Strict Liability for the Wrongdoing of Another in Tort

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Criminal versus Civil Responsibility

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The work documented in this thesis has been undertaken whilst I was enrolled as a student at the Australian National University. None of the work presented in this thesis has been submitted for credit for any other degree or part thereof. To the best of my knowledge, it contains no material, written or published by another person, except where due reference is made in the text.

Signature:......................................................

Date:..............13/8/12........................................
'Cases do not unfold their principles for the asking. They yield up their kernel slowly and painfully. The instance cannot lead to a generalisation till we know it as it is. That in itself is no easy task. For the thing adjudged comes to us oftentimes swathed in obscuring dicta, which must be stripped off and cast aside.'

Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921), 29
ABSTRACT

This thesis adopts a novel approach to resolving the present difficulties experienced by the courts in imposing strict liability for the wrongdoing of another in tort. It looks beyond the traditional classifications of 'vicarious liability' and 'liability for breach of a non-delegable duty of care' and for the first time seeks to explain all instances of strict liability for the wrongdoing of another in tort in terms of the various relationships in which the courts impose such liability. The thesis shows that, despite appearances, there is a unifying feature to the various relationships in which the courts currently impose strict liability for the wrongdoing of another in tort. That feature is authority. Whenever the courts impose strict liability for the wrongdoing of another in tort, the defendant is either vested with authority over the person who wrongfully harmed the plaintiff or has vested or conferred a form of authority upon that person in respect of the plaintiff. This thesis uses this feature of authority to construct a new expository framework within which strict liability for the wrongdoing of another in tort can be understood.
The final project is novel and extends the scope of the primary research. The project explored the potential for real-time processing of information in a complex environment. The work presented is a proof of concept for the feasibility of real-time data processing in this domain and demonstrates the potential for future applications in similar contexts.

The project aimed to address the challenges of processing large datasets in real-time, specifically in scenarios requiring high performance and low latency. The approach taken involved the development of a hybrid system that integrates traditional data processing techniques with machine learning algorithms. This integration allows for the efficient handling of complex and varied data inputs, enabling the system to adapt to changing conditions and provide accurate and timely information.

The results of the project show promising outcomes, indicating the potential for further development and deployment in real-world applications. The findings are significant for the field of real-time data processing, as they highlight the importance of considering both traditional and modern technologies in the design of such systems.
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Chapter 1
Introduction

Strict liability for the wrongdoing of another in tort is riddled with cases which appear inconsistent and often contradictory. An employer, for example, can be held liable for a crane driver who negligently injures an employee, but not for a tool manufacturer who negligently injures an employee. A school can be held liable for a teacher who sexually assaults a student, but not for a janitor who sexually assaults a student. Explaining such distinctions has proved difficult throughout the common law world.

This thesis takes an important first step towards developing a convincing justification for strict liability for the wrongdoing of another in tort which can accommodate such distinctions. It will show that, despite appearances, there is a unifying feature to the various cases in which the courts impose strict liability for the wrongdoing of another in tort. That feature is authority. Whenever the courts impose strict liability for the wrongdoing of another in tort, the defendant is either vested with authority over the person who wrongfully harmed the plaintiff or has vested or conferred a form of authority upon that person in respect of the plaintiff. This thesis will use this feature of authority to construct a new expositive framework within which strict liability for the wrongdoing of another in tort can be understood.

Part one of the thesis will start by identifying the circumstances in which the courts currently impose strict liability for the wrongdoing of another in tort. It will show that the circumstances in which the courts have imposed strict liability for the wrongdoing of another in tort have narrowed over time and

2 Davie v New Merton Board Mills Ltd [1949] AC 604.
5 Particularly Australia and the United Kingdom which will be the focus of this thesis. See below.
6 The term 'vested' is used throughout this thesis to refer to the creation of new authority.
7 The term 'conferred' is used throughout this thesis to refer to authority previously vested in one person being given to another.
8 Such authority may be either to enter into legal relations with the plaintiff or to direct the plaintiff or their property more generally.
that such liability is currently restricted to three main types of relationships: the *employment relationship* (the relationship between an employer and an employee); the *school relationship* (the relationship between a school and a student); and the *agency relationship* (the relationship between a principal and a contractual agent\(^9\)). As will be seen, authority is a common feature of all three relationships. Part two of the thesis will use this feature of authority to construct a new expositive framework for strict liability for the wrongdoing of another in tort. Three separate forms of strict liability for the wrongdoing of another in tort will be identified and explained: *strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another* (found in the employment and school relationships); *strict liability for the wrongdoing of an employee* (found in the employment relationship only); and *strict liability for the wrongdoing of an agent* (found in the agency relationship only). Each form of strict liability will be shown to reflect differences in the nature of the authority present in each of the relationships which give rise to strict liability for the wrongdoing of another in tort. Part three of the thesis will set out the advantages of the new expositive framework for strict liability for the wrongdoing of another in tort. It will demonstrate the capacity of the new expositive framework to distinguish between the different forms of strict liability for the wrongdoing of another in tort and the circumstances in which those forms of strict liability arise. It will also show how the new expositive framework can be used to explain what appear to be miscellaneous examples of the liability.

To start, however, it is first necessary to consider the nature of strict liability for the wrongdoing of another in tort and the framework within which such liability is currently understood.

\(^9\) Although there is no generally agreed definition of the term agent, this thesis will confine the definition to a person who has been vested with authority by a principal to effect legal relations on the principal’s behalf; that is, an agent in the contractual sense. This is because it is generally only when an agent has been vested with authority in the contractual sense, that a principal will be held strictly liable for the wrongdoing of the agent. See further chapter 6.
'Strict liability for the wrongdoing of another' is used in this thesis to describe any form of liability imposed on one person for the wrongdoing of another in tort by reason of the relationship between the defendant and the wrongdoer, regardless of any personal wrongdoing by the defendant. The defendant is not necessarily innocent of wrongdoing which causes the plaintiff harm, but no proof of wrongdoing is required for the plaintiff to succeed. Instead, it is sufficient for a plaintiff to show that they were wrongfully harmed by someone other than the defendant and that the defendant had a relationship with that person which was sufficient to attract liability.

By definition, the term 'strict liability for the wrongdoing of another' excludes any form of liability triggered by the wrongdoing of another person which is only imposed once the personal wrongdoing of the defendant has been established. An example of personal liability for the wrongdoing of another is the duty of care recognised by the House of Lords in *Home Office v Dorset Yacht Co Ltd.* In that case, although the damage was done by the escaped borstal boys, the liability sought to be imposed on the Home Office was liability for its own fault in allowing the escape. The liability imposed by the High Court of Australia in *Geyer v Downs* is another example of personal liability for the wrongdoing of another. In that case, a school was held liable when a student was 'accidentally struck on the head by a softball bat' held by another student. Once again, although the damage was done by a student, the school was held liable for its own fault in not adequately supervising the play ground at the time the incident occurred.

As this thesis is principally concerned with strict liability for the wrongdoing of another person in tort, the thesis will not examine any of the various forms of

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11 *Bernard v The Attorney General of Jamaica* [2005] IRLR 398, [21] (Lord Steyn): 'Vicarious liability is a principle of strict liability. It is a liability for a tort committed by an employee not based on any fault of the employer. There may, of course, be cases of vicarious liability where employers were at fault. But it is not a requirement.'
15 Ibid 92.
liability which require personal wrongdoing by the defendant to be established for liability to be imposed. Personal liability will not be ignored altogether, but the consideration of personal liability will be limited to the final chapter which will briefly explore the implications of this thesis on the explanation of personal liability arising within the same relationships.

The term 'strict liability for the wrongdoing of another' also excludes forms of strict liability triggered by the wrongdoing of another person which are imposed for reasons other than the relationship between the defendant and the person who wrongfully harmed the plaintiff. Consider the liability imposed in Rylands v Fletcher.¹⁶ In that case, the defendant land owner engaged an independent contractor to construct a dam which subsequently collapsed into a series of subterranean mine shafts, flooding a neighbouring property. Although the defendant land owner was held liable for the damage, it was not the defendant land owner's relationship with the independent contractor which attracted the liability, but the defendant land owner's 'non-natural' use of land which created a reasonably foreseeable risk of harm to the neighbouring property.¹⁷ As this thesis is principally concerned with strict liability for the wrongdoing of another person in tort which arises by reason of the relationship between the defendant and the wrongdoer, this thesis will not examine any of the various forms of strict liability which arise for reasons other than the particular relationship between the defendant and the wrongdoer.

II  EXISTING TERMINOLOGY

The presence of strict liability for the wrongdoing of another in tort is typically indicated by the use of the labels 'vicarious liability' or 'liability for breach of a non-delegable duty of care'. Unfortunately, such labels are imprecise and their use has been problematic.

¹⁶ (1866) LR 1 EX 265; (1868) LR 3 HL 330.
¹⁷ (1868) LR 3 HL 330, 339 (Lord Cairns). Although the High Court of Australia has since suggested that the liability imposed under the so-called rule in Rylands v Fletcher is a form of personal liability; see Burnie Port Authority v General Jones Pty Ltd (1992) 179 CLR 520, 556. cf Cambridge Water Co v Eastern Counties Leather [1994] 2 AC 264.
First, the labels used to describe strict liability for the wrongdoing of another in tort have not always been limited to describing *only* strict liability for the wrongdoing of another in tort. This is a particular problem in respect of the label 'liability for breach of a non-delegable duty of care'. Sometimes, the holder of what is currently called a 'non-delegable duty of care' is held liable because the beneficiary of the duty was harmed through the personal fault of the duty holder. Consider an employee injured as a result of their employer failing to establish a safe system of work. This failure will constitute a breach of the so-called 'non-delegable duty' owed by the employer to the employee if it can be shown that a reasonable employer would have installed such a system.\(^{18}\) Liability in this type of situation is imposed because the employer is personally at fault. Such liability is outside the scope of this thesis.

Yet the holder of a so-called 'non-delegable duty of care' is held liable at other times in circumstances in which the holder of the duty was innocent of any personal wrongdoing. Consider the decision of the High Court of Australia in *Kondis v State Transport Authority*.\(^{19}\) In that case, an employee was negligently injured by an independent contractor\(^{20}\) engaged by the employer to use a crane to dismantle a structure on the employer's property. Despite no evidence of personal wrongdoing by the employer being adduced, the employer was held to have breached the so-called 'non-delegable duty' owed to the employee. Such liability was imposed regardless of wrongdoing by the employer and is the type of liability with which this thesis is concerned. The label 'liability for breach of a non-delegable duty of care' appears, therefore, to be used in different circumstances to describe different forms of liability.

Secondly, neither the label 'vicarious liability' nor 'liability for breach of a non-delegable duty of care' gives a clear indication as to *why* strict liability for the wrongdoing of another in tort is imposed or the concern to which the strict liability is responding. This creates difficulties in situations where both labels

\(^{18}\) See *McLean v Tedman* (1984) 155 CLR 306 in which an employer was held liable for failing to provide a reasonable system of rubbish bin collection.

\(^{19}\) (1984) 154 CLR 672.

\(^{20}\) Or more correctly, the employee of an independent contractor engaged to dismantle the structure.
can be used to describe the liability arising in a single factual circumstance. Consider the unfortunate series of cases involving the sexual assault of children by the employees of institutions charged with their care (the ‘child sexual assault cases’).\textsuperscript{21} In those cases, there was the possibility of holding the institutions ‘vicariously liable’ for the sexual assault committed by the employee or holding that the sexual assault constituted a breach of the so-called ‘non-delegable duty of care’ owed by the institution to the child. Judges found it difficult to distinguish between the two forms of liability\textsuperscript{22} and received little guidance from the labels used to describe the different forms of liability. The unfortunate result of such difficulties was that a majority of judges opted to impose ‘vicarious liability’ by finding that the deliberate and self-serving\textsuperscript{23} act of sexually assaulting a child could occur within the ‘course of employment’\textsuperscript{24} rather than address the long standing difficulties associated with determining the nature and incidence of the strict liability that might be imposed for breach of a so-called ‘non-delegable duty of care’.\textsuperscript{25}

The failure of the labels ‘vicarious liability’ and ‘liability for breach of a non-delegable duty of care’ to reflect the reasons why strict liability for the wrongdoing of another in tort is imposed also creates difficulties in situations where a single label is used to describe the strict liability arising in different factual circumstances. The label ‘vicarious liability’, for instance, is used to describe both the strict liability imposed on an employer for the wrongdoing of an employee and the strict liability imposed on a principal for the wrongdoing of an agent. The use of a single label to describe liability in both circumstances suggests that the reasons for liability in both circumstances are the same. It is difficult to reconcile this conclusion, however, with the general rule that an employer cannot be held ‘vicariously liable’ for the

\textsuperscript{22} See, eg, New South Wales v Lepore (2003) 212 CLR 515 in which both forms of liability were considered by different judges.
\textsuperscript{25} Glanville Williams once famously said of the non-delegable duty: ‘...the cases are decided on no rational grounds, but depend merely on whether the judge is attracted by the language of non-delegable duty’. Glanville Williams, ‘Liability for independent contractors’ (1956) Cambridge Law Journal 180, 186.
wrongdoing of an independent contractor.\textsuperscript{26} This is because although an agent may be an employee, they may also be an independent contractor or have been acting gratuitously. This inconsistency has led some commentators to challenge whether what is currently called ‘vicarious liability’ should be recognised outside the employment relationship;\textsuperscript{27} but it does not necessarily follow that just because an employer cannot be held ‘vicariously liable’ for the wrongdoing of an independent contractor, a principal cannot be held strictly liable for the wrongdoing of an agent at all. It may be that the reasons for imposing liability in the two situations differ. Unfortunately, this possibility has been obscured by the use of a single label to describe the liability imposed in both circumstances.

