THE SCOPE OF THE NON-DELEGABLE DUTY OF CARE IN 'A COHERENT LAW OF NEGLIGENCE' UNDER AUSTRALIAN LAW

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*The appeal in AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle ('AA') presented a long-awaited opportunity for the High Court of Australia to reconsider whether a non-delegable duty of care can be breached by intentionally inflicted harm, such as child sexual abuse, which would require overturning New South Wales v Lepore (2003) 212 CLR 511 ('Lepore'). This article considers the relationship between the non-delegable duty of care and negligence and traces the history of the question whether negligence extended to intentional up to the time the appeal was reserved by the High Court. Judgment was delivered by the High Court on 11 February 2026.** In finding the respondent liable, the majority overturned Lepore and held that the non-delegable duty of care and ordinary duties in negligence can be breached by intentionally inflicted harm. It is argued that the High Court's decision in AA marks a significant new direction in the non-delegable duty and for negligence as a whole. It opens new pathways for compensation for survivors of sexual abuse, particularly in the context of sexual abuse by clergy in a religious institution. The case is a lens through which to look back at the law leading up to the appeal, and to look forwards. Whilst its ratio is clear, significant questions remain in relation to how this expanded non-delegable duty interacts with vicarious liability where both doctrines might arise.*

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I INTRODUCTION

Just over 30 years ago, in *Burnie Port Authority v General Jones Pty Ltd* ('*Burnie Port Authority*'),[1] a five member majority of the High Court spoke of the emergence of 'a coherent law of negligence to dominate the territory of tortious liability for unintentional injury to the person or property of another'.[2] The non-delegable duty of care is a subset of duties of care owed in negligence which cannot be discharged by selection of an appropriately qualified contractor.[3] In *New South Wales v Lepore* ('*Lepore*'),[4] the majority found that a non-delegable duty could *not* be breached by intentionally caused harm so as to render a school authority liable for sexual abuse of a child by a teacher as it 'involves more'[5] and to do so would 'sever the duty from

[1] (1994) 179 CLR 520 ('*Burnie Port Authority*').
[2] Ibid 544 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).
[3] *Pafburn Pty Ltd v The Owners – Strata Plan No 84674* (2024) 99 ALJR 148, 154 [20] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) ('*Pafburn*').
[4] (2003) 212 CLR 511 ('*Lepore*').
[5] Ibid 532 [31] (Gleeson CJ, Callinan J agreeing at 624 [339]).

its roots in the law of negligence'.[6] In the appeal in *AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* ('*AA*'),[7] the Court was invited to overturn *Lepore* and recognise that the non-delegable duty of care can be breached by intentionally inflicted harm. This raised broader questions as to whether the law of negligence more generally should remain 'the territory of tortious liability for unintentional injury to the person or property of another'[8] or whether it can already, or should be developed to, apply to intentionally caused harm. In delivering judgment on 11 February 2026,[9] the High Court has taken that step and found that the non-delegable duty of care, and ordinary duties owed in negligence, can be breached by intentionally inflicted harm.

Like *Lepore*, the appeal in *AA* concerned a claim of child sexual abuse in an institutional context, following *Bird v DP (A Pseudonym)* ('*Bird*')[10] and other recent cases that have reached the High Court on different legal issues in the same context.[11] There is a common thread to these cases. Since the 1980s and 1990s, revelations of the extent of historical and ongoing child sexual abuse occurring in institutions entrusted with the care of children have shocked the world, and continue to do so. However, the pathways for survivors to seek compensation from the institutions in whose care they were abused are often blocked by insurmountable doctrinal hurdles. If the institution has not been negligent itself, the question will be whether the institution can be found liable for the wrongdoing of the abuser under the doctrines of vicarious liability, or by the operation of a non-delegable duty of care owed to the plaintiff.

One of the apparent tensions in the law is that claims in respect of institutional child abuse that may be factually very similar can have very different outcomes, depending upon the classification of the working status of the perpetrator. If intentional wrongdoing is committed by an *employee*, then in certain circumstances, the institution can be vicariously liable because it is accepted that vicarious liability applies to intentional torts, like battery. However, if intentional wrongdoing is committed by an *independent contractor* hired by the institution, vicarious liability

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[6] Ibid 602 [266] (Gummow and Hayne JJ). See also *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* [2025] NSWCA 72, [160] (Leeming JA) ('*Trustees of the Roman Catholic Church*').
[7] (High Court of Australia, S94/2025, commenced 17 June 2025).
[8] *Burnie Port Authority* (n 1) 544 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).
[9] *AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* (2026) 100 ALJR 170 ('*AA*').
[10] (2024) 98 ALJR 1349 ('*Bird*').
[11] *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 ('*Prince Alfred College*'); *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857; *Willmot v Queensland* (2024) 98 ALJR 1407; *RC v The Salvation Army (Western Australia) Property Trust* (2024) 98 ALJR 1453.

is unavailable. There is a bright line drawn around independent contractors,[12] who are supposed to carry their own insurance and manage their own liabilities. The non-delegable duty of care which arises in special circumstances has been historically recognised as rendering an institution personally liable for the *negligence* of independent contractors, but not for their intentional wrongdoing. To the community of families attending a school, a childcare centre, a church or other association, the institutional workforce appears as one. But not in the eye of the law. Given the fortress-like wall around vicarious liability limiting its scope to employee wrongdoing, it is therefore understandable that attention has been trained on the non-delegable duty of care, and whether *it* can be expanded in scope. However, as Professor Paula Giliker has noted, there is a very real question as to whether recourse to the non-delegable duty 'derives from frustration at the limits of vicarious liability rather than any considered conceptual development'.[13]

This article considers the issues in relation to the scope of the non-delegable duty of care to apply to intentionally caused harm. The first aim of this article is to clarify the Australian law prior to the delivery of judgment by the High Court in *AA*.[14] It argues that the scope of the non-delegable duty of care was not as uncertain as had been suggested. It shows that the non-delegable duty of care under Australian law was accepted as a duty of care owed in negligence, albeit one that could not be discharged by selection of an appropriately qualified contractor. It was not a stand-alone duty in tort that had a substantively different nature. Nor was it an absolute duty. The cases confirm that it is a 'species' of negligence.[15] If the non-delegable duty of care were developed as a standalone tort, it would require consideration of the effect that such a development would have on existing doctrines, such as vicarious liability, and the coherence of the law as a whole.[16]

[12] See, eg, *CCIG Investments Pty Ltd v Schokman* (2023) 97 ALJR 551, 561–2 [51] (Edelman and Steward JJ) ('*Schokman*'); *Bird* (n 9) [48] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ; Gleeson J contra at [100]).

[13] Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) 144, cited in *Cox v Ministry of Justice* [2014] EWCA 132, [61] (Beatson LJ). See also Jonathan Morgan, 'Liability for Independent Contractors in Contract and Tort: Duties to Ensure that Care is Taken' (2015) 74(1) *Cambridge Law Journal* 109, 122.

[14] In doing so, it endeavours to apply the approach described by Jane Stapleton as '[addressing] the law as it is' rather than seeking out a 'best fit' for a 'Grand Theory'. See Jane Stapleton, *Three Essays on Torts* (Oxford University Press, 2021) 17.

[15] See also John Murphy, 'The Liability Bases of Common Law Non-Delegable Duties: A Reply to Christian Witting' (2007) 30(1) *University of New South Wales Law Journal* 86.

[16] *Perera v Genworth Financial Mortgage Insurance Pty Ltd* (2017) 94 NSWLR 83, 94 [42] (Leeming JA) ('*Perera*'), quoting *Breen v Williams* (1996) 186 CLR 71, 115 (Gaudron and McHugh JJ) ('*Breen*').

The second aim of this article is to consider whether the Australian law of negligence prior to judgment by the High Court in *AA* was concerned with 'unintentional injury to the person or property of another'.[17] It is argued that, despite some inconsistency in the cases, and views of scholars to the contrary, the better view is that prior to *AA*, negligence was concerned with unintended injury and did not extend to intentionally inflicted injury. There is no doubt that negligence could always arise from intentional *acts*. But it was not clear whether it could arise from *intentionally inflicted harm*. This distinction is crucial to understanding the limitation on the scope of negligence prior to *AA*, and by extension, the non-delegable duty. In order to maintain coherence within the law of negligence, the expansion of the non-delegable duty to address intentionally inflicted harm required accepting that the law of negligence *as a whole* can be breached by the forms of criminally intentional wrongdoing discussed in *Lepore*. In *AA*, this is the step that the majority in the High Court has taken. 'Homicide, rape, and theft',[18] as identified by Gleeson CJ, can now be forms of negligent conduct. This is a very significant 'conquest in the imperial expansion of the law of negligence'.[19]

The article is structured as follows. The discussion commences in Part II by outlining the legal issues in relation to claims against institutional defendants in the context of institutional child abuse under Australian law. Part III summarises the facts and background to the appeal in *AA.* Part IV considers the historical scope of the non-delegable duty to apply to intentionally caused harm. Part V is a postscript updating the discussion of these issues in light of the findings of the High Court and concluding with some questions that remain.

II Legal Issues in Institutional Abuse Claims

The causes of action at common law typically relied upon in a claim against an institutional defendant will include one or more of negligence, vicarious liability or a non-delegable duty. However, in practice, prior to *AA* there could be a range of obstacles to any action succeeding under Australian law. For example, an unincorporated association cannot be sued in its own name at common law as it has no legal identity. This limits claims against many defendants, particularly faith-based organisations, that have been historically structured as unincorporated

[17] *Burnie Port Authority* (n 1) 544 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).
[18] *Lepore* (n 4) 532 [31].
[19] *Burnie Port Authority* (n 1) 570 (Brennan J). Cf *Astley v Austrust Ltd* (1999) 197 CLR 1, 23 [48] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

associations.[20] There can be significant practical difficulties in establishing that a duty of care was owed at the time of the relevant conduct, particularly where the offence is alleged to have occurred decades ago and prior to the now widespread community awareness of the risks of child sexual abuse in an institutional context.[21] Whilst a defendant may be vicariously liable for the intentional wrongdoing of an employee, including sexual abuse,[22] vicarious liability does not extend to independent contractors. Furthermore, the High Court has recently rejected the extension of vicarious liability to wrongdoing by persons 'akin to an employee'.[23] This precludes vicarious liability in respect of abuse perpetrated by people working in other positions, particularly clergy, that are not traditional relationships of employment, even though vicarious liability under the common law in England and Wales has extended to such relationships for over a decade.[24] The non-delegable duty of care applies to wrongdoing by independent contractors, but prior to AA was not capable of being breached by intentionally caused harm,[25] thus precluding breach of a non-delegable duty arising from child sexual abuse.

