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Vicarious liability, non-delegable duties and teachers: Can you outsource liability for lessons?

Paula Giliker*

‘The common law is a dynamic instrument. It develops and adapts to meet new situations as they arise ... But therein also lies a danger, the danger of unbridled and unprincipled growth to match what the court perceives to be the merits of the particular case.’¹

1. Introduction

In *Woodland v Essex CC*, the UK Supreme Court faced the tragic case of a young girl suffering severe brain damage as a result of an accident during a swimming lesson at a local swimming pool. The lesson had been supervised by a swimming teacher and lifeguard, but they were employed not by the school, which provided swimming lessons as part of the physical education national curriculum, but by an independent contractor (Beryl Stopford trading as Direct Swimming Services [DSS]). DSS had organised the lessons and provided the staff in question. It was alleged that the injury occurred due to their negligence. Such accidents are sadly not unknown to the tort of negligence,² but the obvious claims against the teacher and lifeguard (and their employer) were complicated by uncertainty as to the insurance position of the parties concerned. Over time, it became clear that insurance cover did not exist for the swimming teacher (Mrs Burlinson) nor Mrs Stopford, who ran DSS. The insurers in question (which provided cover for the lifeguard) had earlier conceded liability but then withdrawn that concession.³ Faced with such uncertainty and delays in the processing of the claim, the claimant joined the local education authority, Essex County Council, as a defendant, alleging a non-delegable duty to see that reasonable care was taken of her during school swimming lessons. 13 years after the accident in July 2000, the Supreme Court took the radical step of confirming that the school did owe a non-delegable duty to Annie Woodland to ensure that reasonable care would be taken in the performance of its educational duties, regardless of the employment status of the teacher in question. Further, the court identified criteria which would guide future courts as to the circumstances in which this non-delegable duty would arise.

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¹ Baroness Hale in *Woodland v Essex CC* (also known as *Woodland v Swimming Teachers Association and others* and hereafter *Woodland*) [2013] UKSC 66, [2014] AC 537 (Lords Clarke, Wilson and Toulson JSC in agreement) at [28].

² See, for example, *Grimes v Hawkins & Anor* [2011] EWHC 2004 (QB); *Darby v National Trust for Places of Historic Interest or Natural Beauty* [2001] EWCA Civ 189, [2001] PIQR P27 (pond in the grounds of a stately home); *O’Shea v Royal Borough of Kingston Upon Thames* [1995] PIQR P208; *Ratcliff v McConnell & Anor* [1997] EWCA Civ 2679, [1999] 1 WLR 670.

³ *Woodland v Maxwell & Anor* [2015] EWHC 273 (QB), [6]-[9]. See also C Leech, ‘The ripple effect’ (2015) 165(7650) NLJ 10.

This article will examine the impact of this dramatic course of events on the liability of schools in the common law of tort. As will be shown, liability at common law already provides an intricate mix of primary and secondary liability. In particular, a number of cases have arisen in the context of school trips in which the laudable aim of challenging students with a wide range of out-of-school activities, which can include visits to museums, trips to the countryside or taking part in challenging and adventurous activities, has sadly led to pupil injuries or even deaths.⁴ *Woodland* adds a further layer of liability: a duty on schools to see *that care is taken* in relation to their students. Despite the language of ‘fault’, this is in reality another form of strict liability – a school will be forced to pay compensation if the party to whom it has delegated its duty fails to take reasonable care and this causes foreseeable injury to the pupil. It represents another step in the policy of the UK Supreme Court in recent years to, in the words of Lord Phillips, ‘ensure, in so far as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim’.⁵ The logic of this policy is clear: ‘Such defendants can usually be expected to insure against the risk of such liability, so that this risk is more widely spread.’⁶ Yet tort law represents more than the pursuit of insurance cover. Claims must have a legal basis and in a system framed fundamentally around the idea of corrective justice – defendants being held accountable for their fault which foreseeably harms others – strict liability is regarded as exceptional. Further, in the school context, government policy seeks to promote the provision of educational activities for students despite the possible risk of injury.⁷ The Health and Safety Executive, for example, has published a policy statement indicating that it wants to encourage schools and local authorities to focus on real risks and not be over-cautious.⁸ How, one might wonder, are these goals consistent with the imposition of strict liability? More specifically, how far will the non-delegable duty stretch beyond national curriculum swimming lessons during school hours? The Supreme Court in *Woodland* argued that liability would simply mirror that previously covered by vicarious liability prior to the outsourcing of routine employee tasks to independent contractors.⁹ This article will consider to what extent the decision of the Supreme Court to revive the non-delegable duty from its previous slumber can be so contained. In a litigious society, *Woodland* is unlikely to be a one-off case. Schools will now be targeted.¹⁰ Do hard cases, as Oliver Wendell Holmes Jr suggested, make bad law?

⁴ Statistics from the *Royal Society for the Prevention of Accidents* indicate that on average one pupil dies during activities on school trips every year, although it goes on to add that these figures are set against the 7-10million days of activity that the government estimates take place outside UK classrooms annually: ‘Health and Safety Myths should not stop schools from running trips and outdoor activities’ 04/02/2013 <http://www.rosipa.com/media-centre/press-office/press-releases/detail/?id=1135>.

⁵ *Various Claimants v Catholic Child Welfare Society and others* (hereafter the CCWS case) [2012] UKSC 56, [2013] 2 AC 1, [34].

⁶ *Ibid.*

⁷ See Section 1 of the Compensation Act 2006, which was intended to provide ‘reassurance to the people and organisations who are concerned about possible litigation; and to ensur[e] that normal activities are not prevented because of the fear of litigation and excessively risk-averse behaviour’: Explanatory Notes to Act, [10]. See also section 3, Social Action, Responsibility and Heroism Act 2015.

⁸ HSE, ‘School trips and outdoor learning activities: Tackling the health and safety myths’ (June, 2011) - <http://www.hse.gov.uk/services/education/school-trips.pdf>.

⁹ *Woodland* (n 1) at [25(4)] per Lord Sumption and [40] per Baroness Hale.

¹⁰ The *Woodland* non-delegable duty has already been argued in *GB v Home Office* [2015] EWHC 819 (QB), [2015] 2 FLR 671 [negligent medical care in immigration removal centre], *NA v Nottinghamshire County*

2. The primary and secondary liability of schools: *Carmarthenshire, Lister and beyond.*

The liability of schools to their pupils in tort is well-established. In the early case of *Smith v Martin and Kingston upon Hull Corporation*,¹¹ for example, the education authority was found vicariously liable for a teacher's negligence in instructing a student to attend to a fire which led to her suffering serious burns. Traditionally, the teacher's duty has been to take such care of the children in his or her charge as a careful parent would take of his or her own children ('in loco parentis').¹² Although the law relating to education is now substantially statutory,¹³ the common law duty of care is owed by local authorities and their employees in relation to the care and supervision of pupils. Liability covers matters such as the negligent supervision of students at school,¹⁴ notably for injuries suffered in the course of organised activities,¹⁵ and from the state of the premises.¹⁶ Over time, the standard of care generally expected of a teacher has been raised,¹⁷ although the courts do take account of the fact that a teacher (unlike a parent) is acting in the context of a school with a large number of pupils under his or her responsibility.¹⁸ The age of the pupil and the nature of the activity will be relevant concerns. As stated by *Clerk and Lindsell*, 'A teacher is expected to show such care towards a child under his charge as would be exercised by a reasonably careful parent, taking into account the conditions of school life as distinct from home life, the number of children in the class and the nature of those children.'¹⁹

Council [2015] EWCA Civ 1139 [physical and sexual abuse by foster carers] and *Bell v Alliance Medical Ltd* [2015] CSOH 34 [negligent hospital treatment].

