10-year-old girls enrolled in different circumstances: the first in an expensive independent school which includes swimming in its services, the second in a large school run by a local education authority and having its own staff, including swimming teachers and life guards, and the third in state-funded faith (or mission) school which contracts with an independent service provider to provide swimming lessons and life guards. Yet all three students have the following features in common:

1. They have to go to school;

2. They have to do as the teachers and staff say;

3. Swimming is part of the curriculum;

4. Neither they nor the parents have any control or choice about the arrangements for swimming lessons; and

5. They need care and supervision for their safety.

In the event of negligently caused injury, the first may sue the school for contractual liability, the second may sue the school on the ground of vicarious liability, while the third appears to have no claim against the school. And, it is implicit from Baroness Hale's judgment that the public would be perplexed by such differing results. It is, therefore, necessary to make the school in the third situation liable and Baroness Hale provides the basis:[30]

> The reason why the … school is liable is that … the school has undertaken to teach the pupil, and that responsibility is not discharged simply by choosing apparently competent people to do it. The … school remains personally responsible to see that care is taken in doing it.

She then agreed that the time had come to recognise the underlying principle identified by Lord Greene and Denning LJ and she fully endorsed the framework set forth by Lord Sumption.

Baroness Hale also echoed Lord Sumption's sentiment that the imposition of non-delegable duty under the new framework would not impose an unreasonable burden, adding:[31]

> It is particularly worth remembering that for the most part public authorities would have been vicariously liable to claimants who were harmed in this way until the advent of outsourcing of essential aspects of their functions.

The above statement appears to suggest that outsourcing, as a means of side-stepping vicarious liability, is and should be frowned upon by the Courts.

Finally, Baroness Hale considered[32] Glanville Williams' criticisms of the concept of non-delegable duty and, specifically, his policy arguments that contractors are often far wealthier than their employers and that the social evil of the occasional insolvent contractor is insufficient to justify the complications in the law. In her view, the arguments scarcely apply today where large organisations may well outsource their responsibilities to much poorer and uninsured or under-insured contractors.

Comments on New Framework

Lord Sumption's framework essentially combined the underlying principle set forth by Lord Greene and Denning LJ with the factors laid down in recent Australian cases. It should be noted that the Judges in the Court of Appeal in the *Woodland* case itself had mentioned some of these factors or criteria.[33] Laws LJ referred[34] to "the acceptance of responsibility to take care of … persons who are particularly vulnerable or dependent" and the "duty to see that care is taken for the safety of a child or patient … receiving a service which is part of the institution's mainstream function …",[35] while Kitchin LJ referred[36] to the "special relationship" the essence of which are the "care, supervision and control of a vulnerable person".

Some comment on the above criteria and a comparison with concepts or terms used in the duty of care ("DOC") and the vicarious liability ("VL") structures respectively is in order here.

First, as regards vulnerability and dependence, it is noted that there is some similarity in the DOC analysis where proximity can be found if there is a voluntary assumption of responsibility plus reliance or, controversially, dependence (as in *White v Jones*[37]). Note that the non-delegable duty ("NDD") framework requires a high degree or extent of vulnerability. The VL schematic does not have a similar requirement.

Second, NDD requires an antecedent relationship, which is not a requirement in the DOC analysis although the presence of such a relationship would no doubt be relevant in establishing proximity and, thus, duty. Further, the relationship must be one which involves care, custody and control, which is more than what is required in the DOC

analysis. Also, the NDD framework envisages the assumption of a positive duty, whereas the DOC framework is wider and applies to both positive and negative duties.[38] The VL framework has no equivalent concept, although the employer's control over the delegate (and not over the victim) was one of the earlier tests used to ascertain if the latter is his employee.

The third requirement – that the claimant has no control or influence over the arrangement which the defendant makes in relation to the relevant service – does not factor in the DOC analysis. However, if the claimant indeed had some control, this fact would be relevant if the defendant raises consent or contributory negligence as a defence. The requirement has not appeared in the VL structure.