Compensation from an institution in relation to the intentional wrongdoing of anyone other than a true employee therefore fell outside the scope of common law actions. The case law records the efforts that have been made through court proceedings to overcome these doctrinal boundaries under Australian law, all with little success.[26] State and territory legislatures have responded to certain obstacles in the pathways to justice for survivors through several rounds of targeted legislative reform to remove limitation periods,[27] and, in some jurisdictions, to reform civil liability legislation to create a statutory form of vicarious liability for institutional child sexual abuse (with prospective operation)[28] and to introduce new statutory

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[20] *Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565, 575 [47] (Mason P, Ipp JA agreeing at 603 [200], McColl JA agreeing at 603 [201]). This has been addressed by law reform: see below n 29.
[21] *Trustees of the Roman Catholic Church* (n 6) [201].
[22] *Prince Alfred College* (n 10).
[23] *Bird* (n 9).
[24] See, eg, *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 ('*Catholic Child Welfare*'); *Cox v Ministry of Justice* [2016] AC 660; *Armes v Nottinghamshire County Council* [2018] AC 355 ('*Armes*'); *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2024] AC 567.
[25] *Lepore* (n 4) 531–33 [31]–[34].
[26] See, eg, *Lepore v New South Wales* (2001) 52 NSWLR 420 ('*Lepore (NSWCA)*'); *DP (a Pseudonym) v Bird* [2021] VSC 850; *AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* (2024) 334 IR 70 ('*AA (NSWSC)*').
[27] *Limitation of Actions Act 1936* (SA) s 3A(1); *Limitation of Actions Act 1958* (Vic) pt IIA div 5; *Limitation Act 1969* (NSW) s 6A(1); *Limitation of Actions Act 1974* (Qld) s 11A(1); *Limitation Act 1974* (Tas) s 5B(1); *Limitation Act 1981* (NT) s 5A(2); *Limitation Act 1985* (ACT) s 21C(2); *Limitation Act 2005* (WA) s 6A(2).
[28] *Civil Liability Act 2002* (SA) pt 7A; *Civil Liability Act 2002* (NSW) pt 1B; *Civil Liability Act 2002* (Tas) pt 10C; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) pt 3A.

duties of care.[29] Further reforms now allow for claims against unincorporated associations in respect of child abuse proceedings; for the appointment of a proper defendant to such claims brought against unincorporated associations; and for the recovery of damages from assets held on trust for an unincorporated association.[30] However, the limitations in the scope of vicarious liability and the non-delegable duty of care at common law remained insuperable obstacles for many survivors of historical institutional child sexual abuse.

The appeal in *AA* raised acutely the interaction of these common law obstacles and statutory complexities in the context of institutional child sexual abuse claims, particularly in relation to the liability of an unincorporated association. The proceedings in *AA* are discussed next.

III FACTS AND PROCEDURAL HISTORY IN *AA*

A *At First Instance*

The appellant in the appeal to the High Court was the plaintiff at first instance. He brought proceedings in relation to claims that he had been sexually abused in the 1960s by a priest, Father Ronald Pickin, in the presbytery of St Patrick's Catholic Church, Wallsend, in the Catholic diocese of Maitland-Newcastle, New South Wales.[31] The Diocese of Maitland-Newcastle is an unincorporated association. The proceedings were commenced against the Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle as the proper defendant under s 6O of the *Civil Liability Act 2002* (NSW) in respect of claims arising against the Diocese in negligence, vicarious liability and breach of a non-delegable duty (although the claims were not brought against the Diocese).

The assaults were alleged to have occurred when the plaintiff and a friend, Mr Perry, were in early high school and were invited by Father Pickin into the presbytery of the local church on Friday nights to consume alcohol, smoke cigarettes and play on a gambling machine in the bedroom when they were teenagers. The plaintiff claimed that Father Pickin committed penile-oral intercourse upon him, when the plaintiff was 'paralytic drunk', and they were alone in the presbytery together. Both Father

[29] *Civil Liability Act 1936* (SA) pt 7A div 2; *Wrongs Act 1958* (Vic) pt XIII; *Civil Liability Act 2002* (NSW) pt 1B div 2; *Civil Liability Act 2002* (Tas) pt 10C div 2; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) pt 3A div 2; *Civil Liability Act 2003* (Qld) pt 2A div 2.
[30] *Civil Liability Act 1936* (SA) s 50K; *Wrongs Act 1958* (Vic) s 92(1); *Civil Liability Act 2002* (NSW) pt 1B div 4 s 6N; *Civil Law (Wrongs) Act 2002* (ACT) pt 8A.2; *Civil Liability Act 2002* (Tas) pt 10C div 4; *Civil Liability Act 2002* (WA) pt 2A div 2; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) pt 3A div 4; *Civil Liability Act 2003* (Qld) pt 2A div 3.
[31] *AA (NSWSC)* (n 26).

Pickin and the Bishop of the Diocese had died before the litigation commenced. Mr Perry was called in the defence case. He agreed that he had visited the presbytery on Friday evenings with the plaintiff, where Father Pickin gave them alcohol and perhaps cigarettes, but said that other youths were present, and denied ever being sent out to buy cigarettes or having ever seen the plaintiff so drunk or assaulted.

The primary judge, Schmidt AJ, found the Diocese both vicariously liable[32] and liable in negligence.[33] The duty of care found by the court was based on a combination of the evidence led by the plaintiff about the awareness which bishops and other senior members of the Church then had about the risks which its priests could pose to children, complaints that had been received, the layout of the presbytery and lack of requirement to have other adults present which enabled Father Pickin to give the boys cigarettes and alcohol. Her Honour accepted that these facts together gave rise to a duty of care owed to *AA*. Despite some inconsistencies in the plaintiff's evidence, the primary judge accepted that the abuse occurred on the basis that the plaintiff's account was 'vivid'[34] and consistent with tendency evidence led that Father Pickin had touched other teenage male students' genitals. Her Honour found that the duty of care was breached and awarded damages of $636,480. Her Honour did not determine the claim in relation to a non-delegable duty.

B *The New South Wales Court of Appeal*

The Trustees appealed, submitting that the primary judge erred in finding that the abuse occurred, and that the appellant owed the plaintiff a duty of care which had been breached. On appeal, it was accepted that the judgment below based on vicarious liability could not stand after the High Court decision in *Bird*. However, by a notice of contention, the plaintiff sought to uphold the judgment of the primary judge based on a non-delegable duty.

Leeming JA, with whose reasons Bell CJ agreed, found that the fact-finding process at trial had miscarried. His Honour found that the primary judge had relied heavily on the vividness of the plaintiff's account without adequately addressing the possibility that this represented 'a sincerely held but unreliable belief'.[35] Leeming JA found that in a number of key respects the plaintiff's evidence was demonstrably unreliable.[36] Leeming JA held that the notice of contention in relation to the non-delegable duty was precluded by the *ratio* of the High Court's decision in *Lepore*

[32] Ibid 105 [219].
[33] Ibid 110 [264].
[34] Ibid 97 [164].
[35] *Trustees of the Roman Catholic Church* (n 6) [131], [136], [145].
[36] Ibid [138].

which had not been overturned. Despite questions as to whether the proceedings had been brought properly against the Trustees given that proceedings were not commenced against the Diocese, Leeming JA was prepared to assume that s 6O of the *Civil Liability Act 2002* (NSW) applied to permit the proceedings to be brought against the nominated defendant (although his Honour queried whether the proceedings were still required to be commenced against the association). However, Leeming JA found that no duty of care was owed by the Diocese in 1969. It was held that the existence of a duty of care turned on establishing knowledge by the Bishop or senior members of the Diocese which the plaintiff had not done. Leeming JA concluded that, whilst it may be accepted that a bishop with power to appoint and remove a priest who knew that a priest had a history of sexual assault would be under a duty to take reasonable steps to prevent further assaults,[37] it did not follow that in 1969 a reasonable person in the position of the Bishop would have taken steps 'on the basis that every priest was a potential child abuser'.[38] Leeming JA found that expert evidence about bishops' general awareness of risks was speculative and unsupported, and that a 1987 psychiatric report mentioning a 1954 complaint about another priest who had left the Diocese by 1969 was insufficient to establish relevant knowledge.[39]

Ball JA disagreed that the primary judge had erred in concluding that the plaintiff was sexually abused.[40] However, his Honour accepted that no duty of care was owed in 1969.[41] In the result the appeal was allowed on the grounds that the fact-finding process miscarried; that the claim in vicarious liability was unsustainable and non-delegable duty precluded by authority; and that no duty of care was owed in 1969.

The three grounds of the appeal to the High Court by the plaintiff at trial focused on the non-delegable duty and the duty of care. The first ground of appeal sought to overturn *Lepore* on the question of intentional wrongdoing and the scope of the non-delegable duty.[42] The second ground was whether a Catholic diocese owed a non-delegable duty (of the nature for which the appellant contends) in the 1960s to children entrusted to the pastoral care of a priest for religious education so as to found a cause of action brought against a nominated defendant.[43] The third ground related to the level of knowledge on the part of a bishop required to give rise to a

[37] Ibid [217].
[38] Ibid [218].
[39] Ibid [213]–[217].
[40] Ibid [253].
[41] Ibid.
[42] AA, 'Appellant's Submissions', Submission in *AA v the Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle*, S94/2025, 8 July 2025, [24]–[47].
[43] Ibid [48]–[55].

duty of care in the 1960s, and specifically whether it is necessary to show that 'the Bishop or senior priests in the diocese knew that the priest posed a risk to children'.[44]

Against this background to the appeal to the High Court, Part IV focuses on the historical scope of the non-delegable duty to be breached by intentionally caused harm, and Part V addresses the reasons of the High Court in *AA*.

IV The Scope of the Non-Delegable Duty of Care to Apply to Intentionally Caused Harm

Prior to *AA*, the non-delegable duty of care had been identified by courts[45] and scholars[46] as a potential means to render institutional defendants liable for child sexual abuse for some time. This part considers the historical nature of the non-delegable duty of care as a species of negligence and the consequences of that characterisation for its scope to be developed to apply to intentionally caused harm.

A *The Nature of the Non-Delegable Duty*

The nature of a common law non-delegable duty of care was considered by the High Court not long before the appeal in *AA*, in *Pafburn Pty Ltd v The Owners – Strata Plan No 84674* ('*Pafburn*').[47] There it was described by the majority as follows:

> 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 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

[44] Ibid [4].
[45] See, eg, *Schokman* (n 11) [81] (Edelman and Steward JJ).
[46] See, eg, 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; Francis Santayana, 'Vicarious Liability, Non-Delegable Duties and the "Intentional Wrongdoing Problem"' (2019) 25(2) *Torts Law Journal* 152; Robert Stevens, 'Non-Delegable Duties and Vicarious Liability' in Jason Neyers, Erika Chamberlain and Stephen Pitel (eds), *Emerging Issues in Tort Law* (Bloomsbury, 2007) 361; Neil Foster, 'Convergence and Divergence: The Law of Non-Delegable Duties in Australia and the United Kingdom' in Andrew Robertson and Michael Tilbury (eds), *Divergences in Private Law* (Hart, 2016) 197; Christine Beuermann, *Reconceptualising Strict Liability for the Tort of Another* (Hart, 2019) 49. See also Jane Wangmann, 'Liability for Institutional Child Sexual Assault: Where Does Lepore Leave Australia?' (2004) 28(1) *Melbourne University Law Review* 169.
[47] *Pafburn* (n 3).