¹¹ [1911] 2 KB 775.

¹² *Williams v Eady* (1893) 10 TLR 41, CA: 'the schoolmaster was bound to take such care of his boys as a careful father would take of his boys' per Lord Esher.

¹³ See, for example, the relevant provisions of the Health and Safety at Work etc Act of 1974 and secondary legislation such as the Management of Health and Safety at Work Regulations 1999 (SI 1999/324) which require that schools make suitable and sufficient assessment of the risk to health and safety of staff, pupils and others.

¹⁴ *Palmer v Cornwall CC* [2009] EWCA Civ 456, [2009] ELR 314; *Wilson v Governors of Sacred Heart Roman Catholic School* [1998] PIQR P145, CA. This may extend to the prevention of bullying among pupils at school. See, generally, P Giliker, 'Personal injuries at school' (2009) 25 PN 91. Note that claims for 'educational malpractice' (negligent teaching) remain at a relatively early stage of development: see *Phelps v Hillingdon LBC* [2001] 2 AC 619 at 667 (per Lord Nicholls); P Case, 'The disappointed student and the negligent teaching claim' (2011) 27 PN 173; MK Teh, 'Educational negligence – Comparative cases and trends' [2013] Ed Law 200.

¹⁵ *Wright v Cheshire County Council* [1952] 2 All ER 789, CA (vaulting in gym); *Butt v Inner London Education Authority* (1968) 66 LGR 379 (machinery); *Affutu-Nartey v Clark* (1984) Times, 9 February (master tackling boy in game of rugby).

¹⁶ *Woodward v Hastings Corp* [1945] KB 174, CA (uncleared snow); *Reffell v Surrey County Council* [1964] 1 WLR 358 (glass door); *Ward v Hertfordshire County Council* [1970] 1 WLR 356, CA (playground).

¹⁷ See, for example, *Kearn-Price v Kent County Council* [2002] EWCA Civ 1539, [2003] PIQR P11 (school could owe duty of care to supervise pre-school activities of pupils if reasonable in the circumstances) and contrast with the more robust attitude of Lord Denning in *Ward v Hertfordshire CC* [1970] 1 WLR 356.

¹⁸ *Lyes v Middlesex County Council* (1962) 61 LGR 443, 446: 'A lot of pupils are apt to make much more noise even than a few children in a small home and there is . . . more skylarking and a bit of rough play'. See also Lord Oaksey in *Carmarthenshire County Council v Lewis* [1955] AC 549, 559 (ordinary prudent schoolmaster cannot be expected to keep pupils under constant supervision throughout every moment of their attendance at school).

¹⁹ M Jones (ed), *Clerk and Lindsell on Torts* (21st ed., Sweet and Maxwell, 2014) at 8-209.

While a school is under a duty to take reasonable care for the health and safety of the pupils in its charge, the courts have also recognised that, in some respects, this goes beyond mere parental duty, because the school may have special knowledge about some matters e.g. the unusual dangers in playing certain sports, such as rugby, which the parent does not or cannot have.²⁰ Further, the duty may include taking positive steps to protect the child's well-being,²¹ bearing in mind the known propensities of children to injure themselves and others. The Supreme Court in *Woodland* acknowledged that the position of schools is very different to that of parents in that they are providing a service through the work of paid professionals.²² Baroness Hale suggested that the school would owe its pupils *at least* the duty of care which a reasonable parent owes to her children, but that 'it may owe them more than that'.²³ Liability in common law negligence has also been extended more recently to the performance of the statutory duties of teachers, educational psychologists and other professionals employed in the sphere of education.²⁴ There are, however, limits. For example, a school need not insure pupils against injuries whilst playing sport.²⁵ At a day school responsibility will usually end at the school gates, although the school will have a duty to take reasonable steps to ensure that young children who are not old enough to look after themselves do not leave the school premises unattended.²⁶ *Charlesworth & Percy on Negligence* add that 'It is no part of the duty of a teacher to foresee every act of stupidity that might take place' and that a proper balance must be struck between the close supervision of children and the desirable object of encouraging 'sturdy' independence as they mature.²⁷

The House of Lords' decision in *Carmarthenshire County Council v Lewis*²⁸ also illustrates the dual nature of the school's liability. It may be primary – breach of its own duty to take reasonable care in the provision of education – or vicarious. In this case, a boy aged four had been left unattended by a teacher for 10 minutes during which he walked out of school into a busy road causing an accident in which a lorry driver was killed. While the teacher herself was not found to be negligent (so the claim for vicarious liability failed), the local education authority itself was deemed negligent in failing to anticipate that young children might, in the absence of the installation of a gate so made or fastened that a young child

²⁰ *Van Oppen v Clerk to Bedford Charity Trustees* [1990] 1 WLR 235, 266 per Croom-Johnson LJ. The school was not, however, under a greater duty than the parents to arrange personal accident insurance for its pupils

²¹ *Gower v London Borough of Bromley* [1999] ELR 356, CA, per Auld LJ at 359; *Hippolyte v London Borough of Bexley* [1995] PIQR 309, per Steyn LJ at 314.

²² Lord Sumption (n 1) at [25](6).

²³ Baroness Hale (n 1) at [41].

²⁴ *Phelps v Hillingdon LBC* [2001] 2 AC 619; *Carty v Croydon LBC* [2005] EWCA Civ 19, [2005] 1 WLR 2312; *Connor v Surrey County Council* [2010] EWCA Civ 286, [2010] 3 All ER 905 (in which the court considered the divide between duties arising in private and public law).

²⁵ *Van Oppen v Clerk to the Bedford Charity Trustees* [1990] 1 WLR 235, CA.

²⁶ See *Lewis v Carmarthenshire County Council* [1953] 1 WLR 1439, 1443 (CA) (appeal to HL proceeded on same assumption: *Carmarthenshire County Council v Lewis* [1955] AC 549). See also *Bradford-Smith v West Sussex County Council* [2002] EWCA Civ 7, [2002] LGR 489 (generally no responsibility for bullying outside school premises).

²⁷ CT Walton (ed), *Charlesworth and Percy on Negligence* (13th ed., Sweet and Maxwell, 2014) at 9-191.