As can be seen, the labels ‘vicarious liability’ and ‘non-delegable duty of care’ are vague and confusing and add little to the current understanding of strict liability for the wrongdoing of another in tort. This thesis therefore proposes to abandon such labels and devise more appropriate terms to describe the different forms of strict liability for the wrongdoing of another in tort imposed by the courts.

III Existing Explanation(s)

It is not just the terminology currently used to describe strict liability for the wrongdoing of another in tort which is problematic. At present, there does not appear to be any convincing way of explaining why strict liability for the wrongdoing of another in tort might be imposed.

A Strict liability for the wrongdoing of another arising by reason of the employment relationship

The strict liability imposed on an employer for the wrongdoing of an employee has been justified on various grounds. Early explanations tended to focus on the capacity of an employer to exert a degree of control over an employee’s work. The problem with this type of explanation, as Atiyah

\textsuperscript{26} Quarmann v Burnett 1840) 6 M&W 499; 151 ER 509.

pointed out, is that control is neither a necessary nor sufficient condition of the strict liability. It is not necessary because an employer is held strictly liable for the wrongdoing of all employees, even though the degree of control exercised by an employer diminishes as the skill level of an employee increases. Control is also not a sufficient condition because control is exercised over other individuals for whom strict liability does not arise. A school, for instance, is not held strictly liable for the wrongdoing of its students even though the school might be in a position to exert some control over the behaviour of those students.

More modern explanations of the strict liability imposed on an employer for the wrongdoing of an employee focus on the benefit an employer derives from an employee’s work. It is argued that just as an employer takes the benefit of an employee’s work in terms of profit, so too should that employer bear the burden of any damage caused by an employee in the course of earning that profit. Such accounts struggle to explain why an employer is only held strictly liable for the wrongdoing of an employee and not for an independent contractor who might also deliver the employer a benefit.

There is also the problem of explaining why an employer is only held strictly liable for damage wrongfully caused by an employee, as opposed to being held strictly liable for all damage caused by an employee. That an employer takes the benefit of an employee’s work cannot explain why liability is imposed in one situation but not the other.

Further explanations of the strict liability imposed on an employer for the wrongdoing of an employee have been devised from the typically superior capacity of an employer to pay for the damage wrongfully caused by an

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28 Ibid 15-17.
29 Hence control is no longer the sole criterion for identifying an employer relationship. See Stevens v Brodribb Sawmilling Company Pty Ltd (1986) 160 CLR 16.
30 The capacity to exert such control depends, to a large extent, on the child’s age. See further chapter 4.
32 It has been argued that employees might be distinguished from independent contractors on the grounds that the benefit to be delivered by an independent contractor will generally be limited by the terms of the contract under which the contractor has been engaged, whereas the benefit to be delivered by an employee is unlimited. See Stapleton ibid. See also P S Atiyah, Vicarious Liability in the Law of Torts (1967) 18.
33 Atiyah, ibid 28.
employee. It is argued, for instance, that an employer has ‘deeper pockets’ than an employee and can ensure that an injured plaintiff receives the compensation to which they are entitled. This does not explain, however, why it is the employer rather than any other well-resourced institution, such as the government, which is required to compensate the plaintiff.\textsuperscript{34} Alternatively, it is argued that an employer is better positioned to distribute the cost of compensation through the employer’s enterprise. But this does not explain why charities or other institutions that are unable to distribute losses are also held strictly liable.\textsuperscript{35}

B Strict liability for the wrongdoing of another arising by reason of the agency relationship

It has already been noted that the strict liability imposed on a principal for the wrongdoing of an agent is explained in similar terms to the strict liability imposed on an employer for the wrongdoing of an employee. Specifically, it is explained in terms of an agent’s representative capacity.\textsuperscript{36} An agent acts as representative of the principal and not on the agent’s own behalf. As the principal is the beneficiary of the agent’s work, it is argued that the principal should also bear the burden of any damage caused by the agent in obtaining that benefit.\textsuperscript{37} Both the principal and the employer must take the good with the bad.

As the strict liability imposed on a principal for the wrongdoing of an agent is explained in similar terms to the strict liability imposed on an employer for the wrongdoing of an employee, similar problems exist with the explanation’s

\textsuperscript{35} Ibid.
\textsuperscript{36} Colonial Mutual Life Assurance Society Ltd v Produce and Citizens Cooperative Assurance Company of Australia (1931) 4 CLR 1, 48-49 (Dixon J): ‘In most cases in which a tort is committed in the course of the performance of work for the benefit of another person, he cannot be vicariously responsible if the actual tortfeasor is not his servant and he has not directly authorised the doing of the act which amounts to a tort. The work, although done at his request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place, and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative, but as a principal. But a difficulty arises when the function entrusted is that of representing the person who requests its performance in a transaction with others, so that the very services to be performed consists in standing in his place and assuming to act in his right and not in an independent capacity.’
use. That a principal takes the benefit of an agent’s work, for instance, does not explain why a principal is only held strictly liable for damage *wrongfully* caused by an agent, as opposed to being held strictly liable for all damage caused by an agent. There is also the further problem, discussed above, of reconciling the explanation with the general rule that an employer cannot be held ‘vicariously liable’ for the wrongdoing of an independent contractor (as that liability is currently described).

C  **Strict liability for the wrongdoing of another arising by reason of the relationships which currently give rise to a so-called ‘non-delegable duty of care’**

There are a variety of relationships in which the courts recognise a so-called ‘non-delegable duty of care’. They include relationships between ‘adjoining owners of land in relation to work threatening support or common walls; master and servant in relation to a safe system of work; hospital and patient; school authority and pupil; and (arguably), occupier and invitee.' The use of the label ‘non-delegable duty’ in each of those relationships is typically taken to indicate that strict liability for the wrongdoing of another in tort can be imposed. This proposition will be challenged in Chapter 2.

Assuming for the moment that strict liability for the wrongdoing of another is imposed in each of the above relationships, such liability is sought to be justified on the basis of an ‘assumption of responsibility’. The holder of the so-called ‘non-delegable duty’ is said to undertake not just to use reasonable care in respect of the beneficiary of the duty, but to ‘ensure’ that reasonable care is taken. Once such an ‘assumption of responsibility’ is found to exist, it is argued that the person who assumed responsibility should be held

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39 Kondis v State Transport Authority (1984) 154 CLR 672, 687 (Mason J); ‘because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised.’ See also: Robert Stevens, ‘Non-delegable duties and vicarious liability’ in Jason Neyers, Stephen Pitel and Erika Chamberlain (eds), *Emerging Issues in Tort Law* (2007) 331. John Murphy, ‘Juridical foundations of common law non-delegable duties’ in Jason Neyers, Stephen Pitel and Erika Chamberlain (eds), *Emerging Issues in Tort Law* (2007) 369.

liable for any damage wrongfully caused to the person over whom responsibility was assumed, regardless of any personal wrongdoing.\textsuperscript{41}

There are several difficulties in using the concept of an ‘assumption of responsibility’ to explain any strict liability imposed for the wrongdoing of another within the various relationships in which a so-called ‘non-delegable duty of care’ is recognised. First, the courts have failed to use the notion of an ‘assumption of responsibility’ with any consistency. As Kit Barker has demonstrated, the concept is used in a variety of senses: sometimes it indicates an implied promise by the defendant to take care; sometimes it means the defendant has assumed the legal risk of the consequences of their actions; and on yet other occasions, it means nothing more than the defendant has voluntarily chosen to act in a particular way.\textsuperscript{42} As judges do not always articulate the sense in which they are using the concept, the concept can appear little more than a label for the particular conclusion a judge wants to reach.

Secondly, it is not always clear how an ‘assumption of responsibility’ in any of the senses in which it is used above, might arise in the various relationships in which a so-called ‘non-delegable duty of care’ is recognised. Take, for instance, the relationship between adjoining land owners when working on a party-wall or foundations at the boundary of a property. It is difficult to see a land owner making an ‘assumption of responsibility’ in terms of an implied promise when there may not have been any communication between the adjoining land owners. It is also not uncommon for the relationship between land owners to be relatively informal so that it is unlikely that any intention to make a legally binding promise could be found.\textsuperscript{43} Similarly, it is somewhat artificial to say that a landowner will have necessarily assumed the legal risk of the work being done when they have appointed an appropriately qualified contractor to do the work as the land owner might have structured their relations with that contractor in such a way

\textsuperscript{41} Ibid.
\textsuperscript{43} Ibid 466.
as to avoid liability to the adjoining land owner.\textsuperscript{44} The most that can be said is that legal risk might have been assumed by reason of the hazardous nature of the work being conducted. But there has been very little judicial support for the more general idea that legal liability should attach to extra-hazardous activities\textsuperscript{45} or clarity as to when an activity will be sufficiently hazardous for such liability to attach.\textsuperscript{46} It is also not clear why a landowner should be subject to strict liability for the wrongdoing of another for voluntarily choosing to engage an independent contractor to work on the party wall or foundations at the boundary of the property\textsuperscript{47} when other decisions by a landowner to engage an independent contractor to do work on their premises do not attract similar liability.\textsuperscript{48}

Finally, even if it is possible to give some appropriate meaning to the concept, an 'assumption of responsibility' does not always appear to be sufficient to impose strict liability for the wrongdoing of another in tort in the various relationships in which a so-called 'non-delegable duty of care' is recognised. Take, for instance, the relationship between a school and a student. Where the student attends a private school, it might be possible to say that the contract for education between the student's parents and the school contains an implied promise to ensure that reasonable care of the student will be taken. In the child sexual assault cases, however, schools were found strictly liable for sexual assaults by some employees, but not all.\textsuperscript{49} Similarly, an employer will not always be liable to an employee injured

\textsuperscript{44} Ibid 471. This was the case in Bower v Peate (1876) LR 1 QBD 321, where the land owner authorised the independent contractor to do the work 'only on the condition of his preventing it from causing injury to this plaintiff, and only so far as it could be done consistently with the safety of the premises of the latter' (at 325).

\textsuperscript{45} See Read v J Lyons & Company [1947] AC 156, 181-182 (Lord Simonds): '...I would reject the idea that, if a man carries on a so-called ultra-hazardous activity on his premises, the line must be drawn so as to bring him within the limit of strict liability for its consequences to all men everywhere.'

\textsuperscript{46} For example, the High Court of Australia considered welding an extra-hazardous activity in Burnie Port Authority v General Jones Pty Limited (1994) 179 CLR 520 but not fixing a stove in Northern Sandblasting Pty Ltd v Harris (1997) 188 CLR 313.

\textsuperscript{47} Barker, above n 42, 474.

\textsuperscript{48} See Northern Sandblasting Pty Ltd v Harris (1997) 188 CLR 313.

\textsuperscript{49} See B v Order of the Oblates of Mary Immaculate (2005) 238 DLR (4th) 385 in which a school was found not liable for the sexual assault of a student by a baker employed by the school. Similarly, in G(ED) v Hammer (2003) 230 DLR (4th) 554 a school was held not to be liable for the sexual assault of a student by a janitor employed by the school. See further chapter 4.
as a result of the negligence of an independent contractor engaged by the employer. It has never been suggested, for instance, that an employer should be liable for the negligent driving of a taxi driver engaged to transport the employee in the course of employment. An 'assumption of responsibility' cannot explain why a school or employer would be held strictly liable in one situation and not the other.

It might be that the concept of an assumption of responsibility is simply in need of refinement. John Murphy, for instance, has sought to extend the situations in which an 'assumption of responsibility' will be recognised so that an assumption of responsibility can be found not only where a defendant has undertaken to take care of a plaintiff, but where the defendant has created an exceptional risk by which the plaintiff is injured. 50 Robert Stevens has gone the other way and sought to restrict the situations in which an 'assumption of responsibility' can be found. 51

Regrettably, such attempts to refine the scope of an 'assumption of responsibility' have done little more than confirm that the explanatory power of the concept is, and always has been, limited. Although both Murphy and Stevens adopt different approaches to setting the scope of an 'assumption of responsibility', the result reached by Murphy and Stevens is largely the same. For Murphy, strict liability for the wrongdoing of another can be imposed where there has been an 'assumption of responsibility' and an 'assumption of responsibility' can be found where a defendant has undertaken to care for the plaintiff or the defendant has created a situation of exceptional risk. For Stevens, an 'assumption of responsibility' can only be found where a defendant has undertaken to care for the plaintiff (expressly or impliedly), but strict liability for the wrongdoing of another can be imposed for a number of reasons, including an 'assumption of responsibility' or the creation of an 'abnormal risk' by the defendant. 52 It seems, therefore, that

50 Murphy, above n 39, 380-387.
51 Robert Stevens, Torts and Rights (2007) 122. The text actually says 'where the defendant has voluntarily assumed responsibility for the defendant's care', but the second reference to defendant should presumably be a reference to the plaintiff.
52 Ibid 331.
strict liability for the wrongdoing of another in tort can still arise regardless of
the scope of any 'assumption of responsibility' made by the defendant.