The fourth criterion – integral function – has no equivalence in the DOC structure, although it could be taken into account in the policy fair, just and reasonable stage. However, it does vaguely resemble the integration test for deciding if the delegate is an employee of the defendant for the purposes of vicarious liability. It would appear, then, that if the delegate was performing an integral function of the defendant, the defendant may be liable from both VL and NDD perspectives. Of course we can expect controversy and inconsistency as Judges struggle over the meaning and application of "integral function" in future cases where non-delegable duty is asserted.

The fifth requirement – that the delegate was negligent in performing the very function that was delegated – is a rephrasing of the limitation that the defendant should not be liable for "collateral negligence".[39] In the negligence framework, this matter is probably dealt with under scope of duty, breach and perhaps causation. In the VL framework, the comparable concept is "'course of employment" or its more recent variant – "close connection".[40]

Further, it is noted that in addition to the five criteria, Lord Sumption subjects the consideration to the test of fair, just and reasonable ("FJR"), as is done in the DOC analysis. Several questions arise here. The first is whether in view of the rigour and demands of the five criteria it is still necessary to consider FJR; one may argue that it is on account of FJR that a very tight framework is being crafted for ascertaining NDD. Another doubt is whether the FJR control mechanism is brought in only because the defendant is a public authority (or, at least, is providing public services). The context in which Lord Sumption made the assertion is ambiguous:[41]

> The courts should be sensitive about imposing unreasonable financial burdens on those providing critical public services. A non-delegable duty of care should be imputed to schools only so far as it would be fair, just and reasonable to do so.

Finally, it seems the FJR analysis is to be done twice,[42] once for DOC and another for NDD. One wonders if the repetition is necessary or useful.

For the sake of completeness, it should be noted that Baroness Hale, at the beginning of her judgment,[43] emphasised the importance of incrementalism in the development of tort law. One should also note that the new framework is a work-in-progress, as witness her reminder that "judicial statements are not to be treated as if they were statutes and can never be cast in stone".[44]

It is clear that both Lord Sumption and Baroness Hale intended to craft a legal framework with substantial restrictions or controls and, indeed, it would have to be exceptional before a Court finds that the duty was non-delegable. In particular, the criteria of antecedent relationship, positive duty and integral function are difficult hurdles to cross. In the writer's view, the Supreme Court has not liberalised the ambit of non-delegable duty.

On the contrary, it may be that judicially established categories of non-delegable duty[45] other than those involving extra-hazardous activities,[46] will now be subject to these criteria. If indeed these criteria are "defining features",[47] one would expect they have to be met. If so, then the ambit of non-delegable duties may even have been narrowed.

Signals from the Supreme Court

On a broader level, it appears the UK Supreme Court has sent out the following messages:

1. Tort law (still) emphasises fault-based liability;

2. Exceptions to this must be exceptional and need to be closely circumscribed;

3. Non-delegable duty needs and now has a coherent and calibrated legal framework;

4. Outsourcing an essential/integral function generally does not insulate a defendant from liability;

5. Non-delegable duty is personal in nature and is essentially different from vicarious liability; and

6. Non-delegable duty is not strict liability;[48] it is the duty to ensure that reasonable care is taken.[49]

Questions and Doubts

Ex facie, the UK Supreme Court has provided clarity which is much needed in this area of law. Nevertheless, difficult questions remain, including:

1. Can non-delegable duty be used to hold an employer liable for an employee's negligence where the elements of vicarious liability are not satisfied?

2. Is agency analysis relevant to non-delegable duty? Can an independent contractor be considered an agent of the principal so that the contractor's negligence is attributed to the principal? If so, what is the nature of the principal's liability – primary or vicarious? Similarly, can an employee be regarded as the agent of the employer?