²⁸ [1955] AC 549.

could not open it, cause an accident by wandering alone outside the school premises into a busy street. That was a proper and reasonable precaution for it to take.²⁹

More recently, developments in vicarious liability have served to highlight the liability of schools arising from allegations of sexual abuse committed by those teaching, instructing or caring for children on school premises. The leading cases of *Lister v Hesley Hall Ltd*³⁰ and *Various Claimants v Catholic Child Welfare Society*³¹ involved claims of sexual abuse by (in *Lister*) the warden of a boarding house attached to a school for children with emotional and behavioural difficulties owned by the defendant and (in *CCWS*) by teachers who also belonged to a lay religious order. These two cases establish that sexual abuse may be regarded as within the course of employment test for vicarious liability in tort if it is 'so closely connected with [the teacher's] employment that it would be fair and just to hold the employers vicariously liable'.³² Further, a relationship can give rise to vicarious liability even where the defendant is not employed under a contract of service on the ground that it is 'akin to that between an employer and an employee'.³³ As a result, schools, in addition to their primary and vicarious liability in negligence, may also find themselves vicariously liable for the *intentional* torts of their staff. This is likely, for example, to extend to volunteer teachers on the premises who are unpaid but where their activities are 'akin' to those of an employed teacher. There has inevitably been some speculation how far the definition of a relationship 'akin' to that of an employee will extend.³⁴ It remains, however, the rule that independent contractors per se are not subject to the rules of vicarious liability. Here, according to *Woodland*, lies the problem.

3. The *Woodland* non-delegable duty.

In *Woodland*, the negligent defendants were not employed teachers, nor even akin to employed teachers, but worked for an independent contractor (DSS). In this case, the school had deliberately chosen to contract out the supply of swimming lessons and hence responsibility for performance was placed on the independent contractor, which would have been expected to insure against the inherent risks of this task. While the school would retain primary liability for negligence e.g. in taking reasonable care in choosing its supplier, vicarious liability would not apply. Such 'outsourcing' of selected educational tasks is far from unusual and is, in fact, a common means of ensuring the most efficient use of limited educational resources. While it renders the legal framework more complicated, it is entirely acceptable for local educational authorities to utilise a contractual framework to pass on its responsibilities to a third party.³⁵ For the Supreme Court, this gave rise to two issues. First,

²⁹ Lord Reid *ibid.*, at 563-566. See also *Barnes (An Infant) v Hampshire County Council* [1969] 1 WLR 1563, HL and *Jenney (a minor) v North Lincolnshire County Council* [2000] PIQR P84, CA.

³⁰ [2001] UKHL 22, [2002] 1 AC 215.

³¹ [2012] UKSC 56, [2013] 2 AC 1 (hereafter *CCWS*).

³² *Lister v Hesley Hall Ltd* [2001] UKHL 22, [28] per Lord Steyn.

³³ *CCWS* [2012] UKSC 56, [47] per Lord Phillips. See also *JGE or E v English Province of Our Lady of Charity and another* [2012] EWCA Civ 938, [2013] QB 722.

³⁴ See *Cox v Ministry of Justice* [2014] EWCA Civ 132, [2015] QB 107 [prisoner working in prison kitchen] (on appeal to Supreme Court) and C McIvor, 'Vicarious liability and child abuse' (2013) 29 PN 62.

³⁵ J Morgan, 'Liability for Independent Contractors in Contract and Tort: Duties to Ensure that Care is Taken' [2015] CLJ 109.

outsourcing signifies that functions traditionally undertaken by teachers (*viz* the swimming lessons in *Woodland*) are now routinely delegated by schools to independent contractors.³⁶ In terms of tort law, this means that *despite* recent extensions to the doctrine of vicarious liability, the torts of outsourced teachers (let us call them ‘independent teachers’) remain outside vicarious liability. This is treated as almost a technicality – a device – which deprives innocent victims of the protection which the doctrine of vicarious liability would provide. Secondly, the Court expressed concern that this led to inconsistency between the legal position of state and private school pupils if the latter were able to sue their school (in contract) for deficiencies in contracted-out lessons, but the former were not. Lord Sumption argued that ‘there is no rational reason why the mere absence of consideration should lead to an entirely different result when comparable services are provided by a public authority’.³⁷ On this basis, the imposition of a non-delegable duty, based on assumption of responsibility, would mirror the legal position of fee-paying schools where schools have a contractual duty to see that care is taken of pupils. While one might question whether Eton and an inner city comprehensive provide ‘comparable services’ in terms of quality and content, and indeed private schools do not even have to follow the national curriculum,³⁸ the key issue here is one of non-discrimination (ably captured by Baroness Hale in her judgment). The public expects that state school students will be subject to the same legal standard of care as those attending a well known and very expensive independent school.³⁹ This is seen as a basic principle of justice. Further, from the parents’ perspective, the school has undertaken to educate their child and the child has been injured in the course of this undertaking.

This leads logically to a new framework for liability based not on vicarious liability but the non-delegable duty. Lord Sumption identified five key characteristics:⁴⁰

1. The claimant is a patient or a child, or for some other reason especially vulnerable or dependent on the protection of the defendant against the risk of injury.
2. There is a pre-existing relationship between the claimant and the defendant, independent of the negligent act or omission itself, which (i) placed the claimant in the actual custody, charge or care of the defendant, and (ii) from which it was possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, not just a duty to refrain from conduct which would foreseeably damage the claimant. It was characteristic of such relationships that they involved an element of control.
3. The claimant had no control over how the defendant chose to perform the relevant obligations (whether personally or through employees or third parties).
4. The defendant had delegated to a third party some function which was an integral part of the positive duty which he had assumed towards the claimant; and the third party was exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that went with it.
5. The third party had been negligent in the performance of the very function assumed by the defendant and delegated by the defendant to him.

³⁶ [2013] UKSC 66, [25](4) and [40] per Lord Sumption and Baroness Hale respectively.

³⁷ [2013] UKSC 66, at [25](5).

³⁸ <https://www.gov.uk/national-curriculum>.

³⁹ [2013] UKSC 66, at [30] per Baroness Hale.

⁴⁰ [2013] UKSC 66, [23].

On this basis, Annie Woodland, caught between multiple defendants and their insurers, was able to obtain justice. Regardless of the technical status of the defendant (employed teacher or 'independent teacher'), she was able to rely on the school to ensure that she received reasonable care during the school day and was not left to the vagaries of suing independent contractors whose names she was unlikely to know and subject to their insurance arrangements which, as the case illustrates, may be complicated and lead to years of litigation. The litigation system had failed Annie Woodland and it took a radical decision of the Supreme Court for her to obtain the compensation she needed.⁴¹