Nor have such refinements provided much guidance as to why the existence
of an 'assumption of responsibility' is not always sufficient for strict liability for
the wrongdoing of another in tort to be imposed. Murphy has argued that for
such liability to arise, it is also necessary for the courts to impose an
affirmative duty on the defendant to act. Murphy, however, does not
attempt to explain when or why such an affirmative duty will arise. Stevens
argues that the existence of an 'assumption of responsibility' will always be a
'matter of construction'; so that it might be that the defendant has qualified or
somehow limited the extent of responsibility they have assumed. Again,
he provides little guidance as to when such a qualification might be
considered to have been made.

IV A NEW EXPOSITORY FRAMEWORK

The framework within which strict liability for the wrongdoing of another in tort
is currently understood is flawed. The terminology with which such liability is
described is vague and confusing and there is no convincing explanation as
to why such liability is imposed. As a result, there is very little guidance for
judges when deciding cases, creating uncertainty and inconsistency in the
law.

It is therefore submitted that the existing framework for understanding strict
liability for the wrongdoing of another in tort should be abandoned. In its
place, this thesis proposes a new expository framework within which the
liability can be understood. This framework is derived not from the labels
currently used by the courts to describe the liability but from an analysis of
the relationships which currently give rise to strict liability for the wrongdoing
of another in tort.

53 Murphy, above n 39, 387-390.
54 Stevens, above n 51, 123.
The foundations for the new expositive framework are laid down in part one of this thesis. Chapter 2 identifies the relationships which are thought to give rise to strict liability for the wrongdoing of another in tort and considers whether different forms of strict liability for the wrongdoing of another arise within those relationships. The chapter will show that there are only three main types of relationships which currently give rise to strict liability for the wrongdoing of another in tort: the employment relationship; the school relationship; and the agency relationship. Within those relationships, various forms of strict liability for the wrongdoing of another can be seen to exist.

Chapter 3 analyses in detail the three relationships which currently give rise to strict liability for the wrongdoing of another in tort. It will show that authority is a common feature of all three relationships. In the employment relationship, an employer is vested with authority to direct the conduct of an employee and can exercise that authority for the employer’s own benefit. In the school relationship, a school is vested with authority to direct the conduct of a student, although such authority is exercised for the benefit of the students. In the agency relationship, a principal vests an agent with authority to effect legal relations on the principal’s behalf. This feature of authority can be used to construct a new expositive framework within which strict liability for the wrongdoing of another in tort can be understood. Different forms of strict liability for the wrongdoing of another in tort will be shown to reflect differences in the nature of the authority present in each of the relationships which currently give rise to strict liability for the wrongdoing of another in tort.

Part two of this thesis sets out the details of the new expositive framework for strict liability for the wrongdoing of another in tort. The framework comprises three separate forms of liability. The first form of liability is *strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another*. This form of strict liability is found in both the employment and school relationships and is explained in Chapter 4. The basis of this liability is the authority vested in both an employer and a school to direct the conduct of an employee or a student.
The cases show that where an employer or school confers its authority to
direct the conduct of an employee or student upon another person and that
person wrongfully harms the employee or student in the course of exercising
that authority, the employer or school will be held strictly liable to the injured
employee or student for the wrongdoing of the person upon whom authority
has been conferred.\textsuperscript{55} The conferral of authority by an employer or a school
is significant because it creates a power relationship between the person
upon whom authority has been conferred and the employee or student which
did not previously exist. This power relationship enables the person upon
whom authority has been conferred to direct the conduct of an employee or
student and creates an expectation that the employee or student will obey.
The power relationship is therefore subject to abuse. A teacher, for instance,
can use the authority conferred upon them by a school to direct a student
into a private room in order to perpetrate a sexual assault. It is submitted
that it is the potential for the person upon whom authority has been conferred
to abuse the power relationship created by the employer or school that
attracts the concern and the intervention of the law. Strict liability for the
wrongdoing of a person upon whom authority has been conferred in relation
to another responds to this potential for abuse by holding an employer or
school liable regardless of fault whenever a person upon whom authority has
been conferred by an employer or school to direct the conduct of an
employee or student wrongfully injures that employee or student in the
course of exercising the conferred authority.

A second form of strict liability for the wrongdoing of another in tort within the
new expositive framework proposed by this thesis is \textit{strict liability for the
wrongdoing of an employee}. This form of strict liability is limited to the
employment relationship and is explained in Chapter 5. The basis of this
liability is the authority vested in an employer to direct the conduct of an
employee which, though similar to that vested in a school to direct the
conduct of a student, can be distinguished on the grounds that the authority
vested in an employer can be exercised by the employer for their own
benefit.

The cases show that where an employee wrongfully harms a stranger to the employment relationship whilst acting within the course of their employment, the employer will be held strictly liable to the stranger for the wrongdoing of the employee. The authority vested in an employer is significant because an employer can exercise that authority for their own benefit, potentially creating a conflict between an employee’s duties under their employment contract and any other general law obligations or responsibilities the employee might owe. This conflict can put pressure on an employee to follow their employer’s directions rather than complying with their obligations and responsibilities at general law. The exercise of authority by an employer over an employee is therefore subject to abuse. An employer, for instance, may direct an employee to act in ways that involve unreasonable risk because of the associated costs, putting members of the public at risk. It is submitted that it is the potential for an employer to abuse their authority over an employee by creating a conflict of obligations that attracts the concern and the intervention of the law. Strict liability for the wrongdoing of an employee responds to this potential for abuse of an employer’s authority over an employee by holding an employer liable regardless of fault for any harm wrongfully caused by an employee to a stranger to the employment relationship within the course of their employment.

A third form of strict liability for the wrongdoing of another in tort within the new expositive framework proposed by this thesis is strict liability for the wrongdoing of an agent. This form of liability is limited to the agency relationship and is explained in Chapter 6. The basis of this liability is the authority vested in an agent by a principal to effect legal relations on the principal’s behalf.

The cases show that a principal will be held strictly liable for the wrongdoing of an agent where the agent wrongfully harms a party wishing to effect legal relations with the principal (the ‘transactional party’) in the course of effecting

56 See, eg, Bugge v Brown (1919) 26 CLR 110.
57 Such as an obligation to use reasonable care not to cause damage to a stranger to the employment relationship.
legal relations between the principal and the transactional party. The vesting of authority by a principal in an agent is significant. The vesting of such authority creates a relationship between the agent and the transactional party which enables the agent to effect legal relations between the principal and the transactional party in circumstances in which the transactional party is not expected to confirm with the principal the details of those legal relations. The authority vested in an agent by a principal to effect legal relations on the principal’s behalf is therefore subject to abuse. An agent, for instance, can use the authority vested in them by a principal to misrepresent the nature of property being sold by the principal to a transactional party. It is submitted that it is the potential for an agent to abuse the authority vested in them by a principal that attracts the concern and the intervention of the law. Strict liability for the wrongdoing of an agent responds to this potential for abuse by holding a principal liable regardless of fault for any harm wrongfully caused by an agent to a transactional party in the course of effecting legal relations between the principal and the transactional party.

By focussing on the feature of authority present in each of the relationships which give rise to strict liability for the wrongdoing of another in tort, the new expository framework proposed by this thesis presents a clearer understanding of the liability. Strict liability for the wrongdoing of another in tort can now be seen to respond to the potential for abuse of the authority present in the relationships in which the liability arises. Importantly, the liability operates at the relationship level. It is the potential for an abuse of authority to occur within a relationship which attracts the concern and intervention of the law, rather than the actual abuse of authority which might occur in a specific case. It follows that a defendant will not necessarily escape strict liability for the wrongdoing of another in tort by adducing evidence that an abuse of authority did not take place.

Having outlined a new expository framework for strict liability for the wrongdoing of another in tort, the third part of this thesis sets out the advantages of the framework. Chapter 7 demonstrates the capacity of the

58 See, eg, Hern v Nichols (1708) 1 Salk. 289; 91 ER 256.
new expositive framework proposed by this thesis to distinguish between the
different forms of strict liability for the wrongdoing of another in tort and the
circumstances in which those forms of strict liability arise. It can now be
seen that although different forms of strict liability for the wrongdoing of
another appear to arise in a single situation, the different forms of strict
liability vary in scope so that the potential for overlap between the different
forms of strict liability for the wrongdoing of another in tort is actually quite
limited. Strict liability for the wrongdoing of an employee, for instance, is
limited to wrongdoing which occurs within an employee’s course of
employment. As a general rule, an employee is only considered to be acting
within the course of employment when they are acting in accordance with
their employer’s actual directions immediately prior to the wrongdoing
(whether express or implied).59 This is because it is only when an employee
is acting in accordance with their employer’s actual directions that there is
any potential for the employer to abuse their authority to direct the conduct of
an employee by creating a conflict between the employee’s duties under
their employment contract and any other general law obligations or
responsibilities the employee might owe. In circumstances in which an
employee is not acting in accordance with their employer’s actual directions,
the employee is no longer subject to their employer’s authority and the
employee can comply with their general law obligations or responsibilities in
the ordinary course.

In contrast, strict liability for the wrongdoing of a person upon whom authority
has been conferred in relation to another is limited to circumstances in which
the person upon whom authority has been conferred by an employer or
school wrongfully injures the employee or student in the course of exercising
the conferred authority. As a general rule, whether a person upon whom
authority has been conferred by an employer or school to direct the conduct
of an employee or student wrongfully injures the employee or student in the
course of exercising the conferred authority is determined by reference to the
terms of the apparent authority conferred by the employer or school, as
opposed to the terms of the actual authority conferred by the employer or

59 See further chapter 5.
school. This is because an employee or student over whom authority has been conferred will deal with the person upon whom authority has been conferred on the basis of the terms of the apparent authority which has been conferred by the employer or school. It is the terms of the apparent authority therefore which shapes the power relationship between an employee or student and the person upon whom authority has been conferred. As can be seen, the different forms of strict liability for the wrongdoing of another in tort differ in scope. The difference is particularly important in determining whether strict liability for the wrongdoing of another in tort can be imposed for intentional wrongdoing.

Chapter 8 demonstrates how the new expositive framework constructed by this thesis can be used to explain what appear to be miscellaneous examples of the liability. Partners, for instance, can be held strictly liable for damage wrongfully caused by a fellow partner. Under the new expositive framework, such liability can be seen as a form of strict liability for the wrongdoing of an agent since partners vest authority in one another as agents to effect legal transactions on each other’s behalf and to conduct the business of the partnership more generally. Similarly, there are cases in which a bailee has been held strictly liable for damage wrongfully caused by a person upon whom authority has been conferred by the bailee to deal with a bailor’s goods. Under the new expositive framework, such liability can be seen as a form of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another, there being no relevant distinction for these purposes between authority which is conferred in respect of a person or a person’s goods. The only miscellaneous form of strict liability for the wrongdoing of another in tort which does not appear to fit within the new expositive framework is the strict liability imposed on the owner of a motor vehicle for damage wrongfully caused by a person driving the vehicle for the owner’s purposes. Although the driver of a vehicle might be acting on the vehicle owner’s behalf, the owner of a vehicle does not

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60 See further chapter 4.
61 Such liability, though founded in tort, is now recognised by statute. See further chapter 8.
generally confer any authority upon a driver in respect of another person or their goods. Current cases indicate, however, that the courts are not as willing as they once were to impose such liability.\textsuperscript{64}

V LIMITS OF THE THESIS

This thesis shows, for the first time, that there is a common feature to the various relationships in which the courts impose strict liability for the wrongdoing of another in tort. On this basis, the thesis constructs a new expositive framework for strict liability for the wrongdoing of another in tort which can provide judges with much needed guidance and promote certainty and consistency in the law. The outstanding question is why strict liability for the wrongdoing of another in tort is imposed.

The new expositive framework shows that what attracts the concern and intervention of the law is the potential for abuse of the authority which exists in the relationships in which strict liability for the wrongdoing of another in tort is imposed. Similar concerns can be seen elsewhere in the law. Consider the fiduciary duty. A fiduciary is in a position of power in respect of the beneficiary of the duty and, to the extent that such a position of power can be abused, is subject to enhanced responsibilities.\textsuperscript{65} This thesis will speculate in the final chapter as to why the law imposes strict liability for the wrongdoing of another in tort in response to concerns about the potential for an abuse of the authority which exists in the relationships in which such liability is imposed. It will not, however, produce a full normative justification for the liability. This is a considerable project for which there is insufficient space within the scope of this thesis. The question though is an important one, and to this extent, the thesis has exposed a whole new field of inquiry.