3. As regards primary liability, why have courts hardly ever dealt with the issue of the principal's duty, in requisite circumstances, to supervise his independent contractor?

4. What is the principal's liability for a representative who is neither an employee nor an independent contractor?

5. Is it not possible that the general position should be that a duty of care is non-delegable and that a principal should bear liability when he asks another to perform a task for which the law attaches negligence liability?

6. Are non-delegable duty and vicarious liability really different in nature? Is it time for an integration of these two concepts, which achieve the same practical result?

While it is not appropriate or possible to explore the above weighty questions fully within the confines of this paper, the writer offers the following thoughts for the reader's reflection.

As regards question (1), on both principle and policy, it is difficult to see any sustainable objection[50] to applying the non-delegable duty framework to a negligent act by an employee. Indeed, the statements of Lord Greene and Denning LJ suggest that the non-delegable duty analysis can be applied to liability for employees.

The enquiries in (2) are more difficult. Even though agency analysis has hardly been used by Courts in dealing with torts, commentators acknowledge the relevance of the concept. *Charlesworth & Percy on Negligence* assert confidently:[51]

> Although a principal is liable for the negligence of an agent acting in the course of authority, as joint tortfeasors they are jointly and severally liable. [A] person who either authorises or procures another to commit a tort is equally responsible for the commission of that wrong, every bit as much as if he had committed it himself. In this way, if the principal gives the agent express or implied authority to commit some tortious act, the former will be held liable even though he may be the employer of an independent contractor.

The passage suggests the following principles:

1. A principal is liable for torts committed by his agent acting within the scope[52] of the latter's authority;

2. A principal who procures or specifically authorises the agent to commit a tort has primary liability for the tort;

3. Both the principal and the agent are liable as joint tortfeasors; and

4. The agent's authority includes implied authority.

In contrast, *Markesinis & Deakin*[53] express this more generally and tentatively:

> [The principal] may authorise the commission of a tort, in which case he is liable as a joint tortfeasor along with the independent contractor. This is not vicarious liability. The main problem in such cases lies in deciding what constitutes authorisation.

The following statement from *Bowstead & Reynolds on Agency*[54] provides an interesting comparison:

> A principal is liable for the loss or injury caused by the tort of his agent, whether or not his servant, and if not his servant, whether or not he is called an independent contractor… (a) if the wrong was specifically instigated, authorised or ratified by the principal.

All that can be said at this point of time is that agency jurisprudence, though large unutilised by Judges, provides a real alternative to both vicarious liability as well as non-delegable duty in analysing liability in this area of law.

As regards question (3), the current judicial attitude is that either the principal has non-delegable duty and is primarily liable or, having been careful in his selection, is not at all liable for the contractor's conduct. However, there is an intermediate zone of liability – there may be circumstances in which having delegated the task the principal retains a duty to supervise or oversee the contractor, such as where the contractor though qualified has limited experience[55] or, as in *BNM v National University of Singapore*,[56] where the principal had by clauses in the tender contract retained a considerable degree over the way the tenderer carried out its duties.[57]

The query in (4) concerns a residual class of agents known as the "casual delegate",[58] whose tort may result in liability on the part of the principal. For example, a principal may entrust a task to someone who is neither an employee nor an independent contractor, such as a family member or a friend, who agrees gratuitously to perform the task. Is the principal liable for the representative's negligence, and if so what is the basis? Non-delegable duty may not assist since the *Woodland* criteria are not easily satisfied. Would agency be the basis?

In *Alcock v Wraith & Others*,[59] Neill LJ catalogued seven situations of non-delegable duty: statutory duties that are cannot be delegated,[60] withdrawal of support from neighbouring land, escape of fire, liability under the rule in *Rylands v Fletcher*, operations on highways, an employer's duty of safety towards his employees[61] and extra-hazardous activities. To all these will now be added other situations in which the *Woodland* criteria are satisfied. Little wonder then that Lord Sumption feared the exception might eat up the rule.