As lawyers, however, it is the aftershock which concerns us. As stated above, outsourcing is prevalent in schools. The *Times Educational Supplement* recently reported suggestions to outsource the marking of pupils' work to India⁴² and the outsourcing of transport and school meals is common. Academies, further, have greater powers to outsource and therefore the familiar figures of the 'dinner lady', 'the school nurse' or 'secretary' may in reality not be employees, but supplied by independent contractors. Parents, however, are usually not privy to these cost-cutting measures. 'Miss Brown', from their perspective, works for the school and inevitably her actual status only becomes an issue when things go wrong. What we see, therefore, is an expectation gap. As Annie's father stated: 'How could the school not be responsible for our daughter during a national curriculum lesson?'⁴³ It is submitted that it is this expectation gap which is the justification for the imposition of a non-delegable duty. Indeed, as the Supreme Court acknowledged, the classic non-delegable duty cases arise from gaps in the common law: the employer's non-delegable duty to his employee existed to circumvent the doctrine of common employment;⁴⁴ the hospital's non-delegable duty to its patients to avoid case-law indicating that surgeons were not employees.⁴⁵ Admittedly, the employer's non-delegable duty survived the abolition of the doctrine of common employment,⁴⁶ but this occurred in an environment where the courts were unlikely to seek openly to reduce the protection of employees.⁴⁷ This does not undermine the argument that these measures were devices to fill gaps in vicarious liability in meritorious cases. A similar situation arises in *Woodland*. 'Outsourced teachers' are seen as a means of avoiding vicarious liability and, in plugging this hole, the Supreme Court shares the good intentions of the House of Lords in *Wilsons and Clyde Coal Co Ltd v English* in 1938 and Lord Denning in *Cassidy v Ministry of Health* in 1951. The decision is also consistent with steps taken in *Lister* and *CCWS* to extend vicarious liability to deserving cases. In all these cases, the courts seek to adapt the law to reflect social and economic change. On this basis, imposing liability in a situation 'akin to vicarious liability', where the

⁴¹ Merkin and Steele go so far as to suggest: 'It is tempting to conclude that the real purpose of a non-delegable duty here is not to ensure that care is taken but that a remedy is available where care is not taken': R Merkin and J Steele, *Insurance and the Law of Obligations* (Oxford: OUP, 2013) at 246.

⁴² TES, 'Schools should consider outsourcing marking abroad, expert says' 29th April 2015.

⁴³ *Guardian*, 'Woman who almost drowned 13 years ago wins landmark court ruling' 23rd October 2013.

⁴⁴ *Wilsons and Clyde Coal Co Ltd v English* [1938] AC 57.

⁴⁵ See Denning LJ in *Cassidy v Ministry of Health* [1951] 2 KB 343.

⁴⁶ Abolished by the Law Reform (Personal Injuries) Act 1948, s 1.

⁴⁷ See *McDermid v Nash Dredging and Reclamation Co Ltd* [1987] AC 906 (regarded by Ewan McKendrick as close to imposing vicarious liability for the torts of independent contractors: 'Vicarious Liability and Independent Contractors – A Re-examination' (1990) 53 MLR 770, 773). Glanville Williams suggested that the perpetuation of this special rule may be justified on the ground that it is desirable to compensate employees for industrial injuries: G Williams, 'Liability for independent contractors' [1956] CLJ 180, 191.

‘independent teacher’ is performing the role which, but for outsourcing, would have been performed by an employed teacher, may be justified as a legitimate extension of the law, or ‘fair, just and reasonable’ if one prefers. Yet in moving beyond vicarious liability to the non-delegable duty, the courts are taking a significant step. This is a new form of primary liability and one imposing strict liability no less. This raises important questions about the liability framework within which schools (and similar institutions) now operate. Will schools now be liable for *anyone* who cares for its pupils in school hours (or beyond?) What, in the words of Lord Sumption, is there to prevent ‘the exception from eating up the rule’?⁴⁸

4. Determining the scope of the non-delegable duty: policy and practice.

In *Various Claimants v Catholic Child Welfare Society and others* (the CCWS case)⁴⁹, Lord Phillips identified a number of reasons which rendered the imposition of vicarious liability fair, just and reasonable. No single rationale was identified.⁵⁰ It was relevant, however, that the employer has the means to compensate the victim (the deeper pocket argument); the tort was committed as a result of activity undertaken on behalf of the employer (the delegation of task argument); the employee’s activity is likely to be part of the employer’s business activity (the enterprise liability argument); the employer by engaging the employee to carry on the activity in question created the risk that the tort would be committed (the risk creation argument) and the employee was to some degree under the employer’s control (the control argument).⁵¹ In terms of the justification for extending vicarious liability to intentional torts, the Court stressed the significance of the risk creation argument as likely to be an important element in the facts that give rise to such liability.⁵² A number of commonalities may be found with the *Woodland* non-delegable duty. It is assumed that the school (not the independent contractor) will have the deeper pockets (or in reality be insured/self-insured). As indicated above, uncertainties as to the insurance cover of the independent contractors led to the joining of the school at a later stage of proceedings with the sole aim of targeting a solvent defendant. Secondly, it can be argued that the delegation of task and enterprise liability arguments lend themselves equally to the non-delegable duty – the defendant must delegate to a third party an integral part of the duties it has assumed to the victim. Thirdly, this delegated task created the risk in question. The key distinction is the absence of control which the employer has over the independent contractor. This is replaced by the requirement of control over the *claimant*, thereby providing a direct link/duty between the school and the pupil victim. Liability is therefore primary, not vicarious, but the justificatory framework similar.

On this basis, it is the assumption of control (or responsibility) over the victim which is the rationale that both distinguishes the non-delegable duty from vicarious liability and justifies

⁴⁸ Lord Sumption [2013] UKSC 66, [22].

⁴⁹ [2012] UKSC 56.

⁵⁰ Indeed it has been argued that this is impossible: P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge: CUP, 2013) Ch 8, although others would disagree: see, for example, D Brodie, ‘Enterprise Liability: Justifying Vicarious Liability’ (2007) 27 OJLS 493; P Morgan, ‘Recasting vicarious liability’ [2012] CLJ 615; JW Neyers, ‘A Theory of Vicarious Liability’ (2005–2006) 43 Alta L Rev 287.

⁵¹ (n 49), at [35].

⁵² (n 49), at [87].

its imposition,⁵³ countering arguments that it has no basis in policy⁵⁴ or is simply a disguised form of vicarious liability.⁵⁵ This gives rise to a positive duty to protect the school's pupils. In developing this conceptual framework, both the Supreme Court and Laws LJ (dissenting in the Court of Appeal in *Woodland*) were influenced by developments in Australia. In the influential decision of the High Court of Australia in *Commonwealth of Australia v Introvigne*,⁵⁶ Mason J (with whom Gibbs CJ agreed) had found strong reasons why a school authority should come under a duty to ensure that reasonable care is taken of pupils attending the school, focusing on the vulnerability of pupils and their consequent dependence on the school to take precautions to care for their safety.⁵⁷ By highlighting special dependence and vulnerability in circumstances where vicarious liability was not available, the Australian courts adopted a far looser test than that established by Lord Sumption,⁵⁸ but one which at present is confined to negligence, excluding intentional torts.⁵⁹

The *Woodland* 'assumption of responsibility' test is not, however, without its weaknesses.⁶⁰ The school is not found to have voluntarily assumed responsibility to its pupils – this is imputed by the courts in the circumstances set out in the five-fold test. In the absence of any genuine test of a voluntary assumption of responsibility, the role of the courts in determining the exact boundaries of this liability will be crucial. Liability, we are told, will be exceptional; Lord Sumption expressly recognising that the non-delegable duty is inconsistent with the fault-based principles of negligence⁶¹ and that the courts should be sensitive about imposing unreasonable financial burdens on those providing critical public services.⁶² The key question, therefore, is whether the *Woodland* non-delegable duty can be kept within reasonable bounds.