> 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.[48]

Pafburn lent no support to the conception of the non-delegable duty of care as unrelated to the doctrine of negligence or as a standalone tort.49 This is consistent with earlier cases such as Leichhardt Municipal Council,50 where Kirby J observed that '[t]he supposition of a non-delegable duty does not alter the content of the tort sued for, nor does it substitute a different and free-standing tort.'51 His Honour there said that it 'does no more than to affirm the imposition of personal liability on the duty-holder, which cannot be discharged, as otherwise it would, by selecting an apparently reputable and competent contractor'.52 In Burnie Port Authority,53 Brennan J discussed the suggestion that had been made that the non-delegable duty was 'an absolute duty 'to prevent…mischief',54 a duty higher than a duty to exercise reasonable care. However, his Honour noted that 'the duty in negligence is not so demanding'.55 In that case, the majority also noted that in Kondis v State Transport Authority,56 Mason J had 'identified some of the principal categories of case in which the duty to take reasonable care under the ordinary law of negligence is non-delegable in that sense'. 57 As these cases confirm, it has consistently been treated as a 'species' of negligence, albeit one that cannot be discharged by selection of an appropriately qualified contractor.58

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[48] Ibid 154 [20] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), citing *Lepore* (n 4) 527–529 [20]–[21]; *Commonwealth v Introvigne* (1982) 150 CLR 258, 270 (Mason J) ('*Introvigne*'); *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906, 910 (Lord Hailsham); *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 350 (Toohey J); *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22, 29 [9] (Gleeson CJ) ('*Leichhardt Municipal Council*'). As Denning LJ said in *Cassidy v Ministry of Health* [1951] 2 KB 343, 363: '…where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services.'

[49] Cf Christian Witting, 'Breach of the Non-Delegable Duty: Defending Limited Strict Liability in Tort' (2006) 29(3) *University of New South Wales Law Journal* 33.

[50] *Leichhardt Municipal Council* (n 48).

[51] Ibid 62 [109].

[52] Ibid.

[53] *Burnie Port Authority* (n 1).

[54] Ibid 576, quoting *Bower v Peate* (1876) 1 QBD 321, 326–7 (Cockburn CJ).

[55] *Burnie Port Authority* (n 1) 577.

[56] (1984) 154 CLR 672, 679–87 ('*Kondis*').

[57] *Burnie Port Authority* (n 1) 550.

[58] See also John Murphy, 'The Liability Bases of Common Law Non-Delegable Duties: A Reply to Christian Witting' (2007) 30(1) *University of New South Wales Law Journal* 86.

The majority in *Pafburn* cited *Lepore* as one of the authorities for this description of the nature of the non-delegable duty of care.[59] The Court's reasons in *Lepore* are discussed in detail below, but for present purposes, Gummow and Hayne JJ expressly noted that all of the cases in which non-delegable duties have been considered by the High Court 'have been cases in which the plaintiff has been injured as a result of negligence'.[60] The majority also cited the Court's earlier decision in *Introvigne*.[61] Like *Lepore*, *Introvigne* was a case dealing with the non-delegable duty owed by a school authority but unlike *Lepore*, in that case it was found to have been breached. In *Introvigne*, Mason J there described the duty of care owed by the school in classical terms drawn from *Carmarthenshire County Council v Lewis*,[62] observing that the liability of a school authority in negligence for injury suffered by a pupil attending the school is not a purely vicarious liability. His Honour stated:

> A school authority owes to its pupil a duty to ensure that reasonable care is taken of them whilst they are on the school premises during hours when the school is open for attendance…[The decision in *Carmarthenshire*] proceeds on the footing that 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.[63]

All of these discussions are consistent with the non-delegable duty as a duty owed in negligence, but one that cannot be discharged through delegation to a competent contractor.

Some cases describe the non-delegable duty as a duty 'to take positive steps' to protect a plaintiff from particular harm.[64] The question has been raised whether this gives the non-delegable duty of care a different scope, such that it is breached if a particular harm (like abuse) occurs. In *Lepore*, Gaudron J addressed this argument. Her Honour noted that positively expressed formulations of the non-delegable duty such as a 'duty to provide a safe system of work' upon an employer, do not amount to strict liability for *any* harm. Her Honour observed that:

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[59] *Pafburn* (n 3) 154 [20], citing *Lepore* (n 4).
[60] *Lepore* (n 4) 599 [256].
[61] *Pafburn* (n 3) 154 [20], citing *Introvigne* (n 48).
[62] [1955] AC 549 ('*Carmarthenshire*').
[63] *Introvigne* (n 48) 269–70 (Mason J, Gibbs CJ agreeing at 260).
[64] See, eg, *Lepore* (n 4) 552–3 [104]–[105] (Gaudron J); *Kondis* (n 56) 686–7 (Mason J, Deane J agreeing at 694, Dawson J agreeing at 695); *Introvigne* (n 48) 271 (Mason J); *Leichhardt Municipal Council* (n 48) 64–5 [117]–[121] (Kirby J); *Woodland v Swimming Teachers Association* [2014] AC 537, 573 [7], 583 [23], 584–5 [25] (Lord Sumption JSC, Lords Clarke, Wilson and Toulson JJSC agreeing) ('*Woodland*').

> There is a tendency to speak, in the case of an employer, of a duty to provide a safe system of work or, in the case of an education authority, a duty to provide a safe school environment, without acknowledging either that, in that context, "safe" means "free of a foreseeable risk of harm" or that the duty is a duty to take reasonable care. If the duty of an education authority to provide a safe school environment were not confined by considerations of foreseeability and reasonable care, it would result in strict liability in the sense that the authority would be liable upon proof of injury being sustained on school premises during school hours.[65]

In other words, whilst the duty is commonly one that can be expressed positively,[66] that does not convert it into a positive duty to prevent all harm.

Against this brief summary of the nature of the non-delegable duty under Australian law leading up to the appeal in *AA*, the next section considers what support existed for the proposition that *negligence generally* could be breached by intentionally caused harm. It considers the surprising lack of certainty about such a foundational question in the law prior to *AA*. This remains relevant in other common law jurisdictions that still lack a clear answer to the question and for which the Australian developments will be of interest when the issue arises for consideration.

B *Does Negligence Extend to Intentionally Caused Harm?*

This section addresses the historical development of negligence and differing views prior to *AA* as to whether it encompassed intentionally caused harm, or 'deliberately and criminally inflict[ed] injury.'[67] It is argued here that the better view of earlier High Court authority was that intentionally caused harm did not fall within the scope of the negligence under Australian law.[68]

It is important to recognise that whilst the historical form of action moulded the early development of negligence, its contemporary form is shaped by precedent. As discussed in this section, there is little to support the argument that prior to *AA*, the courts had recognised that negligence extended to intentionally inflicted harm. For example, in *Burnie Port Authority*, the High Court noted that from the historical action on the case we can trace 'the subsequent emergence of a coherent law of negligence to dominate the territory of tortious liability for unintentional injury to the person or property of another'.[69] In *Lepore* the reasons given by the majority for rejecting such scope for the non-delegable duty of care also rejected, by necessary

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[65] *Lepore* (n 4) 552 [103] (Gaudron J).
[66] Ibid 552–3 [104] (Gaudron J).
[67] Ibid 531 [31] (Gleeson CJ).
[68] Ibid 531–2 [31] (Gleeson CJ).
[69] *Burnie Port Authority* (n 1) 544 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

inference, the argument that negligence could apply to intentionally inflicted personal injury.[70] Gleeson CJ, with whom Callinan J agreed, found that intentional criminality introduces a factor of legal relevance beyond a mere failure to take care in negligence. Gummow and Hayne JJ commented that all of the cases in which a non-delegable duty has been found have been cases of negligence, so to extend non-delegable duty to intentional acts would be to 'sever the duty from its roots in the law of negligence'.[71] There were some judicial *dicta* suggesting that negligence could apply to intentionally caused harm. For example, in *Schokman*, Edelman and Steward JJ observed that 'it is at least arguable that the assault claim [in *Lepore*] could nevertheless have been pleaded as a breach of a duty of care'.[72] In *Carrier v Bonham*,[73] McPherson JA suggested that '[w]hat we really have now is not two distinct torts of trespass and negligence, but a single tort of failing to use reasonable care to avoid damage however caused.'[74] However these cases did not need to decide the issue.

There has been stronger academic support for the view that the modern law of negligence is conduct-based only and, therefore, whether harm is intentionally caused or not is irrelevant. Cane for example, had argued that '[n]egligence in tort law is failure to comply with a legally specified standard of conduct, pure and simple. It has no mental element.'[75] On this view, arguably, '[h]omicide, rape, and theft'[76] are acts that fall below the standard of conduct required and this is all that matters. Accordingly, as argued by Stevens, 'liability for deliberate abuse follows *a fortiori* from liability for want of care'.[77] Handford comprehensively surveyed scholarly support for the proposition and also argued that 'the tort of negligence is a valuable addition to the armoury of weapons available for deliberate wrongdoing'.[78]

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[70] *Lepore* (n 4) 535 [38]–[39] (Gleeson CJ, Callinan J agreeing at 624 [339]), 601 [265] (Gummow and Hayne JJ).
[71] Ibid 602 [266] (Gummow and Hayne JJ).
[72] *Schokman* (n 12) 198 [78], citing *Lepore* (n 4); *Williams v Milotin* (1957) 97 CLR 465, 470–1 (Dixon CJ, McTiernan, Williams, Webb and Kitto JJ) ('*Milotin*'); *Gray v Motor Accident Commission* (1998) 196 CLR 1, 9–10 [22] (Gleeson CJ, McHugh, Gummow, and Hayne JJ), 28 [85] (Kirby J) ('*Gray*').
[73] [2002] 1 Qd R 474.
[74] Ibid 484 [27] (McPherson JA).
[75] Peter Cane, 'Mens Rea in Tort Law' (2000) 20(4) *Oxford Journal of Legal Studies* 535, 536.
[76] *Lepore* (n 4) 531–2 [31] (Gleeson CJ).
[77] Stevens, 'Non-Delegable Duties and Vicarious Liability' (n 46) 361. See also Jack Maxwell, 'Liability of Educational Institutions for Child Abuse' (2019) 93(6) *Australian Law Journal* 477, 480, citing Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 271.
[78] Peter Handford, 'Intentional Negligence: A Contradiction in Terms?' (2010) 32(1) *Sydney Law Review* 29, 61.

There is no question that *mens rea* is not an express element of negligence. From 19th century expressions of principle in cases such as *Heaven v Pender*,[79] in which Brett MR described 'actionable negligence' as 'the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill', through to Lord Atkin's famous dictum in *Donoghue v Stevenson,*[80] to modern formulations,[81] it is conspicuously absent. It is expressly rejected by the authors of the 11th edition of *Fleming's Law of Torts*:

> … it is important to grasp at the outset that negligence is not a state of mind, but conduct that falls below the standard regarded as normal or desirable. The subjective notion of personal 'fault' has long been discarded in favour of the stricter, impersonal standard of how a reasonable person should have acted in the circumstances.[82]

It is surprising that such a fundamental question has apparently not been authoritatively settled under Australian law. As discussed below, it is argued that the better view of the law of Australia prior to *AA* was that negligence does *not* apply to intentionally inflicted harm. However, it is not clear how this limitation arose, other than by judicial implication, or whether there remains a logical rationale for it. As discussed in Part V, the High Court has now found that the non-delegable duty does extend to intentionally inflicted harm.

1 *The meaning of 'intention'*

A brief exercise in ground clearing is necessary to address the meaning of 'intention' as it is used in relation to arguments that negligence does, or does not, extend to 'intentional conduct', 'intentional wrongdoing', and 'intentionally inflicted injury'. A comprehensive discussion of the role of intention in tort law is beyond the scope of this article, and this article is not intended to engage with various theoretical underpinnings for tortious liability, or the relevance of intention to any particular model.[83] However, there are two narrow points to clarify for the limited purpose of understanding the different ways in which these terms are used in cases.