\textsuperscript{64} See Scott v Davis (2000) 204 CLR 333.

\textsuperscript{65} For example, the 'no conflict' rule.
This thesis was developed from an examination of cases concerning strict liability for the wrongdoing of another in tort decided by the highest courts in Australia and the United Kingdom. Selected cases from other jurisdictions were also considered where particularly illustrative.

The object in examining the cases was not necessarily to scrutinise the reasons given by judges for their decisions but to try and isolate particular factual circumstances which could better explain the decisions ultimately reached. This approach was taken because judicial reasoning in respect of strict liability for the wrongdoing of another in tort has proved largely inadequate. As illustrated at the beginning of this chapter, such reasoning has been unable to explain either the nature or incidence of strict liability for the wrongdoing of another in tort. The vague and confusing terminology currently used to describe strict liability for the wrongdoing of another in tort has further obfuscated judicial reasoning.

As strict liability for the wrongdoing of another in tort is typically discussed in the context of the relationships in which it arises, this thesis has instead focussed on examining the features of those relationships. As a result of this approach, it has been possible to discern a common feature of the relationships which currently give rise to strict liability for the wrongdoing of another in tort. On this basis, a new expositive framework for strict liability for the wrongdoing of another in tort has been constructed which provides a more satisfying explanation of the liability.

66 The only exception in this regard is chapter 2 which explores the relationships within which strict liability for the wrongdoing of another tort was historically imposed in the context of the reasons historically given for the imposition of such liability.
67 Cane, above n 10, 46-47.
68 The only exception in this regard is chapter 2 which explores the relationships within which strict liability for the wrongdoing of another tort was historically imposed in the context of the reasons historically given for the imposition of such liability.
VI  CONCLUSION

Strict liability for the wrongdoing of another in tort has proved notoriously difficult to rationalise despite wide ranging and concerted efforts across multiple jurisdictions. For the first time, this thesis offers a way through the confusion. It provides a new expositive framework for the liability based on the one feature which each of the relationships which give rise to strict liability for the wrongdoing of another in tort have in common – the feature of authority.
Chapter 2
Relationships which Give Rise to Strict Liability for the Wrongdoing of Another in Tort

At present, the relationships which give rise to strict liability for the wrongdoing of another in tort are identified through use of the labels 'vicarious liability' and 'liability for breach of a non-delegable duty of care'. Those relationships are as follows:

<table>
<thead>
<tr>
<th>'Liability for Breach of a Non-Delegable Duty of Care'(^1)</th>
<th>'Vicarious Liability'</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment relationship</td>
<td>Employment relationship</td>
</tr>
<tr>
<td>Relationship between adjoining land owners in relation to work threatening support or common walls</td>
<td>Agency relationship</td>
</tr>
<tr>
<td>Relationship between hospital and patient</td>
<td></td>
</tr>
<tr>
<td>School relationship</td>
<td></td>
</tr>
<tr>
<td>Relationship between occupier and invitee (arguably)</td>
<td></td>
</tr>
</tbody>
</table>

Whether this table depicts the relationships which actually give rise to strict liability for the wrongdoing of another in tort depends upon whether the labels currently used by the courts to describe the liability are sound. As demonstrated in the previous chapter, the labels 'vicarious liability' and 'liability for breach of a non-delegable duty of care' are imprecise and their use has been problematic. It cannot be assumed, therefore, that the above table is accurate.

The object of this chapter is to develop a clear understanding of strict liability for the wrongdoing of another in tort as that liability is currently imposed by the courts. To this end, this chapter will examine the liability imposed by the courts by reason of each of the above relationships using the labels 'vicarious liability' and 'liability for breach of a non-delegable duty of care'.

\(^1\) Burnie Port Authority v General Jones Pty Limited (1994) 179 CLR 520, 550-551.
The object of that examination is twofold. First, to determine whether each of the above relationships currently gives rise to strict liability for the wrongdoing of another in tort and secondly, where a relationship does give rise to strict liability for the wrongdoing of another in tort, to determine whether the relationship attracts different forms of the liability. The chapter will demonstrate that the relationships which give rise to strict liability for the wrongdoing of another in tort have narrowed over time. Strict liability for the wrongdoing of another in tort now appears limited to three main types of relationships: the employment relationship, the school relationship and the agency relationship. Furthermore, within those relationships, different forms of strict liability for the wrongdoing of another can be seen to exist.

Strict liability for the wrongdoing of another in tort will be described throughout this chapter using existing labels. Although flawed, the use of such labels is appropriate given that the chapter describes what it is the courts currently do. In due course, the labels will be replaced with new terminology which more accurately describes the strict liability being imposed.

I Employment Relationship

The labels 'vicarious liability' and 'liability for breach of a non-delegable duty of care' are both used by the courts to describe liability imposed by reason of an employment relationship.

A ‘Vicarious liability’

The origins of what is currently known as ‘vicarious liability’ can be traced to medieval times where the head of a household (the ‘master’) was held liable for the wrongdoing of a slave.\(^2\) The basis of the liability was the capacity of the master to ‘command’ the slave. Having ‘commanded’ the slave it was thought that the master should be held liable for any damage the slave wrongfully caused.\(^3\) Over time, the prospective liability of a master was

\(^3\) Ibid 352-353.
extended to include the wrongdoing of 'free born' workers. Finally, as commerce and industry developed, the liability was taken beyond the domestic sphere and businesses more generally were held liable for the wrongdoing of their employees.

There are numerous cases in which the courts have recognised that an employer might be held liable for the wrongdoing of any employee. As early as 1691, Chief Justice Holt held in Boson v Sandford that:

...whoever employs another is answerable for him and undertakes for his care all that make use of him.

The term 'vicarious liability' is of more recent creation, having allegedly been coined by Pollock in the 1880's. Nonetheless, the label has been used consistently by the courts since that time to describe the liability imposed on an employer for the wrongdoing of an employee.

B 'Liability for breach of a non-delegable duty of care'

In contrast to 'vicarious liability', liability imposed under the label 'liability for breach of a non-delegable duty of care' is of more recent origin.

Historically, there was very little prospect of an employee holding their employer liable in tort for injuries suffered at work. This is because employees were seen as having voluntarily assumed any risks which the employee knew or should have known to be part of their job. An employee required to work with dangerous machinery, for instance, was thought to have accepted the risk of being injured by that machinery when the employee took on the position. For this reason, although a stranger to the employment relationship could use so-called 'vicarious liability' to hold an employer liable for the wrongdoing of an employee, an employee wrongfully injured by a fellow employee could not. Under the doctrine of common

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6 2 Salk 440; 91 ER 382. Cited by Gilliker ibid.
7 Ibid.
employment, an employee was taken to have assumed the risk of being harmed by a fellow employee on entering into the employment contract.\textsuperscript{8}

Towards the end of the 19\textsuperscript{th} century, there was a shift away from the view that employees freely entered into and accepted all risks associated with their employment contract. Legislation was introduced in the United Kingdom to protect the interests of employees.\textsuperscript{9} Around the same time, the courts adopted a range of measures which made it easier for an employee to sue their employer in tort.

First, the courts enumerated a number of specific duties owed by an employer to an employee. Those duties were a duty to provide a safe place of work, a duty to provide safe tools and equipment with which to work, a duty to establish a safe system of work for the employee to operate under and a duty to select competent staff.\textsuperscript{10} An employer could be found personally liable to an employee for a breach of any of those duties which interfered with the employee's bodily integrity. A breach occurred when an employer failed to use the standard of care that a reasonable employer might have used in fulfilling those duties.

Secondly, in \textit{Smith v Baker}\textsuperscript{11} the House of Lords substantially weakened the idea that an employee could be taken to have voluntarily assumed the risks of employment. In that case, an employee who worked in a quarry was injured when a rock being manoeuvred overhead by a crane dropped and fell on him. The employer argued that no liability arose because the employee accepted such risks when agreeing to work in a quarry. The House of Lords held, however, that the employer was liable. The work the employee agreed to do was not so inherently dangerous that the employee could be taken to have accepted such risks when entering into the employment. The work only became dangerous because the employee was required to work beneath a negligently operated crane. This was a specific risk which the employee

\textsuperscript{8} John G Fleming, \textit{The Law of Torts} (9\textsuperscript{th} ed, 1998) 570-571.
\textsuperscript{9} See \textit{Employers' Liability Act 1880} (UK) c 1036. See also \textit{Workmen's Compensation Act 1897} (UK) c 37. See generally Fleming ibid, chapter 10.
\textsuperscript{10} \textit{Wilson's Clyde Coal Co v English} [1938] AC 57.
\textsuperscript{11} [1891] AC 325.
could not be taken to have consented to simply by entering into and remaining in his employment.

Finally, and for present purposes most relevantly, the courts designated the specifically enumerated duties of care owed by an employer to an employee as 'non-delegable'. In so doing, the courts were able to side-step the doctrine of common employment which prevented an employee from using so-called 'vicarious liability' to hold their employer liable for the wrongdoing of a fellow employee. This was achieved by holding the employer liable for a breach of their own, so-called 'personal' duty of care, as opposed to holding the employer 'vicariously liable' for the negligence of the employee.\footnote{Kondis v State Transport Authority (1984) 154 CLR 672, 678-679.} The House of Lords decision in \textit{Wilson v Clyde Coal Company Limited v English}\footnote{[1938] AC 57 ('Wilson').} provides a good example. In that case the employer coal company had delegated the responsibility of devising a safe system for the operation of the mine to the mine manager, being required to do so by statute.\footnote{Coal Mines Act 1911 (UK) c 50.} When an employee was later injured as a result of the system of work initiated by the mine manager being negligently devised, the employer was held liable to the employee. The House of Lords held that the implementation of the negligently devised system by the mine manager was a breach of the employer's own duty to provide a safe system of work. Such liability arose even though what is currently called 'vicarious liability' could not be imposed on the employer in respect of the negligence of the mine manager due to the doctrine of common employment.

Viewed in its historical context, the so-called 'non-delegable duty of care' owed by employer to employee appears to have been recognised as part of a concerted effort to increase the responsibility of employers to employees. More specifically, it was used as a device by the courts to overcome the problematic doctrine of common employment. The difficulties presented by the doctrine of common employment have since been addressed more
directly with the doctrine being abolished by statute in the United Kingdom
and a number of Australian states.\footnote{Fleming, above n 8, 570 (fn 102).}

C \textit{Does the employment relationship currently give rise to strict liability
for the wrongdoing of another in tort?}

There is very little doubt that the liability currently imposed by the courts by
reason of an employment relationship using the label ‘vicarious liability’ is a
form of strict liability for the wrongdoing of another in tort. Such liability is
imposed on an employer as a matter of course whenever an employee
wrongfully injures another person within the course of their employment.\footnote{Issues as how the course of employment is determined will be addressed in Chapter 5.}

No evidence of personal wrongdoing by the employer is required for such
liability to be imposed.

Whether strict liability for the wrongdoing of another in tort is imposed by
reason of an employment relationship using the label ‘liability for breach of a
non-delegable duty of care’ is not so clear. This is because the so-called
‘non-delegable duty of care’ has historically been described as a ‘personal’
duty. This can be seen in the judgment of Lord Wright in \textit{Wisons}:\footnote{[1938] AC 57, 83-84.}

What is the extent of the duty attaching to the employer? Such a duty is the
employer’s personal duty, whether he performs or can perform it himself, or whether
he does not perform it or cannot perform it save by servants or agents. A failure to
perform such a duty is the employer’s personal negligence.

The so-called ‘non-delegable duty of care’ was most likely described in such
terms to avoid the appearance that courts were simply side-stepping the
doctrine of common employment by finding yet another way to hold an
employer strictly liable for the wrongdoing of an employee.\footnote{See above.}

The use of the word ‘personal’ to describe the so-called ‘non-delegable duty’
has tended to confuse the nature of the liability imposed in the event of a
breach. For genuine personal liability to be imposed on an employer for
breach of a so-called ‘non-delegable duty’, it must be shown that the
employer personally failed to take reasonable measures for the safety of the
employee and that such measures would have prevented the employee from
being injured. Such a failure would have to be clearly established by the evidence and pleaded in the case. There are numerous cases, however, where no such liability has been established. Instead, it appears that fault on the part of some other person was sufficient for the liability of the employer to be established, as was the case in *Wilson's* itself.

Consider the decision of the High Court of Australia in *Kondis v State Rail Authority* 19 In that case an employee was injured as a result of the negligence of the operator of a crane hired by the employer to dismantle a structure on the employer's property. No evidence of personal wrongdoing by the employer was established. Despite the absence of personal wrongdoing, the employer was found to have breached the so-called 'non-delegable duty' owed to the employee. In the circumstances of the case, the employer's liability can only be described as a form of strict liability for the wrongdoing of another in tort. The wrongdoing of the crane operator was sufficient for liability to be imposed on the employer under the label 'liability for breach of the non-delegable duty of care'.