⁵³ See also J Murphy, 'Juridical foundations of common law non-delegable duties' in JW Neyers, E Chamberlain and SGA Pitel, *Emerging issues in Tort Law* (Oxford: Hart, 2007).

⁵⁴ Williams (n 47).

⁵⁵ J Fleming, *The Law of Torts* (9th ed., Sydney: LBC Information Services, 1998) at 433.

⁵⁶ [1982] HCA 40, (1982) 150 CLR 258 (non-delegable duty owed by school to child notwithstanding that the running of the school and the employment of the staff had been delegated to the State of New South Wales).

⁵⁷ *Ibid.*, at [30]. See also Mason J in *Kondis v State Transport Authority* [1984] HCA 61, (1984) 154 CLR 672, [29]-[33], *Burnie Port Authority v General Jones Pty Ltd* [1994] HCA 13, (1994) 179 CLR 520, [36] and McMurdo P in *Fitzgerald v Hill* [2008] QCA 283, [66]-[67].

⁵⁸ For an argument that it should be rationalised as based on 'conferred authority', see C Beuermann, 'Conferred Authority Strict Liability and Institutional Child Sexual Abuse' (2015) 37 Sydney L Rev. 113 and in relation to *Woodland* (at CA): 'Vicarious liability and conferred authority strict liability' (2013) 20 TLJ 265. It should also be noted that a leading Australian textbook regards *Introvigne* as an unusual case, anticipating that in most cases teachers will be held liable under the doctrine of vicarious liability: K Barker, P Cane, M Lunney and F Trindade, *The Law of Torts in Australia* (5th ed., Sydney: OUP, 2012) at 17.6.2.4.

⁵⁹ See *State of New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511, [36]-[39] per Gleeson CJ. See also Gummow and Hayne JJ at [264]-[270], Kirby J at [295]-[296] and Callinan J at [339]-[340]. This was subject to a powerful dissent by McHugh J, but the Supreme Court of South Australia in *A, DC v Prince Alfred College Incorporated* [2015] SASFC 161 recently accepted the view that liability for intentional criminal wrongdoing was more appropriately dealt with through vicarious liability than under a non-delegable duty.

⁶⁰ For criticism relating to the assumption of responsibility doctrine, see, for example, A Robertson and J Wang, 'The assumption of responsibility' in K Barker, R Grantham and W Swain (eds), *Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Oxford: Hart Publishing 2015) and Barker's classic critique: K. Barker, 'Unreliable assumptions in the modern law of negligence' (1993) 109 LQR 461.

⁶¹ [2013] UKSC 66, [22].

⁶² [2013] UKSC 66, [25].

5. The limits of the protective non-delegable duty: Meals, school trips and intentional torts.

As Baroness Hale recognised in *Woodland*, the common law grows incrementally, by analogy with existing categories. The boundaries of the Sumption test will be tested in future case-law, in particular in determining which functions (under the fourth limb of the test) are ‘an integral part of the positive duty’ undertaken by the school. A fundamental distinction may be identified between duties *undertaken* by the school (and delegated to a third party) and matters which the school *arranges* on its pupils’ behalf such as taxi services and school buses. Only the former gives rise to a non-delegable duty. On this basis, a non-delegable duty would *not* arise in relation to negligent driving by a taxi firm or bus driver transporting children to and from school,⁶³ *unless* the school had undertaken to provide transport and placed the pupils in the driver’s care.⁶⁴

One rather graphic example caught the attention of the court at all three levels of litigation. At first instance, Langstaff J had given the example of a child being bitten by an animal due to the negligence of the zoo-keeper’s staff on a class outing to a zoo, which had been arranged as part of the school’s regular schedule of important educational visits.⁶⁵ No-one, in his view, could sensibly argue that the school would be responsible for the child’s injuries in addition to the zoo and its staff members where the accompanying teacher (not herself an expert in animal behaviour) had exercised reasonably careful supervision. Tomlinson LJ in the Court of Appeal indeed relied on this example to predict a chilling effect on educational authorities if a non-delegable duty was imposed.⁶⁶ Baroness Hale, in contrast, felt that the Sumption five-fold test was sufficiently refined to exclude liability for the carelessness of the zoo-keeper, but acknowledged that the exact boundaries of the test would have to be determined on a case-by-case basis.⁶⁷

These examples provide limited comfort for schools (and their insurers). The Supreme Court in *Woodland* faced what was essentially a straightforward application of the Sumption test: is the teaching of core curriculum lessons part of the functions undertaken by the school? The real question is whether in less clear-cut circumstances the Sumption test provides sufficient guidance.

To answer this question, this article will propose three mock scenarios. These will serve to appraise the operation of the Sumption five-fold test. All three are based on facts which could easily arise, and, in all three scenarios, it will be assumed that the school has taken reasonable care in choosing the independent contractors in question.

⁶³ See *Myton v Woods* (1980) 79 LGR 28. In this case, the pupils in question were mentally handicapped and, under statute, it was the duty of the county council to see that there was suitable transport for them, free of any charge, to take them to and from school. Nevertheless the Court of Appeal found that the local education authority only had a duty to make reasonable arrangements for the transport of the children to and from school. It did not extend to a duty to ensure that reasonable care had been taken by the taxi company in question.

⁶⁴ Baroness Hale [2013] UKSC 66, [39].

⁶⁵ [2011] EWHC 2631 (QB), [55]-[56].

⁶⁶ [2012] EWCA Civ 239, [57].

⁶⁷ [2013] UKSC 66, [39].

- (a) Scenario one: the school contracts out the supply of lunch-time food to an independent contractor, Independent Food Services (IFS). One of the cooks working for IFS negligently reheats some cooked chicken and six pupils suffer food poisoning.
- (b) Scenario two: the school's English curriculum involves the study of 'Hamlet' and the English teacher takes a group to the local theatre to watch a matinée performance of the play. The school organises a subsequent question and answer session with the actor playing Hamlet (Y) to discuss the play and students are advised to take notes. Y is employed by the theatre company (Theatrics). In describing a scene, Y chooses to demonstrate his sword skills and negligently injures one of the pupils. Alternatively, while recreating a scene with a female pupil in the role of Ophelia, Y indecently assaults the pupil.
- (c) Scenario three: a self-employed instructor hired to tutor pupils on a school skiing trip is negligent and one of the students is injured. The trip is optional, but organised by the school and has school teachers in attendance (but not giving skiing instruction).

These three scenarios are sadly all too predictable. In the first, the pupils are injured while eating their school lunch, provided on school premises by the school, albeit using independent contractors to supply this service. Is the school, therefore, providing lunch or merely arranging for lunch to be available to its students? Here, the statutory framework would appear to be a good starting point in ascertaining the nature of the school's duties to its pupils. Under section 512 of the Education Act 1996, a local education authority is empowered to provide registered pupils with milk, meals and other refreshments at any school maintained by the authority.⁶⁸ However, local authorities are not *required* to provide meals if it would be unreasonable for them to do so.⁶⁹ The School Standards and Framework Act 1998 s114A allows for regulations to be made setting nutritional standards for school meals.⁷⁰ On the basis of the Sumption test, therefore, the key question would be: has the school delegated to a third party a function which is an integral part of its positive duty which it has assumed to its pupils? Can it be said that the third party is exercising for the purpose of the function delegated to him the school's custody or care of the claimant and the control that goes with it? It is certainly arguable that if the school chooses to provide food during the school day, it is an 'integral part' of its duties towards its pupils which include safeguarding and promoting the welfare of children.⁷¹ Further, lunch time meals are regulated at government level in terms of both content and provision. A

⁶⁸ Or other persons who receive education at such a school. This is in the section of the Act entitled Part IX Ancillary Functions, Chapter II Ancillary functions of local authorities. See also section 533, Education Act 1996 (Functions of governing bodies of maintained schools with respect to provision of school meals etc).