[79] (1883) 11 QBD 503, 509 ('*Heaven*').
[80] [1932] AC 562, 579–80 ('*Donoghue*').
[81] See, eg, Carolyn Sappideen et al, *Fleming's The Law of Torts* (Thomson Reuters, 11th ed, 2023) 141.
[82] Ibid.
[83] There have been a number of significant scholarly considerations of its role. See, eg, Cane (n 71); Handford (n 748; Peter Cane, 'Justice and Justifications for Tort Liability' (1982) 2(1) *Oxford Journal of Legal Studies* 30; FA Trindade, 'Intentional Torts: Some Thoughts on Assault and Battery' (1982) 2(2) *Oxford Journal of Legal Studies* 211; Philip Sales and Daniel Stilitz, 'Intentional Infliction of Harm by Unlawful Means' (1999) 115 *Law Quarterly Review* 411, 436–7.

First, the word 'intentional' in the phrase an 'intentional act' is sometimes used simply to denote a *voluntary* act as opposed to an involuntary act.[84] There is no doubt that negligence can arise from an 'intentional act' in this sense. Voluntary acts are often conscious deliberate choices. I can choose to kick a ball. However, this does not imply an *intention to inflict harm* from that conduct.

Second, it is clear that negligence can arise from intentional conduct and even give rise to exemplary damages where the defendant is shown to have acted 'consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff'.[85] These are relatively rare cases in negligence. However, the instances in which it has been awarded were still *unintentional* injury cases, rather than instances of an intention to cause harm. For example, exemplary damages have been awarded in employment cases where an employer has consciously allowed a risk of harm to continue on a worksite, such as the presence of asbestos, where the employer knew or ought to have known that it could cause harm. It has been held in some of these cases that the employer's decisions preferencing corporate profits were 'in contumelious disregard of the rights of the plaintiff' who later contracts a deadly lung disease or other physical illness. However, they did not arise from an intention to *cause* such harm. As observed by Mahoney P:

> One may, I think, act "in contumelious disregard of the plaintiff's rights" by doing recklessly and negligently what is likely to cause damage to the plaintiff even though it is not one's intention to cause it.[86]

Accordingly, acting intentionally, even 'in contumelious disregard of the plaintiff's rights', is not to be equated with intentionally caused harm or 'intentional wrongdoing' and can arise in relation to unintentionally caused injuries within the law of negligence.

In some contexts, negligence is used to indicate 'inadvertence to consequences' as opposed to intention which signifies 'advertence to consequences'.[87] However, difficult questions arise in relation to reckless indifference as to a foreseeable outcome that was not desired, but not avoided. Cane has noted that recklessness can sometimes be elided with an intention to produce that harm.[88] It is beyond the scope of this article to explore in detail the role of recklessness in negligence. The focus here is on intentionally inflicted, direct physical contact in the form of child sexual

[84] Cane (n 83) 35.
[85] *Gray* (n 72) 9–10 [22] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
[86] *Trend Management Ltd v Borg* (1996) 40 NSWLR 500, 504 (Mahoney P) ('*Trend Management*').
[87] Cane (n 83) 38.
[88] Ibid.

abuse. In these cases, the perpetrator has intentionally committed this form of direct and unlawful harm that amounts to the tort of battery.

2 *19th and 20th century developments*

A brief sketch of the history of intentional and unintentional torts and their relationship to the forms of action in the nineteenth century provides context for the discussion of the development of negligence which follows. The point has been made that the distinction between the historical forms of action was originally between direct and indirect harm,[89] rather than between intentional and unintentional conduct. However, as noted by Cane,[90] gradually the distinction between negligence as inadvertent (careless) and unintentionally inflicted harm, on the one hand, and wilfully inflicted injury, on the other, became evident in the cases.

(a) Intentionally caused harm

Prior to the judicature reforms, choosing the appropriate form of action turned on whether the harm was direct or indirect. The presence of intention to cause the harm could be relevant to the appropriate cause of action. Directly caused harm was actionable in trespass, including if intentionally caused. These came to be known as the 'intentional' torts: of battery, assault and false imprisonment.[91] Harm caused intentionally but *indirectly* came to be recognised in discrete actions on the case. For example, in *Bird v Holbrook* ('*Holbrook*'),[92] the Court recognised that indirectly but intentionally caused physical injury was actionable on the case. *Holbrook* concerned the deliberate setting of a loaded gun, or 'spring gun', set in a garden with a trip wire 'for the express purpose of doing injury'.[93] The teenage plaintiff was badly injured by a spring gun when he trespassed into the defendant's garden to retrieve his pea fowl which had strayed onto the defendant's property. In *Wilkinson v Downton*,[94] the defendant was found liable for the plaintiff's injuries arising from severe shock following the defendant's conduct in deliberately telling the plaintiff a practical joke about her husband having been badly injured. Wright J found that:

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[89] *Scott v Shepherd* (1773) 2 Black W 892; 96 ER 525, 527-8 (Blackstone J).

[90] Cane (n 83) 37, citing *Ogle v Barnes* (1799) 8 TR 188; 101 ER 1338, *Williams v Holland* (1833) 6 Car & P 23; 172 ER 1129. Cane (n 82) observes (at 38) that '[t]hus it was, in the area of personal injuries, that the exclusive territory of Trespass came to be restricted to intentional, direct injuries.'

[91] See, eg, Trindade (n 83) for a discussion of these intentional torts.

[92] (1828) 4 Bing 628; 130 ER 911 ('*Holbrook*').

[93] Ibid 916 (Best CJ).

[94] [1897] 2 QB 57 ('*Downton*'). See generally Handford (n 748; M Lunney, 'Practical Joking and its Penalty: *Wilkinson v Downton* in Context' (2002) 10(3) *Tort Law Review* 168.

> The defendant has … wilfully done an act calculated to cause physical harm to the plaintiff — that is to say, to infringe her legal right to personal safety, and has in fact caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification for the act.[95]

The conduct was characterised there as 'calculated to harm' because:

> It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore *an intention to produce such an effect must be imputed*…[96]

Handford notes that in order to find for the plaintiff, Wright J had to create a new tort as no existing tort fitted the facts: it was treated as a cause of action arising from intentionally caused, indirect harm. Handford observed that '[t]he tort that he created is potentially quite wide-ranging: it covers any sort of conduct which is calculated to cause physical harm to the person',[97] and that a tort for intentionally inflicted, indirect harm could in theory apply to other intentionally caused, indirect harm cases, such as spring-gun cases like Bird v Holbrook, the administration of drugs or poison, the infliction of disease, and the well-known examples of logs on the highway.[98] However, its subsequent reach has been largely confined to physical harm by way of nervous shock. Different views have been taken as to whether it was properly a case of intentionally inflicted harm if the intention had to be imputed. As there was no intention to injure by telling the joke which caused the readily foreseeable harm, it has been suggested that the circumstances might be better analysed now under negligence.[99]

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[95] *Downton* (n 94) 58-–9.
[96] Ibid 59 (emphasis added).
[97] Peter Handford, 'Wilkinson v Downton and Acts Calculated to Cause Physical Harm' (1985) 16(1–2) *University of Western Australia Law Review* 31, 34.
[98] Ibid 35.
[99] The proper understanding of the case continues to be debated. There has been *obiter* in the High Court to suggest that the case might have been subsumed by negligence. See *Magill v Magill* (2006) 226 CLR 551, 589 [117] (Gummow, Kirby and Crennan JJ) ('*Magill*'). This was doubted by Spigelman CJ in *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471, 486–7 [71]–[74] ('*Nationwide News*'). See also Scott Wotherspoon, 'Resuscitating the Wilkinson v Downton Tort in Australia' (2011) 85(1) *Australian Law Journal* 37.

(b) Unintentionally caused harm

In *Williams v Holland,*[100] a significant nineteenth century case resolving that negligence was not confined by the existing forms of action, both the parties and the court confined intentional wrongdoing (or *wilful* harm) to trespass and excluded it from the scope of negligence. Tindal CJ held that:

> We think [*Moreton v Hardern* (1825) 4 B & C 223; 107 ER 1042] has laid down a plain and intelligible rule, that where the injury is occasioned by the carelessness and negligence of the Defendant, the Plaintiff is at liberty to bring an action on the case, notwithstanding the act is immediate, *so long as it is not a wilful act;* and, upon the authority of that case, we think the present form of action maintainable to recover damages for the injury.[101]

For present purposes, it is this express exclusion of intentionally caused harm from the scope of negligence that is important. This was adopted under Australian law. *Williams* was applied in *Elliott v Barnes*.[102] Street CJ found that, '[i]f of course, the plaintiff were able to establish a wilful and deliberate act on the part of the plaintiff causing injury to the plaintiff then trespass would lie and the plaintiff should bring his action in that form.'[103] Similarly, Maxwell J held that 'in relation to a wilful act the plaintiff is confined to an action for trespass against the defendant for his own personal act'.[104]

The action on the case for indirect harm was the forerunner of the modern law of negligence. By the nineteenth century, the law had come to recognise particular duties to take care in certain relationships that would be breached by an act or omission that caused harm to another inadvertently. These cases were 'directly opposed to intention where the mind fully appreciates the duty'.[105] Following the abolition of the forms of action,[106] it took another 50 years before Lord Atkin articulated a general conception of a duty of care in tort in *Donoghue*, such that in *Grant v Australian Knitting Mills*,[107] it was said that 'the decision treats negligence,

[100] (1833) 10 Bing 112; 131 ER 848 ('*Williams*').
[101] Ibid 850 (emphasis added). In *Moreton v Hardern* (1825) 4 B & C 223; 107 ER 1042, it was claimed that the defendants so carelessly managed their coach and horses, that the coach ran against the plaintiff and broke his leg. The jury found that it happened through his defendant's negligent driving.
[102] (1951) 51 SR (NSW) 179.
[103] Ibid 182 (Street CJ, with whom Owen J agreed).
[104] Ibid, (Maxwell J, with whom Owen J also agreed).
[105] See generally Percy H Winfield, 'The History of Negligence in the Law of Torts' (1926) 42(2) *Law Quarterly Review* 184.
[106] *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66; *Supreme Court of Judicature Act 1875*, 38 & 39 Vict, c 77. See, eg, Winfield (n 105).
[107] (1935) 54 CLR 49 ('*Australian Knitting Mills*').

where there is a duty to take care, as a specific tort in itself'.[108] The correlation that developed between negligence and careless or inadvertent injury, as contrasted with wilfully inflicted injury actionable in trespass, was evident in scholarly analysis. For example, in the first edition of Salmond*'s Law of Torts,* published in 1907, the exclusion of intentionally inflicted injury from the scope of negligence was discussed as follows:

> §5-Negligence
>
> Negligence is the breach of a legal duty to take care. It is carelessness in a matter in which carefulness is made obligatory by law. Negligence and wrongful intent are the two alternative forms of *mens rea*, one or other of which is commonly required as a condition of liability. Each consists in a certain mental attitude of the defendant towards the consequences of his act. He intends those consequences when he foresees and desires them, and there does the act in order that they may happen. He is guilty of negligence, on the other hand, when he does not desire the consequences, and does not act in order to produce them, but is nevertheless indifferent or careless whether they happen or not, therefore does not refrain from the act notwithstanding the risk. The careless man is he who does not care — who is not anxious that his activities shall not be the cause of loss to others. The wilful wrongdoer is he who desires harm; the negligent wrongdoer is he who does not sufficiently desire to avoid doing it. Negligence and wrongful intent are inconsistent and mutually exclusive states of mind. He who causes a result intentionally cannot have caused it negligently, and vice versa.
>
> ….
>
> The term negligence is used to denote not merely the mental attitude that has been described, but also conduct produced by such a mental attitude. In other words negligence means either subjectively a careless state of mind, or objectively careless conduct…This double use causes no difficulty or confusion, for negligence in the one sense is necessarily accompanied by negligence in the other also…Negligence in the subjective sense is opposed to wrongful intent; negligence in the objective sense is opposed to intentional wrongdoing.
>
> It is negligence in its objective sense that is referred to in the well-known definition of Alderson B in *Blyth v Birmingham Waterworks Co*:[109] "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct

[108] Ibid 63 (Lord Wright for the Board).
[109] (1856) 11 Ex 781, 784.