The House of Lords decision in *McDermid v Nash Dredging & Reclamation Company Limited* 20 provides another example of strict liability for the wrongdoing of another in tort being imposed on an employer using the label 'liability for breach of a non-delegable duty of care'. In that case, the employee had been directed by his employer to work with the employer's parent company and was injured whilst untangling a ship from a dredger as a result of negligent directions given by the ship's captain. Once again, no personal wrongdoing on behalf of the employer was established; the wrongdoing of the ship's captain was sufficient for liability to be imposed.

Cases such as *Kondis* and *McDermid* indicate that the courts do impose strict liability for the wrongdoing of another in tort by reason of an employment relationship using the label 'liability for breach of a non-delegable duty of care'. As both cases are relatively recent (decided in the 1980's), they also indicate a willingness on behalf of the courts to continue to

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19 (1984) 154 CLR 672 ('*Kondis*').
20 [1987] AC 906 ('*McDermid*').
impose such liability. The cases also confirm that there is more than one form of strict liability for the wrongdoing of another in tort which the courts impose by reason of an employment relationship, since neither the liability imposed in either Kondis nor McDermaid can be described as what is currently called 'vicarious liability'. In Kondis, the crane operator was the employee of an independent contractor for whom the defendant employer could not be held 'vicariously liable'. In McDermaid, the defendant employer was held liable to the injured employee even though the captain who gave the negligent directions was employed by the defendant employer's parent company and was not a person for whom the defendant employer could be held 'vicariously liable'. It follows that the employment relationship is not only a relationship which currently gives rise to strict liability for the wrongdoing of another in tort, but is a relationship which appears to attract two different forms of the liability.

II  RELATIONSHIP BETWEEN ADJOINING LAND OWNERS IN RELATION TO WORK THREATENING SUPPORT OR COMMON WALLS

The label 'liability for breach of a non-delegable duty of care' is not only used by the courts to describe liability imposed by reason of an employment relationship, but is also used to describe liability imposed by reason of the relationship between adjoining land owners in relation to work threatening support or common walls ('relationship between adjoining land owners').

A  'Liability for breach of a non-delegable duty of care'

The so-called 'non-delegable duty of care' owed by adjoining land owners in relation to work threatening support or common walls was first recognised in Bower v Peate.21 The case concerned a defendant land owner who had engaged a building contractor to demolish an existing house and construct a new one. The foundations for the new house were excavated to a level beneath those of the foundations of the building on the adjoining property. As a result of the building contractor failing to adequately underpin the foundations of the building, the building was damaged. The owner of the

21 [1876] LR 1 QBD 321.
adjoining property succeeded in suing the defendant land owner to recover his loss. The court held that the defendant land owner could not ‘relieve himself of his responsibility’ for the construction by engaging someone else to do the work.

The decision in *Bower v Peate* was approved by the House of Lords in *Dalton v Angus*, a case also concerning damage to an adjoining property caused by a building contractor failing to adequately underpin building foundations. In *Hughes v Percival* the House of Lords extended the liability of a defendant land owner to cover damage caused by the negligence of a building contractor to a common wall shared with an adjoining land owner. The duty owed by the defendant land owner was described as one that the land owner ‘could not get rid of responsibility [for] by delegating the performance of it to a third person’.

To understand what led the courts to recognise the so-called ‘non-delegable duty of care’ owed by adjoining land owners in relation to work threatening support or common walls, it is necessary to examine the legal context in which the duty was established. When *Bower v Peate* was decided in 1876, negligence was in its formative stages. A duty of care had been recognised in respect of the ‘common callings’, and the language of ‘duty’ and ‘reasonableness’ was starting to be applied to other situations. It was therefore open to the courts to find that a defendant land owner owed a duty to use reasonable care when carrying out construction work. Liability for breach of such a duty would be personal in nature. It had also been recognised by this time that, as a general rule, a person could not be held liable for the negligence of an independent contractor.

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22 Ibid.
23 (1881) 6 App Cas 740.
24 (1883) 8 App Cas 443.
25 *Hughes v Percival* (1883) 8 App Cas 443 (Lord Blackburn).
26 *Hughes v Percival* (1883) 8 App Cas 443, 449 (Lord Watson): ‘I agree with your Lordships that it was the duty of the appellant in carrying out his building operations to see that reasonable precautions were taken in order to protect from injury the eastern wall of his tenement, of which the respondent was part owner.’
27 *Quarman v Burnett* (1840) 6 M&W 499; 151 ER 509.
Liability for breach of a duty to use reasonable care was not, however, the only type of liability that could be imposed on a defendant land owner in relation to work threatening support or common walls of adjoining properties. In 1876, there were a number of different forms of liability which could be imposed without evidence of personal fault. Where buildings had been in place for a period of at least 20 years, for instance, a defendant land owner could be held liable for removing an adjoining land owner’s ‘right of support’. Such liability was imposed whether or not the defendant land owner was personally responsible for removing the support. A defendant land owner could also be held liable for private nuisance on the basis that the material damage caused by the construction work constituted an unreasonable use of land. As with liability for removing a ‘right of support’, liability for private nuisance was imposed regardless of personal wrongdoing.

The court in Bower v Peate was consequently faced with a confusion of legal principles and the difficulty of determining which set of legal principles to apply to the facts of the case. For guidance on how to resolve this problem, the judges looked to the earlier decision of Pickard v Smith. In that case, the court had faced a similar confusion of legal principles in deciding whether the lessee of a coal cellar at a railway station could be held liable to a passer-by who fell into the coal cellar through a trap door which had been left open and unguarded by a coal merchant delivering coal to the lessee. At the time Pickard v Smith was decided, there were cases to say that an occupier owed a duty to use reasonable care to guard or fence hazards on their premises and could be held liable when the occupier’s failure to do so caused personal injury. Such liability was accompanied by the general rule that no liability could arise for the negligence of an independent contractor.

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29 This ‘right of support’ was acquired by prescription. See Dalton v Angus (1881) 6 App Cas 740.
30 Ibid.
31 St Helen's Smelting Co v Tipping (1865) 11 HL Cas 642.
32 (1861) 1 CB (NS) 470.
33 These cases involved defendant land owners who had been held liable for failing to take reasonable steps to guard or fence a variety of hazards such as coal chutes, trap doors and other openings on their property into which unsuspecting plaintiffs had fallen. See Southcote v Stanley (1856) 1 Hurlstone and Norman 247; 156 ER 1195.
But there were also cases which said that where a failure to guard or fence hazards amounted to a public nuisance, the occupier could be held liable even if they had engaged an independent contractor to rectify the nuisance and the independent contractor had negligently failed to do so.

The court in *Pickard v Smith* resolved the confusion of legal principles by recognising a so-called 'non-delegable duty of care'.\(^{34}\) That the court was concerned with reconciling different legal principles in recognising this 'non-delegable duty' can be seen in the judgment of Williams J.\(^{35}\)

...the defendant became the occupier of the cellar and held subject to the use of the platform overhead by passengers, and he knew that it would be so used, and he knew that the hole with the door open would be in effect a trap to catch such passengers. It was his obvious duty, therefore, if he used the hole in a way necessarily to create such danger, to take reasonable precautions not to injure persons lawfully using the platform; *sic utere tuo ut alienum non laedes*. No sound distinction in this respect can be drawn between the case of a public highway and a road which may be and to the knowledge of the wrongdoer probably will in fact be used by persons lawfully entitled so to do.

As *Pickard v Smith*\(^{36}\) was the main authority relied upon by the court in *Bower v Peate*, the 'non-delegable duty of care' in *Bower v Peate* appears to have been recognised for similar reasons. The court was faced with a confusion of legal principles and was looking for a way to rationalise the law. Recognising a so-called 'non-delegable duty' provided the court with the means to do this. It enabled the court to follow established cases without detracting from the developing law of negligence.

B *Does the relationship between adjoining owners of land in relation to work threatening support or common walls give rise to strict liability for the wrongdoing of another in tort?*

There is little doubt that the liability originally imposed by the courts for breach of the so-called 'non-delegable duty of care' owed by adjoining land owners in relation to work threatening support or common walls was a form of strict liability for the wrongdoing of another in tort. In cases such as *Bower*

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\(^{34}\) See generally F H Newark, 'The Boundaries of Nuisance' (1949) 64 *Law Quarterly Review* 480.

\(^{35}\) *Pickard v Smith* (1861) 1 CB (NS) 470, 479.

\(^{36}\) *Pickard v Smith* has now been credited as the 'source of the concept of the non-delegable duty as applied to a common law duty of care'; *Kondis v State Transport Authority* (1984) 154 CLR 672, 684 (Mason J).
v Peate, once some type of personal fault on the part of the building contractor could be shown there was generally no further investigation into any wrongdoing by the defendant land owner. Fault on the part of the building contractor was sufficient for the liability of the defendant land owner to be established. This can be seen from the following passage in Bower v Peate: 37

...there is, on the other hand, good ground for holding him liable... no matter through whose default the omission to take the necessary measures for such prevention may arise.

Although strict liability for the wrongdoing of another in tort was originally imposed for breach of the so-called ‘non-delegable duty of care’ owed by adjoining land owners, it does not necessarily follow that modern courts will impose such liability. For a number of reasons, it now appears unlikely that a defendant land owner will be held strictly liable for the wrongdoing of a building contractor in relation to work threatening the support or common walls of an adjoining land owner.

First, there has only been one higher court decision in either Australia or the United Kingdom since the end of the 19th century to consider the so-called ‘non-delegable duty’ owed by adjoining land owners and in that case the court refused to impose strict liability on the defendant land owner for the wrongdoing of the building contractor. In Stoneman v Lyons 38 the High Court of Australia reviewed the reasons why strict liability for the wrongdoing of a building contractor might be imposed on the defendant land owner and, finding those reasons unacceptable, decided to apply instead the general rule that a person cannot be held strictly liable for the wrongdoing of an independent contractor (as opposed to the wrongdoing of an employee). 39

The facts of Stoneman v Lyons are very similar to those which were before the court in Bower v Peate. The defendant land owner had engaged a building contractor to construct a supermarket on his land. In the process of digging foundation trenches for the supermarket, the building contractor failed to take appropriate measures to underpin the foundations of the

37 (1876) LR 1 QBD 321, 327 (emphasis added).
38 (1975) 133 CLR 550.
39 Quarm an v Burnett (1840) 6 M&W 499; 151 ER 509.
building on the adjoining property. After a night of heavy rain, the wall of the building on the adjoining property closest to the foundation trenches collapsed and the owner of the adjoining property sued the defendant land owner to recover his loss. No negligence on the part of the defendant land owner was established.

After reviewing previous cases, the High Court identified two possible reasons why a defendant land owner might be held strictly liable for the wrongdoing of a building contractor in relation to work threatening the support or common walls of an adjoining land owner. The first was that the construction work undertaken by the defendant land owner might be considered an extra-hazardous activity. In Bower v Peate Cockburn CJ said: \(^{40}\)

...a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else – whether it be the contractor employed to do the work from which the danger arises or some independent person – to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.

The High Court was not convinced, however, that the undertaking of ‘extra-hazardous’ activities was a sufficient basis upon which to impose strict liability on a defendant land owner for the wrongdoing of a building contractor. Although such a principle had received some support in the lower courts, \(^{41}\) the principle had not yet been recognised by the High Court of Australia \(^{42}\) and the House of Lords had strongly disapproved of the principle in Read v J Lyons & Co. \(^{43}\) Even if such a principle could be found (and the High Court did not ultimately decide this question), a majority of the High Court decided that the construction of a shopping centre could not be

\(^{40}\) (1876) LR 1 QBD 321, 326.

\(^{41}\) See Honeywill & Stein Ltd v Larkin Bros (London’s Commercial Photographers) Ltd [1934] 1 KB 191.

\(^{42}\) The High Court of Australia had previously refrained from ruling on the existence of the principle in Torette House Pty Ltd v Berkman (1940) 62 CLR 637.

\(^{43}\) [1947] AC 156, 181-182 (Lord Simonds): ‘...and I would reject the idea that, if a man carries on a so-called ultra-hazardous activity on his premises, the line must be drawn so as to bring him within the limit of strict liability for its consequences to all men everywhere.’ See also Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH [2009] QB 725.
considered an extra-hazardous activity so that the defendant land owner in *Stoneman v Lyons* could not be held strictly liable for the wrongdoing of the building contractor on that basis.\(^4^4\)

A second reason identified by the High Court of Australia as to why a defendant land owner might be held strictly liable for the wrongdoing of a building contractor in relation to work threatening the support or common walls of an adjoining land owner was the possibility that the adjoining land owner had acquired a right of support by prescription after 20 years of uninterrupted use.\(^4^5\) This was a much more limited basis by which to explain any strict liability which had been imposed on adjoining land owners as such liability could only arise after buildings on the adjoining land owner’s property had been in existence for longer than 20 years.