This leads us to the more fundamental question raised in (5) above – can it not be that the general principle is that a duty of care is non-delegable? Is it not possible to treat Lord Greene's proposition – that a person accused of a breach of the obligation cannot escape liability because he has employed another person, whether a servant or agent to discharge it on his behalf – as the general principle rather than the exception? From a benefit-responsibility perspective, this makes sense as the person who takes the benefit should also bear the responsbility, which is one of the arguments for imposing vicarious liability. A general principle of non-delegability could be subject to exceptions such as necessity, as where the principal lacks the special expertise to perform the task. The Courts could conceivably come up with other special circumstances in which it is fair, just and reasonable to allow delegation of the duty, including where the victim is aware of and consents to the delegation.

It may be thought that a general position of non-delegable duty would be unduly harsh. However, this writer suggests a few reasons why this is not so and that the proposed position is in fact desirable.

First, the imposition of non-delegable duty does not result in absolute liability. Non-delegable duty simply requires that care be taken, either by the principal himself or by his delegate. If despite care being taken by the delegate there is injury or damage to the victim, the principal bears no liability. The duty to ensure that care is taken is not an intolerably heavy one.

Second, it is always open for the principal to come to an agreement with his delegate as to who should bear the responsibility for any injury negligently caused by the delegate. In fact, in the professional or commercial context, it would be most appropriate for the principal and the delegate to decide who should indemnify the other and to make the necessary insurance arrangements.

Third, elevating Lord Greene's proposition to the general position helps to address the difficulties in query (6). On this matter, it is observed that while Judges often strenuously emphasise that vicarious liability is different in nature from personal liability and that non-delegable duty is a form of personal liability, the reality is that both vicarious liability and non-delegable duty are ways by which the law imputes or attributes liability to the principal. It is no wonder that commentators have questioned if vicarious liability and non-delegable duty "share more than a functional equivalence"[62] and that the time may have come for the integration[63] (and re-naming)[64] of the two concepts. The candour of*Winfield & Jolowicz on Torts*[65] is illuminating:

> It is not very clear why we are reluctant simply to say that there is a vicarious liability in these cases [of non-delegable duty], for that seems to be the practical effect. To say, as we commonly do, that there is a duty to 'ensure that care is taken' hardly distinguishes the case from ordinary vicarious liability…

It is not suggested that the current position of delegability as the general principle and non-delegability as the exception is unworkable or unduly favourable to the defendant. After all, delegation is not a carte blanche – the law expects the principal to exercise due care in the selection of his delegate. Further, theoretically, the principal may, delegation notwithstanding, still have a (primary) duty to supervise (or to keep a check on) the delegate if the circumstances so require. The main attraction of reversing the general position is that it helps to unify vicarious liability and non-delegable duty and, perhaps, agency analysis as well.

Concluding Remarks

To be sure, the *Woodland* framework is a coherent and robust one and is a commendable and positive development in the law. After *Woodland*, there is now a detailed and rational framework which clearly sets out and carefully circumscribes the ambit of non-delegable duty. But other difficulties remain.

As one steps back to take a more detached look at the labyrinth of law on the subject and the three applicable concepts – vicarious liability, non-delegable duty and agency – one cannot help but wonder if a more cohesive and comprehensive approach is needed. The solution may lie in the adoption of a general principle in tort law that when the law imposes on a person a duty to take care, that duty is not delegable. Of course, that would be a radical move.

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Notes

1 In case law, as well as literature on the subject of non-delegable duty, the term "employer" is often used, even where it is clear that the representative so engaged is an independent contractor and not an employee. To avoid this imprecision and its attendant confusion, the writer will use the term "principal" instead of "employer" even though it is somewhat unconventional to do so.

2 [2013] 3 WLR 1227.

3 The other defendants were the Swimming Teachers Association (first defendant), the contractors Direct Swimming Services (second defendant), the lifeguard (third defendant) and the operator of the swimming pool (fifth defendant). The school was the fourth defendant.