> of human affairs, would do, or doing something which a prudent and reasonable man would not do".[110]

Understood this way, negligent conduct and intentionally inflicted injury are mutually exclusive. There is a purpose for tracing this early development of negligence by the courts and contemporaneous scholarly analysis. It suggests that the exclusion of intentionally inflicted harm was not a constraint imposed by forms of action and discarded with their abolition: it was a limitation that had shaped the scope of negligence as it developed an independent tort. Dias observed that:

> The recognition of carelessness as a mode of inflicting harm has been variously traced by legal historians. When a sufficiently large volume of case-law has accumulated dealing with the careless infliction of harm, it is possible to draw a ring round them on paper, extract principles according to which remedies have been granted and refused, and then say that this is the "tort of negligence."[111]

(c) 20th century developments

Many of the key 20th century cases were limitation cases, where the shorter limitation period for intentional torts was an obstacle sought to be overcome by pleading in negligence which attracted a longer limitation period. *Milotin* concerned limitation periods in respect of injuries caused by negligent driving of a car by the defendant. The issue was whether the action for damages for personal injury was available in either of negligence (for which the limitation period was six years) or in trespass (for which the three-year limitation period had expired), at the election of the plaintiff. It was held that in the circumstances, it could have been brought in either and so was not out of time. However, in so finding, the majority distinguished the facts from intentional harm, saying '[t]here is no suggestion that the defendant intended to strike him. If that had been the allegation the action could have been brought in trespass and not otherwise.'[112] The court cited *Williams* as one of the authorities for the finding.

Following *Milotin*, another case arising from limitation issues under English law was decided by the Court of Appeal in *Letang v Cooper*.[113] On the scope of negligence, Lord Denning MR found that '[i]f [a person] does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only

[110] Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Stevens and Haynes, 1907) 18–20.
[111] RWM Dias, 'The Duty Problem in Negligence' (1955) 13(2) *Cambridge Law Journal* 198, 199.
[112] *Milotin* (n 72) 470 (Dixon CJ, McTiernan, Williams, Webb and Kitto JJ).
[113] [1965] 1 QB 232 ('*Letang*').

cause of action is in negligence, and then only on proof of reasonable care.'[114] Handford has rightly noted that Lord Denning MR did not say, in terms, that for *intentionally caused* injuries, the *only* cause of action was trespass.[115] However, subsequently in *Gray v Barr*,[116] Lord Denning MR held so unambiguously. The issue was whether Mr Barr's home insurance policy coverage of 'accidents' applied to the circumstances where he had gone into Mr Gray's house with a loaded gun (suspecting that Mr Gray was with Mr Barr's wife), firing one shot deliberately. During a physical fight between the men, the gun went off again, killing Mr Gray. Lord Denning MR held that the 'dominant and effective cause' of the shooting was the 'deliberate act in going up the stairs with a loaded shotgun',[117] observing that:

> If the death of Mr Gray was caused by the deliberate act of Mr Barr in going up the stairs with a loaded gun, it was no accident ... The first question, therefore, is whether Mr Gray, had he lived, would have had a cause of action. The answer is: Yes, he would: but it would have been an action for assault, not for negligence. Whenever two men have a fight and one is injured, the action is for assault, not for negligence. … The idea of negligence — and contributory negligence — is quite foreign to men grappling in a struggle.[118]

Prior to *AA*, the High Court of Australia had continued to distinguish intentionally inflicted harm from negligence. In *Burnie Port Authority*, the majority of the High Court described negligence as 'the territory of tortious liability for *unintentional injury* to the person or property of another'[119] and in *Northern Territory v Mengel* ('*Mengel*'),[120] the majority distinguished negligence from 'torts which impose liability on private individuals for the intentional infliction of harm',[121] noting that 'the recent trend of legal development…has been to the effect that liability in tort depends on either the intentional or the negligent infliction of harm'.[122] Four judges, Mason CJ, Dawson, Toohey and Gaudron JJ, were in the majority in both *Burnie Port Authority* and *Mengel*.

Twenty years before his appointment to the United Kingdom Supreme Court, Philip Sales (as he then was) and Daniel Stilitz cited these views of the Australian High

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[114] Ibid 239.
[115] Handford (n 78) 41.
[116] [1971] 2 QB 554 ('*Barr*'). See also Trindade (n 83).
[117] *Barr* (n 116) 567.
[118] Ibid 569.
[119] *Burnie Port Authority* (n 1) 544 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) (emphasis added).
[120] (1995) 185 CLR 307 ('*Mengel*').
[121] Ibid 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).
[122] Ibid 341.

Court in *Mengel*, amongst other judicial references,[123] for the proposition that the law of tort could be 'organised at the two levels of intentional infliction of harm and failure to take reasonable care',[124] distinguishing 'harm inflicted intentionally, as a counterpart to the generalisation of the reasonable care or reasonable behaviour standard in the non-intentional sphere'.[125] The authors noted that the Australian High Court's observation in *Mengel* referred to above echoed the words of Lord Denning MR in *Letang* that claims for personal injury were now classified by whether 'the defendant did the injury intentionally or unintentionally'.[126]

In their article, Sales and Stilitz were not addressing the non-delegable duty of care; rather, the scope of the tort of interference with trade or business by unlawful means. The authors argued that the tort would be more accurately described as 'intentional infliction of harm by unlawful means' and that 'a more helpful approach to understanding the limits of the tort lies in focusing more closely upon the element of intention'.[127] But the authors' broader thesis remains relevant to this discussion. The authors argued for an organisation of torts such that 'the two principles of liability, for intentional infliction of harm and for failure to take reasonable care, should be regarded as base rules'.[128] These 'base rules' are consistent with the statements in *Burnie Port Authority* and *Mengel* discussed above, and with the *ratio* of *Lepore* considered next.

(d) Lepore

Lepore concerned the scope of the non-delegable duty of care owed by the State to a child in a State school in respect of sexual abuse of the child by the schoolteacher. The New South Wales Court of Appeal had found that the non-delegable duty of care owed by the State *could* be breached by such intentional wrongdoing.[129] In that case, a teacher was convicted of common assault of a child in punishing him for misbehaviour by sending him to a small room adjacent to the classroom, making him take his clothes off, and smacking the child on his bare buttocks and indecently handling him. It is noteworthy that the Court of Appeal regarded the question as novel. Mason P noted that '[i]t sometimes happens that a court is faced with a

[123] Including *Hunter v Canary Wharf* [1997] AC 655, 707E–G (Lord Hoffmann).
[124] Sales and Stilitz (n 83) 436–7.
[125] Ibid 436.
[126] *Letang* (n 113) 239E–240B (Lord Denning MR).
[127] Sales and Stilitz (n 83) 411.
[128] Ibid 437.
[129] *Lepore (NSWCA)* (n 26).

specific new situation in which there is no direct authority.'[130] The majority held that the non-delegable duty was breached by the deliberate assault. Mason P held:

> In my view the State's obligations to school pupils on school premises and during school hours extend to ensuring that they are not injured physically at the hands of an employed teacher (*whether acting negligently or intentionally*).[131]

The same question arose in *Rich v State of Queensland*.[132] The Queensland Court of Appeal unanimously refused to apply the majority's reasons in the New South Wales Court of Appeal in *Lepore* on this issue, agreeing with the reasons of Heydon JA in dissent. McPherson JA observed that:

> Having regard to what I consider was decided in *Commonwealth v Introvigne,* the "undertaking" [in a non-delegable duty], if that is what it really is, is not "to ensure that no harm befalls the plaintiff", but at most an undertaking that the State would take reasonable steps to ensure the safety of persons like the plaintiffs. That is consistent with the decision in *Carmarthenshire County Council v Lewis* [1955] AC 549, from which the liability is derived.[133]

Thomas and Williams JJA each observed that to give it such scope would introduce a new rule rendering the employer absolutely liable. Thus, this question was squarely in issue in the appeal to the High Court.

In the High Court, a majority also rejected the application of the non-delegable duty of care to intentionally inflicted harm. Gleeson CJ, with whom Callinan J agreed, observed that

> although deliberately and criminally inflicting injury on another person involves a failure to take care of that person, it involves more. If a member of a hospital's staff with homicidal propensities were to attack and injure a patient, in circumstances where there was no fault on the part of the hospital authorities, or any other person for whose acts or omissions the hospital was vicariously responsible, the common law should not determine the question of the hospital's liability to the patient on the footing that the staff member had neglected to take reasonable care of the patient. It should face up to the fact that the staff member had criminally assaulted the patient, and address the problem of the

[130] Ibid 421–2 [1] (Mason P, Davies AJA agreeing at 448 [127]).
[131] Ibid 432 [61] (Mason P, Davies AJA agreeing at 448 [127]) (emphasis added).
[132] (2001) Aust Torts Reports 81-626 (McPherson, Thomas and Williams JJA).
[133] Ibid 67,392 [18].

> circumstances in which an employer may be vicariously liable for the criminal acts of an employee. Intentional wrongdoing, especially intentional criminality, introduces a factor of legal relevance beyond a mere failure to take care. *Homicide, rape, and theft are all acts that are inconsistent with care of person or property, but to characterise them as failure to take care, for the purpose of assigning tortious responsibility to a third party, would be to evade an issue.*[134]

Gleeson CJ's example of the act of a homicidal hospital staff member constituting a crime, not negligence, directly illustrated the question of the scope of negligence to apply to intentionally inflicted harm and it was rejected. Gummow and Hayne JJ similarly commented that all of the cases in which a non-delegable duty has been found have been cases of negligence, so to extend non-delegable duty to intentional acts would be to 'sever the duty from its roots in the law of negligence'.[135] *Milotin* was applied as authority for the exclusion from negligence of intentionally caused harm. Their Honours said:

> As *Williams v Milotin* makes plain, negligently inflicted injury to the person can, in at least some circumstances, be pleaded as trespass to the person, but the intentional infliction of harm cannot be pleaded as negligence.[136]

This reasoning clearly demonstrates that the scope of the non-delegable duty was viewed by the Court through the lens of negligence, and that criminally intentional wrongdoing was regarded as lying beyond its focus.