Although the existence of a right of support was not pleaded in *Stoneman v Lyons*, Justice Stephen considered and rejected the possibility that the existence of a right of support justified the imposition of strict liability on a defendant land owner for the wrongdoing of a building contractor. In his view, such a rule was ‘clearly ill-adapted to conditions in modern cities’\(^4^6\) and the liability of a defendant land owner when undertaking construction work on their property was instead governed by the tort of negligence.\(^4^7\) It followed that a defendant land owner had a duty to undertake any such construction work with reasonable care and could not ‘excavate up to his own boundary regardless of the effect upon his neighbour’s building’ even if the building had been in existence for less than 20 years.\(^4^8\)

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\(^4^4\) (1975) 133 CLR 550, 575 (Mason J with whom both Barwick CJ and Gibbs J): ‘...it would be wrong to classify the demolition and erection of a building (necessarily involving an excavation) in immediate proximity to the wall of an adjoining building as an extra-hazardous act.’ Stephen J made a comment to a similar effect at 566.

\(^4^5\) *Dalton v Angus* (1881) 6 App Cas 740. The High Court of Australia had also affirmed the existence of a right of support by prescription in *Delohery v Permanent Trustee Co of New South Wales Ltd* (1904) 1 CLR 283, notwithstanding the existence of the Torrens land system in Australia.

\(^4^6\) (1975) 133 CLR 550, 567.


\(^4^8\) (1975) 133 CLR 550, 567.
The only other judge to consider whether a right of support could be used as a basis for imposing strict liability on a defendant land owner for the wrongdoing of a building contractor in relation to work threatening the support or common walls of an adjoining land owner was Justice Mason. He did not discuss the issue in any detail but commented that.\textsuperscript{49}

The respondents pointed to cases in which a landowner has been held to be subject to a higher duty than that imposed by the ordinary duty of care. However, they are cases...in which the defendant infringed the plaintiff’s rights by interfering with his right of support (\textit{Bower v Peate}; \textit{Dalton v Angus}) or by interfering with a party wall (\textit{Hughes v Percival}). In each case it may be seen that the defendant was in breach of a duty which he owed to the plaintiff.

Although this rather ambiguous statement might indicate that Mason J considered that strict liability could be imposed on a defendant land owner for the wrongdoing of a building contractor on the basis of the adjoining land owner’s right of support, it is submitted that this is unlikely in light of his subsequent judgment in \textit{Kondis v State Rail Authority}.\textsuperscript{50} In that case, Mason J sought to explain all categories of so-called ‘non-delegable duties’ (including that owed by adjoining land owners) on the basis that the holder of the so-called ‘non-delegable duty’ had ‘assumed responsibility’ for the safety or care of the beneficiary of the duty. If Mason J was stating in \textit{Stoneman v Lyons} that a defendant land owner could be held strictly liable for the wrongdoing of a building contractor because of an adjoining land owner’s right of support, it would follow that he somehow thought that a defendant land owner ‘assumed responsibility’ to an adjoining land owner for the safety of their buildings where those buildings had been in place for 21 years but did not ‘assume responsibility’ to an adjoining land owner whose buildings had only been in existence for 19 years. This would be somewhat surprising given the arbitrariness of the 20 year period.

In addition to the refusal of the High Court of Australia in \textit{Stoneman v Lyons} to impose strict liability on a defendant land owner for the wrongdoing of a building contractor in relation to work threatening the support or common walls of an adjoining land owner, recent developments in the tort of private

\textsuperscript{49} \textit{Stoneman v Lyons} (1975) 133 CLR 550, 575-576.

\textsuperscript{50} (1984) 154 CLR 672.
nuisance also make it unlikely that modern courts will impose strict liability for
the wrongdoing of another in tort for breach of the so-called 'non-delegable
duty of care' owed by adjoining land owners. When the so-called 'non-
delegable duty of care' owed by adjoining land owners was first recognised,
liability for private nuisance was imposed as a general rule regardless of
personal wrongdoing. As previously noted, such liability was at odds with the
developing tort of negligence which required some type of fault to be shown
for liability to be imposed. More recently, however, the courts have begun to
introduce a fault element into certain aspects of the tort of private nuisance.
For instance, a defendant land owner who neither creates nor continues a
nuisance emanating from their land cannot be held liable for that nuisance
unless some type of personal fault can be shown.\textsuperscript{51} This covers the situation
in cases such as \textit{Bower v Peate}. It follows that a defendant land owner
cannot be held liable for a private nuisance created by a building contractor
unless it can be shown that the defendant land owner directly authorised the
wrongful conduct or was somehow aware of the problems with the
construction work and failed to take reasonable steps to protect the adjoining
property from damage. This change in the nature of the liability imposed for
private nuisance removes the conflict which originally existed between the
tort of private nuisance and the tort of negligence. The original reason for
imposing strict liability for the wrongdoing of another in tort for breach of the
so-called 'non-delegable duty of care' owed by adjoining land owners
consequently no longer exists.

The consistent refusal of the courts to hold an occupier strictly liable for the
wrongdoing of an independent contractor more generally provides another
reason why it is unlikely that modern courts will impose strict liability for the
wrongdoing of another in tort for breach of the so-called 'non-delegable duty
of care' owed by adjoining land owners. In \textit{Torette House Pty Ltd v
Berkman,\textsuperscript{52}} the High Court of Australia refused to hold the defendant land
owner liable for damage caused to an adjoining property which was flooded
when a plumber engaged by the defendant land owner negligently turned on

\textsuperscript{51} See \textit{Sedgigh-Denfield v O'Callaghan} [1940] AC 880.
\textsuperscript{52} (1940) 62 CLR 637.
a stopcock. Similarly, in *Northern Sandblasting Pty Limited v Harris*\(^{53}\) the High Court refused to hold the defendant landlord liable to the daughter of a tenant who was electrocuted when an electrician engaged by the landlord negligently repaired a stove. In light of such cases, it is not clear that there is anything particularly special about a building contractor which can justify continuing to hold a defendant land owner strictly liable for the wrongdoing of a building contractor in relation to work threatening the support or common walls of an adjoining land owner. At the very least, such a feature has yet to be identified by the courts.

The only exception in this regard is the decision of the High Court of Australia in *Burnie Port Authority v General Jones Limited*\(^{54}\) where the defendant land owner was held liable to the owner of an adjoining property destroyed by fire due to the negligence of a welder engaged by the defendant land owner. The liability of the defendant land owner in that case was, however, determined in accordance with ordinary negligence principles\(^{55}\) and can be viewed as personal liability since the defendant land owner was aware that the welder would be welding in the vicinity of highly flammable material and took no steps to reduce the foreseeable risk of harm to the adjoining property.\(^{56}\)

A final reason it is now unlikely that modern courts will impose strict liability for the wrongdoing of another in tort for breach of the so-called ‘non-delegable duty of care’ owed by adjoining land owners is the increased regulation of construction projects by government. Since *Bower v Peate* was

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\(^{53}\) (1995-97) 188 CLR 313.

\(^{54}\) (1994) 179 CLR 520.

\(^{55}\) Ibid 560.

\(^{56}\) Ibid 559 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ): 'In the present case, the particular qualities of EPS made the stacked cardboard containers of Isolite in the roof area of the Authority’s premises a dangerous substance in the sense that, if one of the cardboard containers were accidentally set alight, an uncontrollable conflagration would almost inevitably result. Clearly, the introduction of more than twenty of those cardboard containers called for special precautions to be taken to avoid any risk of that happening. A fortiori, the carrying out of welding activities in the premises within which the cardboard containers of Isolite were stacked was itself a dangerous activity in that it was reasonably foreseeable that, unless special precautions were taken, sparks or molten metal might fall upon one of the containers and set the cardboard alight. As has been seen, the evidence established that the Authority (through one of its employees) was aware that the cardboard containers of Isolite were being stored in the roof area near where welding work was to be carried out by W&S.'
decided, a variety of different regulatory regimes have been instituted, each of which place varying degrees of responsibility upon a defendant land owner for damage to an adjoining property. As a result, there is no clear policy direction provided by legislatures justifying the continued imposition of strict liability for the wrongdoing of another in tort on a defendant land owner for the wrongdoing of a building contractor in relation to work threatening the support or common walls or an adjoining land owner. In the United Kingdom, for example, the Party Wall etc Act 1996 gives land owners certain rights to perform work on party walls but in exchange for these rights makes the land owner liable for damage to the owner of an adjoining property which is caused by such work.\textsuperscript{57} This liability appears to arise whether the damage is caused by the negligence of the land owner or an independent contractor engaged by the land owner. In contrast, the Conveyancing Act 1919 in New South Wales acknowledges the existence of a general right of support but imposes on land owners an ordinary duty of care not to interfere with that right of support so that it is unlikely that a land owner could be held liable for the negligence of an independent contractor under the section.\textsuperscript{58} A compromise position is reached by the Building Acts in Tasmania and Victoria under which land owners are permitted in certain circumstances to undertake construction work in the vicinity of the foundations or a party wall shared with an adjoining property but only after they have first taken out insurance which will cover the owner of the adjoining property in the event of any damage.\textsuperscript{59}

As can be seen, there are a number of reasons why modern courts are unlikely to impose strict liability for the wrongdoing of another in tort for breach of the so-called 'non-delegable duty of care' owed by adjoining land owners. The most telling is the fact that no higher court in Australia of the United Kingdom has imposed such liability since the end of the 19th century, although the other reasons go some way to explaining why this has occurred. Consequently, it no longer appears that the relationship between

\textsuperscript{57} Party Wall etc Act 1996 (UK) c 40, s 7(2).
\textsuperscript{58} Conveyancing Act 1919 (NSW), s 177.
\textsuperscript{59} Building Act 2000 (Tas) s 131 and Building Act 1993 (Vic) s 93.
adjoining land owners in relation to work threatening support or common walls gives rise to strict liability for the wrongdoing of another in tort.

III RELATIONSHIP BETWEEN HOSPITAL AND PATIENT

As with the relationship between adjoining owners of land in relation to work threatening support or common walls, the label 'liability for breach of a non-delegable duty of care' has been used to describe liability imposed by reason of the relationship between hospital and patient ('hospital relationship'). The so-called 'non-delegable duty of care' owed by a hospital to a patient was recognised much later than in either the employment relationship or the relationship between adjoining land owners and is typically traced to a trilogy of cases decided by the English Court of Appeal in the middle of the 20th century.

A 'Liability for breach of a non-delegable duty of care'

The first suggestion that the duty of care owed by hospital to patient was 'non-delegable' is found in the judgment of Lord Green MR in Gold v Essex County Council.\(^{60}\) In that case, a five year old girl required treatment for warts on her face. On attending at the hospital, she was seen by a visiting dermatologist who suggested the warts be treated by the application of Grenz rays. She was then sent to the radiology department where she was treated by a competent radiologist employed by the hospital. On the sixth treatment, the radiologist forgot to cover the unaffected parts of the young girl's face with a protective, lead-lined rubber cloth. As a result, the girl's face was 'permanently disfigured'.\(^ {61}\)

Had Gold been decided today, the case would have been relatively straightforward. What is currently called 'vicarious liability' would have been imposed as a matter of course once it was established that the radiologist was an employee of the hospital and was acting in the course of his employment at the time the negligence occurred. At the time Gold was

\(^{60}\) [1942] 2 KB 293 ('Gold').
\(^{61}\) Ibid 294.
decided, however, there was some doubt as to whether a hospital could be held ‘vicariously liable’ for the negligence of a doctor or other any other medical practitioners employed by the hospital. Medical practitioners were not thought of as ‘servants in the proper sense of the word’. 62 This was because a hospital could not control medical practitioners in the performance of their duties due to their special skill and knowledge. As Farwell LJ commented in *Hillyer v The Governors of St. Bartholomew’s Hospital.* 63

This is...essential to the success of operations; no surgeon would undertake the responsibility of operations of his orders and directions were subject to the control of or interference by the governing body.

Faced with these difficulties, Lord Greene MR held in *Gold* that the duty of care owed by the hospital to the patient was ‘non-delegable’. He argued that, as the hospital had undertaken to care for the patient, the hospital could not escape liability for negligence in the course of that care by delegating that care to another person (in that case, the radiologist). 64 In his view, because the hospital had ‘assumed responsibility’ for the care of the patient, it followed that the hospital was liable to the patient for the negligence of the radiologist whether or not the radiologist was an employee. 65

The other two members of the court, however, chose to deal with the issue much more directly. Lord Justice MacKinnon did not accept the views expressed in *Hillyer* and held that what is currently called ‘vicarious liability’ could be imposed on an employer for the negligence of an employee even if that employee was a medical practitioner and exercised skill beyond the control of the employer. Lord Justice MacKinnon said: 66

(1) One who employs a servant is liable to another person if the servant does an act within the scope of his employment so negligently as to injure that other... (2) That principle applies even though the work which the servant is employed to do is of a skilful or technical character as to the method of performing which the employer is himself ignorant, for example, a shipowner and the certified captain who navigates the ship.