⁶⁹ Education Act 1996, s.512(3)(c)(ii).

⁷⁰ See also *School Food in England: Departmental advice for governing bodies* (January 2015) (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/393122/School_food_in_England_2015.pdf) and Requirements for School Food Regulations SI 2014/1603.

⁷¹ See DoE, *Keeping Children Safe in Education: Information for all school and college staff* (July 2015): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/447596/KCSIE_Part_1_July_2015.pdf.

parent whose child becomes ill having eaten a 'school meal'⁷² at lunch time would surely assume that reasonable care should have been taken in the provision of food supplied on school premises. The negligence in question cannot be described as collateral.⁷³ Further a private school pupil would be protected in this scenario, which would respond to Baroness Hale's concerns. Yet, can the catering firm be said to exercise 'custody or control' over the pupils? Lord Sumption described it as 'control over the claimant for the purpose of performing a function for which the defendant has assumed responsibility' and distinguishes it from mere control over the environment in question.⁷⁴ It seems unlikely to be the case here. On this basis, a school is most likely to be found to *arrange* food provision for its pupils, but it might be considered whether it should make any difference where, under recent legislation, schools are *obliged* to offer free school meals to every pupil in reception, year 1 and year 2 or whether this would still be interpreted as a duty to arrange rather than take responsibility for the provision of such meals.⁷⁵ Uncertainty in relation to something as fundamental as feeding young children is surely a matter for concern.

Scenario two takes us away from school premises and arguably, on this basis, should be more straightforward. Lord Sumption in *Woodland* stated that schools will not be liable for the negligence of those to whom no control of the child has been delegated, such as the theatre to which the children may be taken by school staff in school hours.⁷⁶ Our trip, however, is clearly linked to study on the English national curriculum and indeed the incidents take place in the course of discussing the play in question. Can we argue, on this basis, that the Sumption test has been met? Here, the question whether an 'integral part of the positive duty' of the school has been delegated to a third party to whom control of the pupil is passed is more difficult to answer. It will be fact-sensitive: was the teacher present during the question and answer session or did the teacher entrust the students into the sole care of the lead actor (Y)? Did the school require all students to attend the play (and the Q & A session) as part of their English studies or was it optional? It will clearly be more difficult to argue that a school trip to a theatre is an 'integral' part of the school curriculum, particularly if it takes place outside school hours, but it is not unarguable for a parent to assert that having been told by the school that she must pay for her daughter to attend the play in school hours as a necessary part of her study of a core text, the actor running the Q & A session is part of the educational process (akin to a teacher) for whom the school should be held responsible.

Scenario two also raises two further legal issues which the Supreme Court did not deal with. First, would the negligent swordplay be dismissed as collateral negligence (the fifth limb of the Sumption test)? The difficulty we experience here is that the collateral negligence test is

⁷² Query to what extent the term 'school meal' should indicate that this is part of the school's responsibility and not simply something they arrange to be provided.

⁷³ *Padbury v Holliday and Greenwood Ltd* (1912) 28 TLR 494.

⁷⁴ [2013] UKSC 66, [24].

⁷⁵ See Children and Families Act 2014, section 106. Local Authorities are also under a duty to provide school meals at no charge to pupils whose parents are on income support or income-based jobseeker's allowance or support provided by Pt VI of the Immigration and Asylum Act 1999 or tax credits (Education Act 1996 s.512 and s.512ZB).

⁷⁶ [2013] UKSC 66, [25](3).

notoriously vague.⁷⁷ There are, in fact, relatively few authorities where the contractor's actions have been held to amount to collateral negligence. Sachs LJ in *Salsbury v Woodland* commented that he 'derived no assistance at all from any distinction between "collateral and casual" negligence and other negligence. Such a distinction provides too many difficulties for me to accept without question, unless it simply means that one must ascertain exactly what was the occupier's duty and then treat any act that is not part of that duty as giving rise to no liability on his part.'⁷⁸ If this is to provide one of the limitations to the new non-delegable duty test, then it needs to be defined in far more detail. If, as it seems, it is to be the equivalent to the 'course of employment' limitation in vicarious liability, then perhaps at the very least the negligence must be 'closely connected' to the task delegated to the third party.

Secondly, and more controversially, the Sumption test talks only of negligence and no mention is made of intentional torts. This was discussed by the High Court of Australia in *New South Wales v Lepore*⁷⁹ (Australia, it may be recalled, being a source of inspiration for the Supreme Court). The majority in that case questioned whether a non-delegable duty could extend to a duty to prevent intentional or criminal wrongdoing such as sexual abuse; Gleeson CJ commenting that 'The proposition that, because a school authority's duty of care to a pupil is non-delegable, the authority is liable for any injury, accidental or intentional, inflicted at school upon a pupil by a teacher, is too broad, and the responsibility with which it fixes school authorities is too demanding.'⁸⁰ In contrast, in the recent English decision in *NA v Nottinghamshire CC*,⁸¹ the judge at first instance rejected the argument that the Sumption non-delegable duty did not cover intentional torts, although it was held that it would not be fair, just and reasonable to impose such a duty in the circumstances of the case. Logically, if we take *Woodland* as an extension of strict liability on the basis that it is 'akin to vicarious liability', then the decision of Males J in *NA* is correct and Gleeson CJ in *Lepore* is attempting to draw an arbitrary line to limit the scope of the school's non-delegable duty.⁸² This is supported by the view of the Supreme Court that outsourcing key staff should mirror the position which would exist in vicarious liability if outsourcing had not taken place and an employee had committed the tort. The key issue here is that this is not explicit in *Woodland*. Judicial reassurance that the decision involves only a limited

⁷⁷ See P Giliker, 'Vicarious liability' in K Oliphant (ed), *The Law of Torts* (LexisNexis, 2014) at 3.59-3.60.

⁷⁸ [1970] 1 QB 324 at 348.

⁷⁹ (2003) 212 CLR 511 (intentional torts by school teachers). See S White and G Orr, 'Precarious liability: The High Court in *Lepore*, *Samin* and *Rich* on school responsibility for assaults by teachers' (2003) 11 TLJ 101.

⁸⁰ (2003) 212 CLR 511 at [34].

⁸¹ [2014] EWHC 4005 (Fam), [211]: 'The defendant's duty was to care for the child, which includes protecting it from harm however inflicted. If I had held that the defendant's duty was non-delegable, I would have held that the defendant was responsible in law for the deliberate abuse of a child by the person to whose care the child was committed' per Males J. Although Burnett LJ in the Court of Appeal ([2015] EWCA Civ 1139) disagreed with this view and supported the position in *Lepore*, Black LJ was more hesitant and Tomlinson LJ expressed no view on the matter. The question thus remains unresolved.