However, McHugh J dissented on the issue. His Honour held that

> a State education authority owes a duty to a pupil to take reasonable care to prevent harm to the pupil. The duty cannot be delegated. If, as is invariably the case, the State delegates the *performance* of the duty to a teacher, the State is liable if the teacher fails to take reasonable care to prevent harm to the pupil. The State is liable even if the teacher intentionally harms the pupil. The State cannot avoid liability by establishing that the teacher intentionally caused the harm even if the conduct of the teacher constitutes a criminal offence. It is the State's duty to protect the pupil, and the conduct of the teacher constitutes a breach of the State's own duty.[137]

[134] *Lepore* (n 4) 531–2 [31] (emphasis added).
[135] Ibid 602 [266] (Gummow and Hayne JJ).
[136] Ibid 602–3 [270].
[137] Ibid 562 [136] (emphasis added).

McHugh J reasoned further that an action for negligent infliction of harm is not barred by reason of the intentional act of the person causing the harm and that following abolition of the forms of action, a plaintiff may, if he or she chooses, sue in negligence for the intentional infliction of harm.[138] McHugh J was the only judge in the Court who clearly accepted that negligence conceptually extends to intentionally caused harm.

Following *Lepore*, its *ratio* was applied to prevent negligence from extending to intentionally inflicted harm. For example, *Nationwide News Pty Ltd v Naidu* concerned the liability of an employer for intentional conduct by way of racial slurs and vilification by one employee of another. Spigelman CJ noted that in respect of the wrongdoer's 'intentional course of conduct, which brutalised the respondent, it is artificial to analyse his conduct in terms of a duty of care owed by either appellant'.[139] The Chief Justice observed that the imperial march of negligence had sometimes led to a 'lack of rigour' in the analysis of a cause of action, particularly in the context of differentiating negligence from intentional conduct,[140] citing both *Lepore* and *Milotin* for the proposition that 'negligently inflicted injury to the person can, in at least some circumstances, be pleaded as trespass to the person, but the intentional infliction of harm cannot be pleaded as negligence'.[141]

There was strong scholarly criticism of the *ratio* in *Lepore*. In particular, Robert Stevens has described the decision as 'indefensible' and argued that:

> Liability for the breach of a primary duty cannot be avoided by showing that the breach was gross …. If the duty assumed is a duty that care will be taken, this is breached where the child is abused. This does not mean that the duty assumed is absolute. A child who falls over in the playground does not necessarily have a claim. However, liability for deliberate abuse follows a fortiori from liability for want of care.142

This argument supported the reasons of McHugh J in *Lepore* that negligence is simply concerned with conduct that falls below the legal standard, however caused, and that following the abolition of forms of action, the gates of negligence have been opened to intentionally inflicted harm. However, as discussed above, writing exactly a century before Robert Stevens,[143] Sir John Salmond had noted that attempts were sometimes made to define negligence as 'a purely objective fact in terms of

[138] Ibid 572 [162].
[139] *Nationwide News* (n 99) 484 [61].
[140] Ibid 484–5 [62].
[141] Ibid 485 [65].
[142] Stevens, 'Non-Delegable Duties and Vicarious Liability' (n 46) 361.
[143] See Salmond (n 110) 19–21. Cf Stevens, *Torts and Rights* (n 77) 271.

unreasonable conduct or a failure to take care, regardless of the state of mind of the actor'. Salmond regarded this as a 'defective analysis of the conception'.[144] This was because harm arising from a failure to take precautions may be 'either intentional wrongdoing or a mere accident'. Salmond opined that 'negligence in the subjective sense is opposed to wrongful intent; negligence in the objective sense is opposed to intentional wrongdoing'.[145]

Neither the abolition of forms of action,[146] nor the lack of express *mens rea* in the elements of the tort, provided a complete answer to the scope of negligence to apply to intentionally inflicted harm under Australian law. Its historical foundation in inadvertent harm seems to have shaped its development as a cause of action. Its elements set the parameters for when a duty will arise and when it will be breached, but the underlying restriction to unintentional harm appears to derive from precedent. Following *Lepore*, in *Magill v Magill*, Gleeson CJ again discussed the duty of care in negligence as controlling 'potential liability for carelessness'. His Honour expressly distinguished between false representations (in that case about paternity) which could be the result of 'carelessness' or ''deliberate fraud'.[147] Gummow, Kirby and Crennan JJ also referred to negligence as an 'unintentional tort'.[148] Another way in which the limitation to unintentional harm or careless conduct seemed to have found expression was in the notion of identifying a relevantly foreseeable risk. For example, in *Minister for the Environment v Sharma*,[149] Beach J observed that:

> The question posed by the consideration of foreseeability at the stage of considering whether a duty of care exists is whether "it is reasonably foreseeable as a possibility that *careless conduct* of any kind on the part of the defendant may result in damage of some kind to the person or property of the plaintiff" …[150]

Similarly, in *Sullivan v Moody*,[151] the majority observed:

> But the fact that it is foreseeable, in the sense of being a real and not far-fetched possibility, *that a careless act or omission on the part of one person may cause harm* to another does not mean that the first person is subject to a legal liability to compensate the second by way of damages for negligence if there is such carelessness, and harm results. … A defendant will only be liable, in negligence, for failure to take reasonable

[144] Salmond (n 110) 20.
[145] Ibid.
[146] See above n 106.
[147] *Magill* (n 99) 563 [21] (Gleeson CJ).
[148] Ibid 589 [117].
[149] (2022) 291 FCR 311 ('*Sharma*').
[150] Ibid 423 [417] (Beach J) (emphasis added).
[151] (2001) 207 CLR 562 ('*Sullivan*').

> care to prevent a certain kind of foreseeable harm to a plaintiff, in circumstances where the law imposes a duty to take such care.[152]

(e) Limited judicial support for negligence to apply to intentionally caused harm

Prior to *AA*, the judicial support for the extension of negligence to intentionally inflicted harm was thin. In *Australian Securities and Investments Commission v Cassimatis (No 8)* ('*Cassimatis*'),[153] Edelman J said that, '[i]n Australia, an action for the tort of negligence can succeed even where the conduct of the defendant was intentional.'[154] Assuming his Honour was referring to intentionally inflicted harm, rather than merely voluntary conduct, the authorities cited for the proposition need to be considered. These were *Milotin*;[155] *Wilson v Horne* ('*Wilson*');[156] *Gray v Motor Accident Commission* ('*Gray*');[157] and *Croucher v Cachia* ('*Croucher*').[158] They are considered below. It is respectfully suggested that with the exception of *Wilson* (which clearly supported the extension of negligence to intentionally inflicted harm in the form of sexual abuse, but which pre-dated *Lepore*), the cases do not lend strong support to the proposition that intentionally inflicted injury was properly characterised or pleaded as negligence under Australian law prior to *AA*.

Milotin is authority for the fact that direct contact may amount to trespass or negligence under Australian law, but that intentional harm cannot be pleaded as negligence. Even if rationalised as a case dealing with pre-judicature reforms, this does not directly support the reach of negligence to intentionally caused harm. As discussed above, the abolition of forms of action is a separate question to the development of the elements of the causes of action in tort in the cases.[159]

Gray[160] was decided by the High Court five years before *Lepore*.[161] The appellant (the plaintiff at trial) was struck by a car intentionally driven at him by a person who was convicted of causing grievous bodily harm with intent to cause such harm. In 1993, the appellant commenced proceedings against the wrongdoer in the District Court

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[152] Ibid 576 [42] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ) (emphasis added).
[153] (2016) 336 ALR 209 ('*Cassimatis*').
[154] Ibid 306 [504] (Edelman J).
[155] *Milotin* (n 72).
[156] (1999) 8 Tas R 363 ('*Wilson*').
[157] *Gray* (n 72).
[158] (2016) 95 NSWLR 117 ('*Croucher*').
[159] As noted by Edelman J in *H Lundbeck A/S v Sandoz Pty Ltd* (2022) 276 CLR 170, 212 [117]: 'The most common use of "cause of action" under Australian law is in the sense set out in *Letang v Cooper*, where Diplock LJ commenced his reasons with the description of a cause of action as "simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person".'
[160] *Gray* (n 72).
[161] *Lepore* (n 4).

of South Australia, claiming damages for personal injury. As noted by the High Court, the District Court action was framed as a claim in negligence, but appeared to be conducted as a claim in trespass.[162] The respondent, who was the compulsory third party insurer of the wrongdoer, was substituted as defendant in the action pursuant to provisions of the *Motor Vehicles Act 1959* (SA). Although the respondent did not admit liability, the High Court noted there seems to have been no real dispute about liability at trial. Accordingly, the finding of negligence in the District Court arising from intentionally caused harm does not appear to have been the subject of argument at trial or in the Court of Appeal or High Court.

The issue before the High Court was the availability of exemplary damages in relation to negligence. As discussed above in the section addressing intention, it had already been accepted before *Gray*'s case that highhanded conduct in contumelious disregard of the rights of a plaintiff could give rise to exemplary damages in negligence. The cases cited by the majority in *Gray*[163] were cases where an employer had acted consciously with respect to the conditions in the workplace, with a high-handed disregard for the health of the workers and exposure to harmful substances such as asbestos or benzol fumes preferencing corporate profits over installing safety equipment. In none of those cases was the defendant found to have intended to injure the plaintiff, nor was the harm direct. In the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ, their Honours observed that

> exemplary damages could not properly be awarded in a case of alleged negligence in which there was no conscious wrongdoing by the defendant. Ordinarily, then, questions of exemplary damages will not arise in most negligence cases be they motor accident or other kinds of case. But there can be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff. Cases of an employer's failure to provide a safe system of work for employees in which it is demonstrated that the employer, well knowing of an extreme danger thus created, persisted in employing the unsafe system might, perhaps, be of that latter kind. No doubt other examples can be found.[164]

This passage has been considered difficult to reconcile with a limitation of negligence as not applying to intentionally inflicted harm because of the Court's acceptance that exemplary damages were available in these circumstances of deliberate wrongdoing. One the one hand, the Court expressed no criticism of the

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[162] *Gray* (n 72) 9–10 [24].

[163] Ibid 27 [40], citing *Midalco Pty Ltd v Rabenalt* [1989] VR 461, 29 [86], *Trend Management* (n 85); *Coloca v BP Australia Ltd* [1992] 2 VR 441. See also Kirby J at [82].

[164] *Gray* (n 72) 9-10 [22].

finding of negligence below, but on the other, it was not in issue. Given that the finding of negligence was not argued at any stage in the litigation, the case cannot be regarded as authority for the proposition that negligence applies to intentionally inflicted harm. A case is not authority for a proposition that was not argued, or was simply agreed or assumed.[165] Accordingly, *Gray* provides limited support at best for the scope of negligence to apply to intentionally inflicted harm.