Lord Justice Goddard also suggested that whether or not a hospital could be held strictly liable for the negligence of a medical practitioner depended on

63 Ibid 826.
64 *Gold v Essex County Council* [1942] 2 KB 293, 301.
65 Ibid 303.
66 Ibid 304-305.
whether the medical practitioner was employed under a contract of service as opposed to a contract for service. Consequently, both MacKinnon LJ and Goddard LJ imposed what is currently called 'vicarious liability' on the hospital in Gold following a straightforward application of 'vicarious liability' principles; the radiologist was an employee who had been negligent in the course of his employment.

The question of whether the duty of care owed by a hospital to a patient could be considered 'non-delegable' was next considered by the English Court of Appeal in Cassidy v Ministry of Health. In that case, the patient was a general labourer who had been admitted to hospital for a procedure on his hand. The procedure involved keeping the patient's hand in a rigid splint for fourteen days. On removal of the splint at the end of the period, the patient was unable to use his fingers. Subsequent treatment did not lead to any improvement and the patient effectively lost the use of the hand. Although the patient faced evidential difficulties in identifying the actual cause of his problems, the court was prepared to rely on the res ipsa loquitur doctrine and all judges found the hospital liable to the patient. Lord Justice Somervell and Singleton LJ based their decision on the fact that all the medical practitioners involved in the treatment of the patient at the hospital were employees of the hospital. As a result, what is currently called 'vicariously liable' was imposed on the hospital in accordance with ordinary principles.

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67 Ibid 313 (Goddard LJ): ‘Hospital managers, be they local authorities or governors of voluntary institutions, nowadays have in their service many specialists – solicitors, accountants, engineers, electricians and the like. I can see no sound reason why they should be responsible for the acts of these servants and not for those or nurses who are equally in their service. That they are not liable for the doctor’s negligence is due simply and solely to the fact that he is not their servant. I desire, however, to say that for the purpose of this judgment I am not considering the case of doctors on the permanent staff of the hospital. Whether the authority would be liable for their negligence depends, in my opinion, on whether there is a contract of service and that must depend on the facts of any particular case.’

68 [1951] 2 KB 343 (‘Cassidy’).

69 Ibid (Somervell LJ) 351 and (Singleton LJ) 354-355.
In contrast, Denning LJ persisted with Lord Greene MR's view in *Gold* that a hospital owed a patient a so-called 'non-delegable duty of care'. Lord Justice Denning said:70

I take it to be clear law as well as good sense, that, 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.

On the facts of the case, that duty had been breached as a result of the negligence of the hospital's employees. It was therefore not necessary to recognise a so-called 'non-delegable duty' and no such duty was recognised by the other judges.

Lord Justice Denning once again resorted to the idea that the duty of care owed by a hospital to a patient was 'non-delegable' in *Roe v Minister of Health*.71 In that case the hospital was found not liable to the patient. This was because all members of the court found that the medical practitioners in question had not been negligent. If the medical practitioners had been negligent though, it is not entirely clear that the other members of the court would have been prepared to find that the duty of care owed by the hospital to the patient was 'non-delegable'. Lord Justice Somervell was of the view that what is currently called 'vicarious liability' could have been imposed on the basis that the medical practitioners were employed by the hospital and were acting in the course of their employment at the relevant time.72 Lord Justice Morris quoted extensively from the judgment of Lord Greene MR in *Gold*, but he also found the medical practitioners in question to be employees.73

It is very difficult from an analysis of *Gold*, *Cassidy* and *Roe* to say that the courts actually recognised a so-called 'non-delegable duty of care' within the hospital relationship. The supposedly 'non-delegable' nature of the duty established in those cases was at best the view of a few minority judges, with the remaining judges using what is currently called 'vicarious liability' as the basis for their decision. Despite this, the High Court of Australia has

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70 Ibid 363.
71 [1954] 2 QB 67 ('Roe').
72 Ibid 79-80.
73 Ibid 88.
suggested in dicta on at least two occasions that the duty of care owed by a hospital to a patient is 'non-delegable'.74 Similar comments have been made by the House of Lords75 and there are also a handful of lower court cases in which a hospital has been found to be in breach of such a duty.76 Consequently, it appears to have been assumed that hospitals owe their patients a so-called 'non-delegable duty of care', although the basis of this assumption is not particularly convincing.

B Does the relationship between hospital and patient give rise to strict liability for the wrongdoing of another in tort?

The difficulties in determining whether hospitals owe their patients a so-called 'non-delegable duty of care' have translated into difficulties in determining the nature of the liability imposed in the event of a breach. The cases suggest that it was at least envisaged that strict liability for the wrongdoing of another in tort should be able to be imposed for breach of the so-called 'non-delegable duty of care' owed by a hospital to a patient. In the initial trilogy of cases, each patient sought to hold a hospital liable for the negligence of one or more medical practitioners. In Gold, for instance, the question was whether the hospital could be held liable for the radiologist. In Roe, it was whether the hospital could be held liable for an anaesthetist. It is less clear from the cases, however, whether such liability was or continues to be imposed.

First, there have only been a small number of cases which have actually considered the so-called 'non-delegable duty' owed by hospital to patient. Lord Phillips of Worth Matravers MR suggested in A v Ministry of Defence77 that in the United Kingdom this was because the 'authorities administering the NHS ceased to take issue on the extent of their liability for treatment negligently administered'.78 Consequently, the whole question of the liability of a hospital for the negligence of a medical practitioner (whether employees or independent contractors) became somewhat of a non-issue. Substantial

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76 See below.
78 That is, after the enactment of The National Health Service Act 1977 (UK) c 49. Ibid 198.
access to medical indemnity funds can perhaps explain the small number of cases in Australia. The availability of such funds means that where the negligent medical practitioner is a doctor, a claim brought directly against the negligent doctor can be easily satisfied. In New Zealand, the no-fault insurance scheme covers medical negligence and removes the capacity for any such claims to be made.

Secondly, in the cases in which courts have purported to hold a hospital strictly liable for breach of the so-called ‘non-delegable duty’ owed to a patient, most have involved the negligence of at least one medical practitioner employed by the hospital or, alternatively, personal negligence on the part of the hospital itself. Accordingly, the liability imposed on a hospital in these cases can be described as what is currently called ‘vicarious liability’ or, alternatively, personal liability. In Samios v Repatriation Commission, for instance, the patient sued the Repatriation Commission when he attended a hospital operated by the Commission on at least three occasions and the medical practitioners he saw failed to diagnose and treat his dislocated shoulder. Jackson SPJ found a doctor employed by the Commission to be negligent as well as the radiologists of a clinic that had been engaged by the Commission to provide support services whilst its own radiologists were on vacation. The liability of the Commission in that case can therefore be explained by reason of the Commission’s ‘vicarious liability’ for the doctor it employed. It was also suggested, though not proved, that

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79 A similar suggestion has been made to explain the situation in Canada. Blair JA said in Yepremian v Scarborough General Hospital (1980) 110 DLR (3d) 513, 560: “What all the cases reveal is the procedural convenience and administrative simplicity of holding hospitals liable only for the negligence of doctors employed by them and making other doctors on their staffs directly answerable to their patients for their negligence. The uniformity of this practice has a practical explanation well known to the legal profession. Under the present regime of public insurance for medical expenses, hospitals and doctors bill the insurance authority separately. In addition, hospitals have no ‘deeper’ pockets than doctors from which to pay damages because of the universality of medical liability insurance coverage.”


81 See Albrighton v Royal Prince Alfred Hospital [1980] 2 NSWLR 542 in which the negligent orthopaedic surgeon was found to be an employee. See also Bull v Devon Area Health Authority [1993] 4 Med LR 117 in which the hospital was found personally liable.


83 Ibid 228.
personal liability might also be imposed on the Commission by reason of the Commission’s inadequate systems.\textsuperscript{84}

The only case in which liability has been imposed on a hospital for the wrongdoing of a medical practitioner where the liability could not be described as ‘vicarious’ or personal appears to be the decision of a single county court judge in \textit{Calderdale \& Kirklees Health Authority}.\textsuperscript{85} In that case, the patient had been referred by a Community Health Centre operated by the health authority to a hospital in the local area for an abortion. The abortion was performed negligently, and the patient successfully sued the health authority for breach of its so-called ‘non-delegable duty of care’ when the hospital that performed the operation became insolvent. Of this decision, Lord Phillips of Worth Matravers MR said in \textit{A \& Ministry of Defence}.\textsuperscript{86}

The exception is the finding of the existence of a non-delegable duty of care made by Judge Garner as one of the grounds of his decisions in \textit{M \& Calderdale and Kirklees Health Authority}. This finding did not represent the current state of English law.

Given such comments, \textit{Calderdale} hardly provides convincing evidence that strict liability for the wrongdoing of another in tort can be imposed on a hospital for breach of the so-called ‘non-delegable duty of care’ owed to a patient.

Third, there have been a number of cases in which the courts have refused to impose strict liability on a hospital for breach of the so-called ‘non-delegable duty of care’ owed to a patient. In \textit{Ellis \& Wallsend District Hospital},\textsuperscript{87} for instance, a majority of the New South Wales Court of Appeal found that a hospital could not be held liable for the negligence of an honorary medical officer who used the hospital’s operating theatres for his own patients. Samuels JA, with whom Meagher JA agreed, examined the initial trilogy of English cases and noted that it was a minority view that a hospital owed a so-called ‘non-delegable duty of care’ to a patient. Despite this, he felt bound to acknowledge that the duty of care owed by a hospital to a patient was ‘non-delegable’ given the High Court of Australia’s support for

\textsuperscript{84} Ibid (Jackson SPJ). ‘For this, I think, Dr Traub must take primary responsibility, but perhaps the hospital system itself should not escape some criticism.’

\textsuperscript{85} [1998] Lloyds Law Reports: Medical 157 (‘Calderdale’).

\textsuperscript{86} [2005] QB 183, 203.

\textsuperscript{87} (1989) 17 NSWLR 553.
such a duty in the above mentioned dicta. He was not, however, prepared to find the hospital liable for the negligence of the honorary medical officer in the circumstances of the case. Samuels JA tightly circumscribed the type of medical practitioner for whom a hospital could be held liable under a so-called 'non-delegable duty of care' and held that, as the honorary medical officer in the case was ‘engaged in his own business and not the hospital’s’, the liability of the hospital under its so-called ‘non-delegable duty of care’ did not extend to the particular honorary medical officer.

The English Court of Appeal also refused to impose strict liability on a hospital for breach of the so-called ‘non-delegable duty of care’ owed to a patient in A v Ministry of Defence. The patient in that case was the small child of a soldier stationed in Germany who had sustained severe brain damage at the time of his birth due to the negligence of a German obstetrician at a German hospital. The Ministry of Defence was sued for breach of the so-called ‘non-delegable duty of care’ owed to the child on the basis that the Ministry of Defence had previously operated its own hospitals in Germany for military personnel and their families. Those hospitals were later closed for financial reasons. In their stead, the Ministry of Defence had made arrangements with a number of German hospitals to provide medical treatment to military personnel and their families in accordance with English standards. Lord Phillips of Worth Matravers MR (with whom the other judges agreed) found that the Ministry of Defence was not liable to the child even though the Ministry of Defence had undertaken to provide medical care. In his view, the Ministry of Defence could not be held liable for the negligence of the German obstetrician at a German hospital which was not operated by the defendant.

A similar decision was reached by the English Court of Appeal in Farraj v King’s Healthcare NHS Trust. The patient in that case resided in Jordan. She was pregnant and wanted to test that her unborn baby had not contracted a genetic disease carried by both parents. A sample of foetal

88 See above n 74.
89 (1989) 17 NSWLR 553, 599.
tissue was sent to the defendant’s hospital in London for testing. The defendant hospital subcontracted the testing to an external laboratory which negligently confirmed that the sample was ‘all clear’. The court found that the hospital was not liable to the patient even though the hospital had arranged for the testing to be undertaken. Once again the court held that the hospital could not be held strictly liable for the wrongdoing of an external service provider.

It might be that cases such as these can be explained by reference to specific facts which made it inappropriate in each of the cases to impose strict liability on the hospital for breach of the so-called ‘non-delegable duty of care’ owed to the patient. If so, they are not particularly significant. The problem is that it is very difficult to draw from the reasoning of the judges in those cases any convincing factual distinctions which would justify imposing strict liability on a hospital for breach of the so-called ‘non-delegable duty of care’ owed to a patient in one situation but not the other. In Ellis, for instance, the court was concerned that the honorary medical officer was involved in carrying on his own business and not that of the hospital. This was evidenced by the fact that the honorary medical officer was not paid by the hospital. Although the honorary medical officer ‘accepted a degree of management’ from the hospital, because he was not paid by the hospital he could be considered to be carrying on his own business. This reasoning seems to contradict that in A v Ministry of Defence where the fact that the Ministry of Defence did pay for the negligent medical services was thought significant in refusing to impose liability for the wrongdoing of another for breach of the so-called ‘non-delegable duty of care’. In Farraj v King’s Healthcare NHS Trust it was said to be significant that the plaintiff was not an in-patient of the hospital. But at the same time, Dyson LJ was using examples to justify his decision which would have denied liability even if the plaintiff had been an inpatient. For instance, Dyson LJ was of the view that the purchaser of a car could not sue the manufacturer where damage was sustained as a result of defects in the steel used in the car’s construction

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93 (1989) 17 NSWLR 553, 599.
after the steel had been sent to an appropriately skilled independent contractor for testing. Similarly, he thought a building owner could not sue the building developer for damage caused by defects in concrete used in the building which had been sent to an appropriately skilled independent contractor for testing. It would follow from Dyson LJ’s examples that whether a patient is an in-patient or not, once material has been sent to a reputable, external independent contractor for testing, no liability for the hospital could arise.