4 More accurately, Essex County Council – the local education authority having responsibility for the school.

5 The case was, therefore, remitted to the High Court for an ascertainment of the relevant facts.

6 At [3].

7 At [5].

8 At [5].

9 At [3].

10 At [6].

11 The "material increase in risk" concept, however, did not feature in the final formulation.

12 At [22].

13 At [22].

14 At [23].

15 [1942] 2 KB 293, 301, CA.

16 [1951] 2 KB 343, 362-363, CA.

17 Namely, *Commonwealth of Australia v Introvigne* (1982) 150 CLR 258, *Kondis v State Transport Authority* (1984) 154 CLR 672, *Burnie Port Authority v General Jones Pty* (1994) 179 CLR 520 and *New South Wales v Lepore* (2003) 212 CLR 511.

18 [1942] 2 KB 293 at 301.

19 [1951] 2 KB 342 at 362.

20 And not just a duty to refrain from conduct which will foreseeably damage the defendant.

21 To be comprehensive, perhaps this element should recite "the third party has been negligent *or otherwise in breach of duty* …", bearing in mind that non-delegable duty is not confined to negligence scenarios.

22 Differing from the view expressed by Lord Phillips MR in *A (A Child) v Ministry of Defence* [2005] QB 183 at [47].

23 Two other reasons were that publicly funded institutions should, in this regard, be treated similarly to privately funded institutions, whose responsibilities are non-delegable, and that whilst imposing non-delegable duty on schools results in putting greater responsibility on them than the law puts on parents, the comparison between the positions of the two classes of persons is not appropriate. Baroness Hale's explanation (at [41]) of the latter point is more compelling: children rarely sue their parents not because the parents do not owe them a duty of care; rather it is because any damages recovered will normally reduce the resources available to cater for the needs of the child and her family.

24 At [26].

25 [2014] 2 SLR 258 at [56]-[62]; on appeal [2014] 4 SLR 931. Non-delegable duty was not discussed in the Court of Appeal.

26 Hydro Aquatic Swimming School, the entity to whom the lifeguard services were outsourced, was the second defendant.

27 The other members of the court – Lord Clarke of Stone-cum-Ebony, Lord Wilson and Lord Toulson JJSC – did not deliver separate judgments, but concurred with both Lord Sumption and Baroness Hale.

28 At [28].

29 [1999] 2 AC 455 at 495.

30 At [34].

31 At [40].

32 At [42].

33 [2012] PIQR 12, although the majority of the Court (Laws LJ dissenting) thought that non-delegable duty did not apply to the school in the instant case.

34 At [30].

35 The term "mainstream function" was also referred to by Tomlinson LJ (at [33]), who was hesitant to impose non-delegable duty on education authorities lest it produced a "chilling effect" on their willingness to provide valuable educational experiences.

36 At [77].

37 [1995] 2 AC 207.

38 Not to mention the different term "voluntary assumption of responsibility" for DOC. Note also the use of the term "acceptance" by Laws and Kitchin LLJ at [30] and [82] respectively.

39 See paras [8] and [15] of Lord Sumption's judgment.

40 *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

41 At [25]. Not dissimilarly, in *Skandinaviska v APB* [2009] 4 SLR(R) 788, CJ Chan also added the requirement of "fair and just" and, in this regard, highlighted the importance of deterrence and victim compensation.

42 Where the framework is applied to tort situations other than negligence (such as the rule in *Rylands v Fletcher*), it appears the FJR consideration is a new hurdle to be crossed when the tort is committed not by the principal himself but by his delegate.

43 At [28].

44 At [38].

45 See *Alcock v Wraith & Others* (1991) 59 BLR 16 for Neill LJ's list of seven situations of non-delegable duty, namely: statutory non-delegable duties, withdrawal of support from neighbouring land, escape of fire, rule in *Rylands v Fletcher*, operations on highways, employer's duty of safety to employees and extra-hazardous activities.