⁸² Stevens has argued that the position in *Lepore* is indefensible— if a duty is assumed to see that care is taken, this is not an absolute duty but liability should not be avoided simply by proof that the breach was gross: 'liability for deliberate abuse follows a fortiori from liability for want of care': R Stevens, 'Non-delegable duties and vicarious liability' in Neyers, Chamberlain and Pitel, *Emerging issues in Tort Law* (n 53) at 361. See also N Foster, 'Vicarious Liability and Non-Delegable Duty in common law actions based on institutional child abuse' http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2583604 at 27-28.

extension of liability for schools fails to factor in the problem of intentional torts. Pressure also then falls on the 'collateral' exception again – is sexual abuse collateral to the actor's master class on the relationship between Hamlet and Ophelia? It seems clear that this much neglected concept is likely to come to the fore in future claims.

Our final scenario is one with which the courts are already familiar and should, therefore, cause fewer difficulties. In *Chittock v Woodbridge School*,⁸³ for example, a school avoided liability when its teacher's response to pupil misbehaviour on a skiing trip was found to be within the range of reasonable responses. The Court of Appeal did not deny that the teacher owed the student a duty of care, but held that a non-delegable duty did not arise in these circumstances. What of the self-employed ski instructor? Logically, here, the line would be drawn. Skiing trips are an optional extra and not within the core curriculum. Teachers do not generally teach their pupils to ski – that is left to professionals. At best, schools arrange the trip in question, but they do not take legal responsibility for its safety. On this basis, parents, giving permission for their child to go on a skiing trip, will generally rely on the school in terms of organisation, but are unlikely to expect (unless told otherwise) that the teachers will undertake to provide the skiing lessons themselves. The non-delegable duty is therefore unlikely to arise in this context. Yet a change of facts is capable once again of leading to uncertainty. Consider, for example, whether the scenario would be decided differently if it concerned an outward bound course taking place during the school term, with teacher participation, in which all pupils were expected to participate.⁸⁴ To what extent, therefore, will even straightforward cases vary according to the degree of involvement of the school and the timing of the event in question?

These three examples indicate that the Sumption test provides guidance in straightforward cases, but that there is a lot left unsaid. Where the independent contractor is performing duties which are part of the school's integral duties to its pupils, i.e. core teaching, then there should be no difficulty in finding a non-delegable duty. It is the borderline cases which gives rise to concerns. While scenario three indicates that where the independent contractor's duties do not replicate these integral tasks, the non-delegable duty is unlikely to arise, there remains a question mark over how to deal with situations where the independent contractor is involved in the provision of services of educational benefit to the child, but which are (arguably) not core duties. These cases will be fact-sensitive. Baroness Hale herself distinguished Lord Sumption's exclusion of the bus driver where the school had *undertaken* to provide transport and placed the pupils in his charge rather than that of the

⁸³ [2002] EWCA Civ 915, [2003] PIQR P81 (pupil injured in skiing trip accident). Contrast *Porter v City of Bradford Metropolitan Council* (CA, 14 January 1985, unreported) [pupil on a voluntary expedition to a neighbouring rocky glen called Shipley Glen to study geology].

⁸⁴ The National Curriculum provides that pupils 'should tackle complex and demanding physical activities. They should get involved in a range of activities that develops personal fitness and promotes an active, healthy lifestyle' and 'take part in further outdoor and adventurous activities in a range of environments which present intellectual and physical challenges and which encourage pupils to work in a team, building on trust and developing skills to solve problems, either individually or as a group': *The national curriculum in England: Key stages 3 and 4 framework document* (December 2014) at 104 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/381754/SECONDARY_national_curriculum.pdf).

teacher.⁸⁵ Fundamentally, can we clearly distinguish between responsibilities undertaken by the school and services merely arranged by the school on behalf of its students?⁸⁶ Further, a number of definitional issues arise - what do we mean by 'an integral part of the positive duty' and 'collateral negligence'? – and it remains to be authoritatively resolved whether the non-delegable duty will extend to intentional torts. Recent applications of the Sumption test at first instance also raise a different issue. Males J in *NA v Nottinghamshire County Council*⁸⁷ found that even where the Sumption test had been met, 'it remains to consider whether it is fair, just and reasonable to impose a non-delegable duty'. This view received support in the Court of Appeal.⁸⁸ This adds an additional layer of policy and arguably uncertainty. At the very least, these issues will only be resolved by future cases, which it will be left to the schools (and similar institutions) to defend at not inconsiderable cost in terms of time and resources.

6. The practical impact of *Woodland* on schools.

Few will not feel sympathy for Annie Woodland and her parents left to wander in the litigation wilderness for 15 years before a determination of liability, during which time her friends had grown up and started families of their own.⁸⁹ Vicarious liability was unable to assist despite the significant developments in recent years permitting the innocent victims of sexual abuse to bring claims out of time⁹⁰ against persons not strictly classified as employees in circumstances where the courts have been prepared to regard sexual abuse as within the course of employment of a school-teacher or warden of a children's home based on a broad notion of when it is 'fair and just to impose vicarious liability'.⁹¹ One might regard it as a short step to develop, in another tragic case, liability 'akin to vicarious liability' – the non-delegable duty to see that reasonable care is taken by those entrusted with the care and/or custody of vulnerable parties. In so deciding, the Supreme Court has provided a framework for all schools (be they public or state). Schools will face claims for primary liability which will include a duty to take reasonable care and a duty to *ensure* that reasonable care is taken. Vicarious liability will continue to arise in relation to the torts of employed teachers and staff 'akin' to such teachers.

Yet, this article has shown that the creation of a new non-delegable duty is more than a mere incremental step. It is a form of primary and strict liability whose scope is likely to be tested by the courts. Extending liability in this way is controversial, and there is no reason why the resuscitation of the non-delegable duty should not give rise to appeals similar to

⁸⁵ [2013] UKSC 66, [39]. See R George, 'Non-delegable duties of care in tort' (2014) 130 LQR 534, 536 who questions whether the Sumption test operates effectively even in relation to previously decided cases.

⁸⁶ Coulson J in *GB v Home Office* [2015] EWHC 819 (QB), [34] remarked that of the five elements identified by Lord Sumption, he found limb (4) the most difficult to apply in that case.

⁸⁷ [2014] EWHC 4005 (QB), [184]. See also Coulson J in *GB v Home Office* (n 86) [38].

⁸⁸ [2015] EWCA Civ 1139, relying on Lord Sumption in *Woodland* [2013] UKSC 66, [25].

⁸⁹ *Woodland v Maxwell & Anor* [2015] EWHC 273 (QB), [4].

⁹⁰ See *A v Hoare* [2008] UKHL 6, [2008] 1 AC 844 and F Burton, 'Limitation, vicarious liability and historic actions for abuse: A changing landscape' [2013] JPI Law 95.