Wilson[166] was a decision of the Full Court of the Supreme Court of Tasmania, decided the year after *Gray*, and before *Lepore*. This case directly supported the scope of negligence to apply to intentionally caused harm in the form of sexual abuse. It was also a case in which the effect of then existing limitation periods loomed large in the disposition of the case. The cause of action in trespass had expired, but an action in negligence remained available. The Court found that sexual abuse of the plaintiff as a child by her uncle could be pleaded as negligence. Cox CJ limited the relevance of *Milotin* to pre-judicature reforms. His Honour cited *Gray* as a (then) recent 'example of conduct involving an intentional trespass to the plaintiff's person but pleaded in negligence',[167] noting that it was 'implicit' 'that the court at first instance had jurisdiction to entertain an action for damages based on negligence as the pleaded cause of action, notwithstanding that the tortfeasor's conduct might also have given rise to a cause of action in trespass'.[168] However, his Honour did not discuss the fact that the issue was effectively agreed at trial in the District Court and not the subject of appeal in the High Court. Wright J similarly regarded *Milotin* as no bar to the claim.[169] Evans J took a similar view, and also noted that the trial judge had cited from the 9th edition of Charlesworth & Percy on *Negligence* (1997) for the proposition that '[n]egligence in this context may consist in a wilful or an intentional act.'[170]

As discussed above, there was never any doubt that negligence could arise from an intentional act. The uncertain question was whether it can arise from intentionally inflicted harm. In the 16th edition of Charlesworth and Percy's *The Law of Negligence*,[171] which was in almost identical terms to the edition cited in *Wilson*, the editors state that '[n]egligence may consist in a wilful or an intentional act. This is because negligence as the breach of a duty to take care is concerned with conduct

[165] *CSR Ltd v Eddy* (2005) 226 CLR 1, 11 [13] (Gleeson CJ, Gummow and Heydon JJ).
[166] *Wilson* (n 156).
[167] Ibid 367 [7].
[168] Ibid.
[169] Ibid 373-4 [21].
[170] Ibid 382 [40].
[171] Mark Armitage et al (eds), *Charlesworth & Percy on Negligence* (Sweet & Maxwell, 16th ed, 2025) 12–13.

and not with intention.'[172] However, the sole authority cited for the proposition is a somewhat unusual case, *Emblen v Myers*.[173] While the case supports the availability of exemplary damages in negligence, in *Rookes v Barnard*[174] Lord Devlin described the case as one in trespass, and one of six early cases dealing with exemplary damages without 'any clear ruling'.[175]

Croucher[176] is the final case to which Edelman J referred to in *Cassimatis* as supporting the proposition that negligence can apply to intentional conduct. The case is relevant to understanding the divergence between Australian and English law insofar as English law[177] does not allow unintentional, direct contact to be pleaded in trespass, whereas Australian law does. Although battery is classed as an 'intentional tort', a battery may occur when the defendant is merely negligent, so that depending on the circumstances, 'the actual facts will or may fulfil the requirements of [battery and negligence]'.[178] However, it is respectfully suggested that *Croucher* is not authority for the inverse proposition that intentionally inflicted harm can be pleaded as negligence.

(f) The position under English law in relation to the non-delegable duty

The most detailed consideration of the scope of the non-delegable duty in the United Kingdom was by Lord Sumption JSC in *Woodland v Swimming Teachers Association* ('*Woodland*').[179] *Woodland* was not a case addressing intentional wrongdoing. The facts concerned a child who suffered a hypoxic brain injury during swimming lessons at a local pool. The school was found liable under a non-delegable duty of care. Lord Sumption carefully reviewed the authorities, including from Australia,

[172] John Charlesworth, *The Law of Negligence*, (Sweet & Maxwell, 2nd ed, 1938) 9. I note that for the purposes of this discussion, intentional conduct is discussed in terms of the deliberate act intending to cause the consequences, rather than simply in terms of a voluntary act. See Cane (n 82) 35.
[173] *Emblen v Myers* (1860) 6 H & N 54; 158 ER 23. The plaintiff owned land with a stable. The defendant owned an adjoining house that had been ordered to be demolished. The plaintiff refused to sell his property to the defendant. The defendant's workmen subsequently recklessly demolished the building, causing a beam to fall on the plaintiff's property. Following an argument, the defendant instructed his workmen to continue, and they threw brick onto the stable. During the course of the trial, the defendant's counsel did not object to evidence in a claim in trespass being introduced in the action that had been brought in negligence. The trial judge allowed the jury to award exemplary damages in the negligence action if they found the defendant had wilfully attempted to drive the plaintiff from his stable.
[174] [1964] AC 1129.
[175] Ibid 1223. Lord Devlin noted that Wilde B at trial had directed the jury that they might find exemplary damages 'without recourse to legal principle'.
[176] Above n 158.
[177] See, eg, *Letang* (n 113).
[178] *Croucher* (n 156) 121 [22] (Leeming JA, Beazley P agreeing at 118–19 [1], Ward JA agreeing at 119 [2]).
[179] *Woodland* (n 64).

and specifically *Lepore*, and observed that they 'are broadly correct in their analysis of the factors that have given rise to non-delegable duties of care'.[180] If His Lordship disagreed with the express reasons of the majority in *Lepore* in restricting the scope of the non-delegable duty to negligent and not intentionally caused harm, that would have been the place to say it, even in *obiter*. His Lordship identified five elements of the non-delegable duty, but also noted that:

> This is not an open-ended liability, for there are important limitations on the range of matters for which a school or education authority assumes non-delegable duties. They are liable for the negligence of independent contractors only if and so far as the latter are performing functions which the school has assumed for itself a duty to perform, generally in school hours and on school premises (or at other times or places where the school may carry out its educational functions). In the absence of negligence of their own, for example in the selection of contractors, they will not be liable for the negligence of independent contractors where on analysis their own duty is not to perform the relevant function but only to arrange for its performance.[181]

It is argued here that Lord Sumption JSC's reasons do not confirm or necessarily even support the reach of the non-delegable duty to criminally intentional wrongdoing.

It is noteworthy that in *Armes*,[182] a decision of the UK Supreme Court, there is *obiter* to the effect that a non-delegable duty of care *can* be breached by the intentional criminal wrongdoing of a delegate. In Lord Reed JSC observed:

> 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's* case [2014] AC 537, 573–574, para 7. On Burnett LJ's approach, the local authority would seemingly be liable if the foster parents negligently enabled a third party to abuse the child, but not if they abused her themselves. That can hardly be right.[183]

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[180] Ibid 583 [23]. In *Woodland*, Lord Sumption identified two broad categories of case in which a non-delegable duty of care has been held to arise. The first was 'a large, varied and anomalous class of cases in which the defendant employs an independent contractor to perform some function which is either inherently hazardous or liable to become so in the course of his work.' The second broad category was said to comprise cases where the common law imposed a duty which had three critical characteristics. First, the duty arises because of an antecedent relationship between the defendant and the claimant. Secondly, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Thirdly, the duty is by virtue of that relationship personal to the defendant.

[181] Ibid 584–5 [23], [25(3)].

[182] *Armes* (n 24).

[183] Ibid 375 [51] (Lord Reed, with whom Baroness Hale PSC, Lord Kerr and Lord Clarke JJSC agreed).

It is respectfully suggested that the conclusion that it can 'hardly be right' that there is a gap in the law leaving a plaintiff without a pathway to compensation raises questions beyond the scope of the non-delegable duty. The law also accepts the limitations of vicarious liability not applying to independent contractors, even where that leaves a plaintiff without a basis for a claim for compensation. Accordingly it is not clear why 'it can hardly be right' that a non-delegable duty does not apply to circumstances relating to intentional wrongdoing if they lie beyond the doctrinal limits of the cause of action. Both the limitations of vicarious liability, and the limited scope of the non-delegable duty of care in negligence, reflect the limitations of separate doctrines that serve different normative purposes. It is respectfully submitted that an unacceptable gap in the law is a separate question, and may properly be one for law reform.

It is beyond the scope of this article to consider the position under the law of England and Wales in detail, but it is to be hoped that the UK Supreme Court will also have an opportunity to clarify the scope of the non-delegable duty and its relationship with negligence, as well as address the anterior question of the scope of negligence to apply to intentionally inflicted injury.

V Postscript — The High Court's Findings in *AA*

The majority of the High Court in *AA*[184] held the Diocese was liable to the appellant for harm suffered as a result of the sexual abuse by Fr Pickin. The reasons of the majority differed in certain respects but afford a clear *ratio* on this issue.[185] In finding that the non-delegable duty and duty of care in negligence can be breached by intentionally inflicted harm, the majority overturned *Lepore*. The case recognises a new class of relationship giving rise to a non-delegable duty of care and will open pathways for compensation that have hitherto been blocked under Australian law, particularly in the context of sexual abuse by clergy in a religious institution. It is a significant development in Australian tort law. Over a decade ago, Lord Phillips in the UK Supreme Court said that vicarious liability under English law was 'on the move'.[186] The same might now be said of negligence and the non-delegable duty under Australian law.

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[184] *AA* (n 9). The majority comprised Gageler CJ, Jagot and Beech-Jones JJ in a joint judgment, and separate judgments by Gordon J and Edelman J. Steward J and Gleeson J delivered separate judgments in dissent. This postscript does not rehearse the facts or procedural history of *AA* discussed in Part III above, or address all issues canvassed in the reasons for judgment. It focuses on the High Court's reasons on the issues discussed in this article and considers two questions that arguably remain.
[185] At least where it is expressed at a higher level of generality: see *MJZP v Director-General of Security* [2025] HCA 26, [36]–[40] (Edelman J).
[186] *Catholic Child Welfare* (n 24) 11 [19].

A *The Nature of the Non-Delegable Duty and Findings of Breach*

The plurality (Gageler CJ, Jagot and Beech-Jones JJ) found that the duty assumed by the Diocese 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'.[187] They reasoned that whilst it may be accepted that Fr Pickin was not performing a 'function of a priest of the Diocese' when sexually assaulting AA, the relevant question was 'whether AA came to be under the care, supervision or control of Fr Pickin in the presbytery as a result of Fr Pickin having purportedly performed a function of a priest of the Diocese'.[188] Critically, their Honours did not appear to regard it as necessary that the Friday night events were an authorised church activity, as long as the boys were attending the presbytery '*as a result of*' Fr Pickin having performed an authorised function, which they found that he did in having delivered religious instruction to the boys in high school.[189] Their Honours held that 'a non-delegable duty is a "special" kind of common law duty of care in negligence'.[190]

Gordon J also found the Diocese liable under a non-delegable duty, but analysed the nature of the duty somewhat differently to the plurality. Her Honour did not accept that the non-delegable duty was a duty owed in negligence or that non-delegable duties should be subsumed into negligence.[191] Her Honour found that the Diocese had assumed[192] or undertaken[193] a duty to ensure that reasonable care was taken 'to avoid the risk of personal injury to child parishioners such as AA while they remained in the care of a priest of the Diocese at the presbytery'[194] which arose because:

> (1) AA, as a child parishioner who was taught to respect and obey priests, was specially vulnerable; and (2) the Diocese undertook the care of child parishioners such as AA in circumstances where it appointed priests to a parish and expected and required them to engage with young people as part of their ministry, the Diocese made the presbytery available to

[187] *AA* (n 9) 180 [2].
[188] Ibid 205 [115].
[189] Ibid 202 [97]–[98] (emphasis added).
[190] Ibid 184 [21].
[191] Ibid 234 [277].
[192] Ibid 233–4 [271]–[273].
[193] Ibid 238 [299].
[194] Ibid 242 [323].