46 Note that Lord Sumption, at [23], prefaced his recitation of the "defining features" with the words "[i]f the highway and hazard cases are put to one side". Thus, the new framework should apply to the remaining five situations in Neill LJ's catalogue.

47 Per Lord Sumption in *Woodland* at [23].

48 Christian Witting, in "Breach of the Non-Delegable Duty: Defending Strict Liability in Tort" (2006) 29 *UNSW Law Journal* 33, asserted that non-delegable duty invariably involved the imposition of strict or absolute liability. He also asserted that non-delegable duty is an independent tort; the *Woodland* judgment does not give any support to such a view. It is submitted that non-delegable duty is a form of liability just as strict liability is a form of liability; it is not an independent tort.

49 This is clear from Lord Sumption's citing with approval a passage from Mason J's judgment in *Commonwealth of Australia v Introvigne* (1982) 150 CLR 258 at para 29-34, where there were two references (at para 29 and para 32) to "a duty to ensure that reasonable care was taken" and his conclusion (at [26]) that the school "assumed a duty to ensure that the claimant's swimming lessons were carefully conducted … " Note also Baroness Hale's statement (at [33]) that "his duty was to see that whoever performed the duty … did so without fault". The duty to ensure that care is taken does not equate with strict or absolute liability: see John Murphy, "The Liability Bases of Common Law Non-Delegable Duties – A Reply to Christian Witting" (2007) 30 *UNSW Law Journal* 1, 86.

50 Apart from the discomfort in seeing that the application of two separate principles – vicarious liability and non-delegable duty – to a scenario can produce contrasting results. But this happens often in different realms of law.

51 12th ed, gen ed Walton, p 3-161.

52 "Scope of authority" rather than "course of authority" was the term used by Lord Wilberforce in *Heatons Transport (St Helens) Ltd v TGWU* [1973] AC 15 at 99, whom *Charlesworth & Percy* cited.

53 *Markesinis & Deakin's Tort Law* (7th edition, OUP, 2013), p 583.

54 Watts and Reynolds (19th edition, Sweet & Maxwell, 2010), pp 8-177.

55 Another possible situation is where the principal, being a supporter of rehabilitation of offenders, knowingly awards the contract to a firm comprising ex-convicts.

56 [2014] SGHC 05 at [72]-[74], and [100].

57 Although the defendant was found to be negligent in supervision, the claim failed on the ground of causation as the Court concluded (at [126]) that the (deceased) claimant would have drowned even if there had not been negligence since he had "severe underlying heart disease".

58 See eg *Bowstead & Reynolds* at 8-187.

59 (1991) 59 BLR 16.

60 Regulation 18B of the Financial Advisers Regulations (Cap 110, Rg 2, 2004 Rev Ed), introduced in July 2011, is a good example of a non-delegable statutory duty. The provision requires the senior management of a financial institution to ensure that due diligence is done in relation to the sale of financial products. On the controversies surrounding this provision, see KY Low, "Product Suitability, Due Diligence and Management Responsibility: The New Regime of Regulation 18B of the Financial Advisers Regulations" (2012) 24 *S AcLJ* 298.

61 The non-delegability of an employer's duty of safety to his employee was confirmed in the Singapore Court of Appeal in *Chandran v Dockers Marine Pte Ltd* [2010] 1 SLR 786.

62 Lunney & Oliphant, *Tort Law, Text and Materials* (5th edition), p 843.

63 Deakin, Johnston & Markesinis, *Markesinis & Deakin's Tort Law* (7th edition), pp 587-588.

64 Vicarious liability and non-delegable duty can both be renamed "attributed liability". Other possibilities include "imposed liability" or "deemed liability".

65 Rogers (ed),*Winfield & Jolowicz on Torts* (18th edition, Sweet & Maxwell, 2010), p 945.