⁹¹ See *CCWS* case.

those found in vicarious liability.⁹² In addition to uncertainty, notably in determining the meaning of concepts such as ‘integral tasks’ and ‘collateral negligence’, the extent of liability for intentional torts and, in particular, the distinction between schools *undertaking* and *arranging* education-related activities or facilities for students, one might consider more generally where this leaves independent contractors in terms of responsibility for their actions. The legal manoeuvring of the swimming teacher and lifeguard in this case, which included the latter (Debbie Maxwell) changing her account of the accident at the start of the trial 15 years after the accident,⁹³ and the less than helpful intervention by their insurers, led to the school bearing the brunt of the accident, despite the absence of fault. While schools may pursue the actual perpetrators of the torts, seeking an indemnity for compensation paid, as *Woodland* has shown the court may not find it ‘just and equitable’ under the Civil Liability (Contribution) Act 1978, s 2 to grant a full indemnity.⁹⁴ Liability as a result more closely resembles a loss distribution exercise rather than holding those at fault accountable for their negligence towards a vulnerable 10 year old child. Further, we may share the scepticism of Glanville Williams that independent contractors (like employees) are unlikely to be able to meet the compensation claims of victims rendering intervention necessary.⁹⁵ In *Woodland*, two of the three defendants had, at least at the start of proceedings, insurance cover and Ms Maxwell (the lifeguard) survived as an (insured) defendant to the final hearing. For Baroness Hale, Williams’ argument has been overtaken by the fact that today large organisations may well outsource their responsibilities to poorer or under-insured contractors,⁹⁶ but this is perhaps as much a generalisation as that of Glanville Williams.

The practical impact of *Woodland*, however, is that schools can expect to be targeted in future when pupils are injured in circumstances related to their studies. The appeal is self-evident – schools represent a solvent defendant and claimants are no longer required to pursue independent contractors whose legal status (and insurance cover) may be difficult to ascertain. Practically, therefore, schools would be well-advised to check (and take copies of) the insurance cover for the independent contractors they hire to facilitate later third party claims. Further, it becomes vital to ensure that suitable indemnity clauses are included in their standard contracting terms.⁹⁷ More generally, schools should make sure that they have in place rigorous and effective risk management systems and that records are

⁹² Note, for example, appeals to the Supreme Court in *Cox v Ministry of Justice* [2014] EWCA Civ 132, [2015] QB 107 and *Mohamud v WM Morrison Supermarkets Plc* [2014] EWCA Civ 116, [2014] IRLR 386 relating to the scope of the ‘relationship’ and ‘course of employment’ tests in vicarious liability.

⁹³ See [2015] EWHC 273 (QB), [40]. The judge commented at [44]: ‘I am satisfied that the shift in her account is not explained by some recent jog of her memory, but the recognition that the timing evidence made her previous account untenable’.

⁹⁴ In *Woodland v Maxwell* [2015] EWHC 820 (QB), Blake J held that, making an assessment of comparative culpability and causative responsibility in this case, Ms Maxwell’s contribution would be confined to one third.

⁹⁵ [1956] CLJ 180, 195.

⁹⁶ Baroness Hale at [2013] UKSC 66, [42].

⁹⁷ Following *Woodland*, legal advisers such as Kennedys Law LLP (specialists in litigation and dispute resolution, with a particular focus on defending insurance claims) have warned of the importance of ensuring that the contractor’s insurance policy contains an adequate limit of indemnity, bearing in mind that catastrophic cases regularly result in damages awards of several million pounds. On this basis, an indemnity limit of £2 million or even £5 million may be inadequate with the local authority left to pick up the shortfall: <http://www.kennedyslaw.com/casereview/localauthority>.

meticulously kept.⁹⁸ To this extent, it will simply mean tightening up existing procedures. Claimants will find it easier to obtain compensation, while schools have an incentive to ensure that they hire reliable (and insured) contractors. The reality, however, is that while schools are now likely to be more diligent in checking that their independent contractors are insured in case of any *Woodland* liability, they would also be wise to insure themselves in case of insolvency or any other obstacle to third party proceedings. This will lead to double insurance.⁹⁹ The most recent edition of *Fleming's The Law of Torts* (long sceptical of the merits of non-delegable duties) comments perceptively that 'what the employer is in effect called upon to do is to guarantee the contractor's ability to meet the claim'.¹⁰⁰

It is not denied in this article that the intentions underlying *Woodland* were noble (as indeed they were in the *Lister* and *CCWS* cases). The innocent and vulnerable should not be defeated by a legal system in which defendants seek to hide behind technical rules of law. Further, a desire to avoid being seen to discriminate in favour of private school pupils and recognition that outsourcing deprives certain claimants of the benefit of vicarious liability may both be seen to justify a new form of strict liability, described in this article as one 'akin to vicarious liability'. However, sympathy may lead us into uncertainty, notably to rules of strict liability without clear boundaries. This risks a conflict with the intention of the Supreme Court that the non-delegable duty should be limited in scope and that it should not place unreasonable financial burdens on public bodies. It should only, we are told, be imposed when 'fair, just and reasonable'. The recent decision of *NA v Nottinghamshire County Council* highlights the difficulties which arise in applying this test in borderline cases – here whether local authorities should be held to owe a non-delegable duty towards children placed in foster care. Both the Court of Appeal and High Court held that the imposition of a non-delegable duty in these circumstances would not be fair, just and reasonable for reasons varying from diversion of financial resources to a fear of defensive risk-averse practices¹⁰¹ – a somewhat questionable revival of the non-empirically tested policy arguments raised in cases such as *Van Colle v Chief Constable of the Hertfordshire Police*, *Smith v Chief Constable of Sussex Police*.¹⁰² The reality is that employers such as education authorities whose work brings them into contact with vulnerable minors will always be an obvious target for claims when their pupils suffer injury and despite their efforts in terms of training, accident prevention and risk management strategies, it will be impossible for them to remove all risk of harm arising from intentional and non-intentional torts in the school environment. The question remains whether this new non-delegable duty can be contained. This article has been critical of uncertainties in the Sumption test and the concept of non-delegable duty itself. Such issues are only likely to be resolved by costly litigation. Far from resolving the question of non-delegable duties, therefore,

⁹⁸ For a comparison with Australia, see J Squelch, 'Playing safe but avoiding a "greenhouse generation" of children' (2013) 18 *International Journal of Law & Education* 7.

⁹⁹ See also Morgan (n 35), who is critical that the Supreme Court did not address the economic structure of outsourcing, notably the insurance arrangements adopted, and warns that 'more of the finite revenue from taxation will be spent on insurance premiums, and so less on teachers': at 137.

¹⁰⁰ L Klar, 'Vicarious liability' in C Sappideen and P Vines (eds), *Fleming's The Law of Torts* (10th ed., Sydney: Thomson Reuters, 2011) at 19.180.

¹⁰¹ [2015] EWCA Civ 1139, [25] per Tomlinson LJ, [38] per Burnett LJ and [60]-[65] per Black LJ; [2014] EWHC 4005 (QB), [198]-[210] per Males J.

¹⁰² [2008] UKHL 50, [2009] AC 225.

Woodland leaves schools facing the prospect of an increasing number of claims from pupils, testing the boundaries of this test for many years to come.