> priests such as Father Pickin to perform that ministry, and AA's parents entrusted the care of AA to Father Pickin.[195]

Edelman J also characterised non-delegable duties as duties arising from an 'assumption of responsibility', as distinguished from the common law duty of care.[196] His Honour held that the Diocese objectively undertook responsibility not merely to take reasonable care, but to ensure that reasonable care to avoid personal injury would be taken by priests for child parishioners invited onto Diocesan premises and in the care of the parish priest.[197] His Honour found that the objective circumstances from which any undertaking and assumption of responsibility by the Diocese that 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. …[198]

Edelman J held that this assumption of responsibility did not depend upon a duty of care imposed by the common law,[199] and that 'confusion is only heaped on confusion' by the suggestion that an ordinary common law duty of care was a 'hurdle' to recognition of this assumed duty.'[200]

In dissent, Steward J accepted that the Diocese owed a non-delegable duty of care but did not find that it was breached as Fr Pickin acted outside the scope of any authorised church activities.[201] Gleeson J also dissented, finding that a non-delegable duty did not arise.[202]

It is suggested here that the analysis of the plurality most clearly reflects the classical theorisation of a non-delegable duty of care as a more stringent or 'special' type of duty of care owed in negligence.[203] This is in effect a sub-type of duty of care in negligence, rather than a different type of tortious duty. In *Leichhardt Municipal*

[195] Ibid 238 [300].
[196] Ibid 246 [345], 247 [349], 247 [351].
[197] Ibid 243 [334].
[198] Ibid 254 [385].
[199] Ibid 253 [375].
[200] Ibid.
[201] Ibid 265 [447] .
[202] Ibid 269 [470] (Gleeson J).
[203] *Kondis* (n 56) 686–7.

Council, Gleeson CJ described the non-delegable duty of care confirmed by Mason J in *Kondis* as 'a proposition of law concerning the nature or content of the duty of care, being the conclusion that 'a defendant who is sued in negligence owed a duty going beyond a duty to exercise reasonable care to avoid injury (or injury of a certain kind) to a plaintiff, and extending to a duty to ensure that reasonable care to avoid injury to the plaintiff was exercised'.[204] This is consistent with the plurality in *AA* describing the non-delegable duty as 'a "special" kind of common law duty of care in negligence'.

B *Negligence Extends to Intentionally Inflicted Harm*

All judges in the majority agreed that *Lepore* should be overturned and that the non-delegable duty, and ordinary duties in negligence, could be breached by intentionally inflicted harm.[205] This is a new direction for the Australian law of negligence. Edelman J described the common law as like Janus, the Roman god with two faces, for the purpose of distinguishing between common law duties that are imposed and those that are assumed.[206] The analogy is apt for another reason. Janus was said to have had one face looking to the past and another to the future; the god of transitions and new beginnings, presiding over the end of conflict. *AA* is a lens through which to look back at the development of negligence, ending the conflict as to its scope, and to look forward to how the law will develop.

Looking back, it is surprising that such a foundational question as to the scope of negligence to apply to intentionally inflicted harm has not been the subject of more direct judicial consideration. The plurality referred to *McInnes v Wardle* ('*McInnes*')[207] as authority for the proposition.[208] In *McInnes*, an independent contractor engaged to fumigate rabbits lit fires during a prohibited season that spread to a neighbour's property. The appellant was held liable under a non-delegable duty on the basis that burning was an ordinary and foreseeable incident of the authorised work[209] and the appellant knew or ought to have known that fire would be used and had failed to take adequate precautions against its spread.[210] However, the contractor did not *intend* to harm the plaintiff and

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[204] *Leichhardt Municipal Council* (n 48) [6] (emphasis added), citing *Kondis* (n 56) 687.
[205] *AA* (n 9) 183 [18], 184 [19], 189 [37]–[38] (Gageler CJ, Jagot and Beech-Jones JJ); 235 [282], 237 [294]–[295] (Gordon J); [339] (Edelman J).
[206] Ibid 245 [342] (Edelman J).
[207] *McInnes v Wardle* (1931) 45 CLR 548 ('*McInnes*').
[208] *AA* (n 9) 183 [18].
[209] *McInnes* (n 207) 548–9 (Gavan Duffy CJ and Starke J); 552 (Dixon J); 555–6 (Evatt J); 558–9 (McTiernan J).
[210] See ibid 551–2 (Dixon J), emphasising that McInnes 'knew, or ought to have known' that fire would likely be used in the course of the fumigation works.

McTiernan J noted that he did not light the fires *'for amusement or maliciously*'.[211] This is another example of the distinction between an intentional *act* and an intention to *inflict harm*:[212] *McInnes* is a paradigm case of the former, not the latter. It is respectfully suggested that this case does not support the extension of the scope of negligence to intentionally inflicted harm.

As discussed in Part IV above, only *Wilson*[213] (which predated *Lepore*) turned on whether negligence can be breached by intentionally inflicted harm. The Full Court of the Supreme Court of Tasmania[214] upheld the trial judge's rejection of the defendant's limitation argument that as the defendant's sexual abuse involved intentional acts, the plaintiff could only sue in trespass and not in negligence, finding:

> There is no doubt that the defendant owed the plaintiff a duty of care to take reasonable steps not to expose her to the risk of reasonably foreseeable injury and there is equally no doubt that by treating her as he did the defendant was in breach of that duty.[215]

Gray[216] involved intentional wrongdoing and could have been a vehicle to raise these issues, but the course of the litigation took a different turn. There, the appellant was seriously injured when he was struck by a car driven at him deliberately by another. Whilst liability in negligence was not admitted by the wrongdoer's insurer in the District Court, 'there seems to have been no real dispute about that issue at trial'.[217] The trial judge refused exemplary damages for negligence, and this narrow question was the only issue that was appealed.

Notwithstanding the lack of clear authority supporting the proposition, the *ratio* of the majority in *AA* is clear: negligence, including non-delegable duties of care, now extends to intentionally inflicted harm. This will redirect and reframe scholarly debate and judicial discussion. For example, in 1989, Samuel Stoljar wrote an essay arguing against recognising absolute liability as a third type of tortious liability independent of 'liability in tort for intentional or deliberate harm *on the one hand*, and liability for harm caused by negligence *on the other*'.[218] Such statements today

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[211] Ibid 553 (emphasis added), citing *Black v Christchurch Finance Co Ltd* [1894] AC 48, 51.
[212] See above Part IV(B)(2), discussing the distinction between an 'intentional act' in the sense of a voluntary act and an intention to inflict harm.
[213] *Wilson* (n 156).
[214] Cox CJ, Wright J, and Evans J.
[215] Wilson (n 156) 366 [5].
[216] *Gray* (n 72).
[217] Ibid 3 [2].
[218] Samuel Stoljar, 'Concerning Strict Liability' in PD Finn (ed), *Essays on Torts* (Law Book Company, 1989) 267, 267 (emphasis added).

would not represent the scope of negligence following *AA*. Of the spectrum of scholarly views considered in Part IV, ranging from Salmond's view[219] that 'negligence and wrongful intent are two alternative forms of *mens rea'* to Fleming's view that 'negligence is not a state of mind, but conduct that falls below the standard regarded as normal or desirable',[220] the latter has been confirmed.[221] This article began with a reference to *Burnie Port Authority*[222] in which the majority of the High Court spoke of the 'emergence of a coherent law of negligence to dominate the territory of tortious liability for unintentional injury to the person or property of another'.[223] Following *AA*, referring to negligence as 'unintentional injury' is no longer correct under Australian law.

C *The Interaction Between the Principles of Vicarious Liability and the Non-Delegable Duty*

Questions will no doubt emerge as to the implications of the decision in *AA*. One is the interaction of vicarious liability and the non-delegable duty. Prior to *AA*, the wrongdoing of an *employee* was not determined under principles of a non-delegable duty of care even in relationships recognised as giving rise to such a duty, such as in schools. In *Geyer v Downs*[224] the liability of the New South Wales government for the negligence of the employed school headmaster was resolved by way of vicarious liability, not a non-delegable duty of care. In *Prince Alfred College*[225] the High Court developed careful criteria for determining when intentionally inflicted harm by way of sexual abuse of a child would fall within the employee's 'course of employment'. However, *AA* has already been construed as applying the non-delegable duty to the wrongdoing of any 'delegate', *including employees*, without constraint by those criteria. For example, in *St Paul's College Ltd v Allan ('Allan')*[226] the New South Wales Court of Appeal considered the pleading of liability of a school for the sexual assault of a student by an employed teacher. Justice Kirk (with whom Price AJA agreed) noted that in *AA* the majority affirmed that 'the duty will be breached if either the duty-holder itself, or any person to whom it has delegated the duty, fails to take

219 Salmond (n 110) 20.
220 *Fleming's The Law of Torts* (n 81) 143 [6.20].
221 Cited by the plurality in *AA* (n 9) at 189 [38].
222 *Burnie Port Authority* (n 1).
223 Ibid 544.
224 See, eg, *Geyer v Downs* (1977) 138 CLR 91. The claim against the Government of New South Wales was in respect of its vicarious liability for the negligence of the school headmaster in his duty to the plaintiff as a pupil attending his school when she was struck on the head by another student playing softball.
225 *Prince Alfred College* (n 11), requiring that the course of employment was the 'occasion' for the wrong, as opposed to a mere 'opportunity'.
226 *St Paul's College Ltd v Allan* [2026] NSWCA 22 ('*Allan*').

reasonable care to avoid the relevant risk of harm (where lack of reasonable care encompasses intentional acts)'.[227] His Honour clearly interpreted the new scope of the non-delegable duty for the wrongdoing of 'delegates' as encompassing employees.[228] His Honour said that in pleading the breach, 'it suffices to allege that the claimant was sexually or physically abused by a person for whom the defendant was responsible (in the sense that the defendant could be characterised as having delegated its duty to that person), and this abuse occurred at a time and a place within the scope of the defendant's duty'.[229] Justice Kirk concluded that:

> These aspects of the reasoning in *AA* have profound consequences for the potential liability of school authorities with respect to abuse of students by those for whom the authorities are responsible.[230]

In effect, this appears to render the principles in *Prince Alfred College*[231] redundant in a school context.[232] This potential is illustrated by *BYM v Brisbane Catholic Education.*[233] The plaintiff alleged that as a child she was permitted to go to the toilet block alone and was raped there by a school groundskeeper who entered her stall.[234] The trial judge found that the assault did not occur, but held that even if it had, the groundsman's duties provided the 'opportunity' for the wrongdoing, not the 'occasion' for it.[235] If the approach in *Allan* were applied to these facts and the abuse was found to have occurred, the expanded non-delegable duty would appear to apply regardless of the groundsman's particular duties of employment.[236] In *AA*, the plurality noted that vicarious liability and the non-delegable duty have different 'pre-conditions'[237] but their overlap did not arise on the facts.

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[227] Ibid [78].
[228] Ibid [83].
[229] Ibid.
[230] Ibid [83].
[231] *Prince Alfred College* (n 11) 151 [52], approved in *CCIG Investments v Schokman* (n 12) 181 [32]–[34].
[232] In *Allan* (n 226) Kirk JA noted at [84] the submission made by the respondent that although he 'has pleaded a further case of vicarious liability it may be unnecessary for the Court to determine that alternative case given the effect of the decision in *AA*'.
[233] *BYM v Brisbane Catholic Education* [2026] QCA 6.
[234] Ibid [2].
[235] Ibid [43]–[50]. The non-delegable duty claim was rejected applying *Lepore* and the appeal was dismissed two weeks before *AA* was delivered.
[236] *Allan* (n 226) [85]–[87] (Kirk JA). As noted by Gleeson J in *AA* (n 9) at 286 [545], in *Introvigne* 'Mason J explained that a "school authority owes to its pupil a duty to ensure that reasonable care is taken of them whilst they are on the school premises during hours when the school is open for attendance", being "a duty the performance of which cannot be delegated".'
[237] *AA* (n 9) 191 [48].

The non-delegable duty is clearly 'on the move' following *AA* and these issues will no doubt be watched closely by courts in other jurisdictions.