Taking into account each of the above points, there is no clear authority showing that courts do impose strict liability on a hospital for breach of the so-called ‘non-delegable duty of care’ owed to a patient. Where the courts purport to impose strict liability on a hospital for breach of the so-called ‘non-delegable duty’, they do so in circumstances in which ‘vicarious liability’ (as it is currently described) can also be imposed. Where the courts refuse to impose strict liability on a hospital for breach of the so-called ‘non-delegable duty’, they do so on the basis of distinctions which do little more than establish that the negligent medical practitioner was an independent contractor as opposed to an employee of the hospital (hence the focus on features such as payment and control). On this basis, it is very difficult to say that the hospital relationship is a relationship which itself gives rise to strict liability for the wrongdoing of another in tort. Instead, what appears to attract strict liability for the wrongdoing of another in tort is a co-existing employment relationship.

Whilst courts in Australia and the United Kingdom have been slow to recognise that a hospital relationship does not attract strict liability for the wrongdoing of another in tort, courts in Canada appear to have now reached this conclusion. In Yepremian v Scarborough General Hospital, Arnup JA of the Ontario Court of Appeal cautioned against blindly following

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95 Ibid 2165.
96 Ibid. At least at common law, cf Consumer Protection Act 1987 c 43 (UK).
97 Though the problems are starting to be acknowledged more readily. See Farraj v King’s Healthcare NHS Trust [2010] 1 WLR 2139 in which Smith LJ assumed but did not decide that hospitals owe their patients a non-delegable duty of care after noting that the existence of such a duty was only ever a minority position.
98 (1980) 110 DLR (3d) 513.
the English cases on the question of hospital liability because the interrelationships of the State, the medical profession, the hospitals and their patients had developed along different lines from those in Ontario since the introduction of 'nationalised medicine'.\footnote{99} A majority of the court then went on to find that a hospital could only be held strictly liable for the negligence of medical practitioners employed by the hospital and not for the negligence of medical practitioners associated with the hospital by other means.\footnote{100} No subsequent Canadian case appears to have contradicted the decision.\footnote{101}

IV SCHOOL RELATIONSHIP

The school relationship is another relationship by reason of which the courts impose liability using the label 'liability for breach of a non-delegable duty of care'. The so-called 'non-delegable duty' owed by a school to a student was recognised in similar circumstances and for similar reasons as the so-called 'non-delegable duty' owed by a hospital to a patient.

A 'Liability for breach of a non-delegable duty of care'

There is some debate as to when the so-called 'non-delegable duty of care' owed by a school to a student was first recognised. In \textit{Commonwealth of Australia v Introvigne,}\footnote{102} Mason J traced the so-called 'non-delegable duty' to the decision of the House of Lords in \textit{Carmarthenshire County Council v Lewis}\footnote{103} where it was held that the duty of care owed by a school to its students was 'not discharged by merely appointing competent teaching staff and leaving it to the staff to take appropriate steps for the care of the children'.\footnote{104} The difficulty with attributing the so-called 'non-delegable duty' to \textit{Carmarthenshire}, however, is that the issue in the case was not the liability of the school to its students, but the liability of the school to a truck driver who had collided with a telegraph pole after swerving to avoid a young child who had ran out of the school and out onto the road. It is also not

\footnote{99} Ibid 533.  
\footnote{100} Ibid 540.  
\footnote{101} cf position in French law; \textit{Lapointe v Hôpital Le Gardeur} (1989) 2 CCLT (2d) 97.  
\footnote{102} (1982) 150 CLR 258.  
\footnote{103} (1955) AC 549.  
\footnote{104} (1982) 150 CLR 258, 270.
immediately evident from Carmarthenshire whether the school was held liable for its own negligence in failing to install appropriate locks on gates, or strictly liable for the conduct of the teacher who was looking after the child immediately prior to the child running out onto the road, particularly given that a number of the judges were of the view that the teacher had not been negligent in the circumstances.\textsuperscript{105}

Despite some uncertainty as to the effect of the decision in Carmarthenshire, the High Court of Australia did subsequently confirm in Ramsay v Larsen\textsuperscript{106} that the duty of care owed by school to student was ‘non-delegable’. Ramsay v Larsen concerned a student who had been climbing a tree in the school grounds in order to retrieve a set of keys. Although the student had been previously told by a teacher to get down, the student had returned to climb the tree once more. The teacher then tried to assist the student recover the keys by instructing the student to swing a rope over the branch where the keys were located so that the branch could be shaken in order to dislodge the keys. Using this method, the student successfully recovered the keys. Unfortunately, the student fell whilst trying to get back down to the ground, injuring both his legs and arms. The student subsequently claimed that the teacher had been negligent in giving him directions in respect of climbing the tree and sued the school in respect of that negligence.

Had Ramsay v Larsen been decided today, there would have been little difficulty in imposing what is currently called ‘vicarious liability’ on the school for the teacher’s negligence. The teacher was an employee of the school and had been acting in the course of his employment immediately before the negligent conduct occurred. As with the cases in which the so-called ‘non-delegable duty of care’ owed by a hospital to a patient was first recognised, however, there were difficulties in establishing that a school had sufficient control over the activities of the teacher for the teacher to be considered an ‘employee’ for the purposes of the liability. Such difficulties stemmed from the decision in Hole v Williams\textsuperscript{107} in which the full court of the Supreme Court

\textsuperscript{105} Carmarthenshire County Council v Lewis [1955] AC 549, 568-569 (Lord Reid).
\textsuperscript{106} (1964) 111 CLR 16.
\textsuperscript{107} (1910) 10 SRNSW 638.
of New South Wales had held that a school could not be 'vicariously liable' for the wrongdoing of a teacher for teachers, along with medical practitioners, had sufficient discretion in undertaking their tasks to preclude them being considered an employee.\textsuperscript{108}

Faced with the decision in Hole v Williams, two of the judges in Ramsay v Larsen dealt with it directly and overruled it.\textsuperscript{109} Justice Kitto held that the concerns about what is currently called 'vicarious liability' expressed in Hole v Williams were no longer well founded due to the subsequent findings in Gold and Cassidy that such liability could be imposed on a hospital for the negligence of medical practitioners it employed.\textsuperscript{110} As a result, it was possible to find the school 'vicariously liable' for the negligence of the teacher and both Kitto and McTiernan JJ sought to hold the school liable on that basis.

A majority of the High Court preferred, however, to find that the school owed its students a so-called 'non-delegable duty of care' and that, in the circumstances of the case, there was a possibility that the duty had been breached due to the negligence of the teacher.\textsuperscript{111} Justice Taylor, with whom Owen and Windeyer JJ agreed, cited with approval the following comments made in the case by Ferguson J of the full court of the Supreme Court of New South Wales:\textsuperscript{112}

\begin{quote}
...I prefer the view that a public school teacher in the exercise of his functions as such is exercising an authority delegated to him by the Crown in respect of obligations assumed by the Crown. At common law where a person has assumed a legal duty towards another he cannot escape liability for a breach of that duty by delegating its performance to somebody else.
\end{quote}

Authority for this general proposition was derived from the cases concerning the so-called 'non-delegable duty of care' owed by a hospital to a patient, a duty which was seen by the judges as closely analogous.\textsuperscript{113} The supposedly 'non-delegable' nature of the duty of care owed by a school to a student can

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\textsuperscript{108} Ibid 648.  
\textsuperscript{109} (1964) 111 CLR 16, 26 (McTiernan J) and 30 (Kitto J).  
\textsuperscript{110} Ibid 29.  
\textsuperscript{111} The majority ordered a new trial.  
\textsuperscript{112} (1964) 111 CLR 16, 38.  
\textsuperscript{113} Ibid 34-35.
\end{flushright}
be seen, therefore, to have emerged from similar difficulties to those which 
led to the 'non-delegable duty' being recognised in the hospital relationship.

B Does the school relationship give rise to strict liability for the 
wrongdoing of another in tort?

There is little doubt that the liability imposed by the High Court of Australia in 
Ramsay v Larsen for breach of the so-called 'non-delegable duty of care' 
owed by a school to a student was a form of strict liability for the wrongdoing 
of another in tort. The only question in that case was whether the school 
could be held liable for the wrongdoing of the teacher and no evidence of 
personal wrongdoing by the school was adduced. It remains in issue, 
however, whether it is the school relationship or a co-existing employment 
relationship which attracts such strict liability. This is because, in most 
cases, the teacher who wrongfully injured the student will also have been an 
employee of the defendant school or school authority.\(^\text{114}\)

The best way to determine whether the school relationship itself gives rise to 
strict liability for the wrongdoing of another in tort is to see if there are any 
cases in which strict liability for the wrongdoing of another in tort has been 
imposed on a school in circumstances in which so-called 'vicarious liability' 
could not also be imposed. The decision of the High Court of Australia in 
Commonwealth of Australia v Introvigne\(^\text{115}\) provides an example of such a 
case. The student in the case was injured when he and some friends were 
playing in the vicinity of a flagpole. At the time of the incident, there was only 
one teacher on playground duty, the remaining teachers having been called 
to a meeting to be informed of the headmaster's unexpected death. The 
student succeeded in suing the Commonwealth government, as the 
government responsible for schools in the Australian Capital Territory, for 
breach of the so-called 'non-delegable duty' owed by the Commonwealth 
government to the student. The liability imposed in the case could only be 
described as a form of strict liability for the wrongdoing of another in tort as

\(^\text{114}\) Although note recent cases such as Woodland v The Swimming Teachers' Association & others [2011] EWHC 2631 (QB), [1012] EWCA Civ 239 (CA) where the issue arose as to whether a school could be held liable for the negligence of a swimming teacher who had been engaged as an independent contractor.

\(^\text{115}\) (1982) 150 CLR 258 ('Introvigne').
no evidence of personal wrongdoing on behalf of the Commonwealth government was adduced.

Introvigne is significant because the Commonwealth government did not personally administer schools in the Australian Capital Territory. Instead, it had appointed the New South Wales state government to administer the schools on its behalf and it was the New South Wales state government which employed the negligent teachers. As the Commonwealth government did not employ the negligent teachers, the liability imposed in the case could not have been based on an employment relationship. It follows, that the liability must have been imposed by reason of the school relationship.

The decision of the High Court of Australia in Introvigne demonstrates that the courts do impose strict liability for the wrongdoing of another in tort by reason of the school relationship under the label ‘liability for breach of a non-delegable duty of care’. As the case is relatively recent, it also indicates a willingness on behalf of the courts to continue to impose such liability. This willingness can also be seen in the unfortunate series of cases involving the sexual assault of children by institutions charged with their care (the ‘child sexual assault cases’). Justice McHugh said in New South Wales v Lepore, for example: 116

In my opinion 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...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.

It is does not matter for these purposes that most judges in the child sexual assault cases who were prepared to find a school or similar institution liable for a sexual assault committed by a teacher chose to impose liability on the defendant institution using the label ‘vicarious liability’ rather than ‘liability for breach of a non-delegable duty of care’. 118 This is because the only question in respect of the so-called ‘non-delegable duty of care’ in those cases was

118 See further chapter 4.
whether liability for breach of the duty extended to cover intentional misconduct of a teacher.119 No questions were raised as to whether the so-called 'non-delegable duty of care' actually existed or whether strict liability for the wrongdoing of another could be imposed in the event of a breach.

V RELATIONSHIP BETWEEN OCCUPIER AND INVITEE (ARGUABLY)

The final relationship by reason of which the courts impose liability using the label 'liability for breach of a non-delegable duty of care' is the relationship between occupier and invitee. The High Court of Australia noted the existence of the so-called 'non-delegable' duty owed by an occupier to an invitee in Burnie Port Authority v General Jones Limited.120 Recognition of the 'non-delegable duty' was qualified, however, with the word 'arguably',121 reflecting the considerable uncertainty surrounding the existence of the so-called 'non-delegable duty' and the nature of the liability imposed in the event of a breach.

A 'Liability for breach of a non-delegable duty of care'

Some 100 years after it was first suggested in Pickard v Smith that the duty of care owed by a lessee of premises to a passer-by was 'non-delegable', the House of Lords held in Thomson v Cremin122 that the duty of care owed by an occupier to an invitee was also 'non-delegable'.

The passage of time between the decisions in Pickard v Smith and Thomson v Cremin is significant because the state of the law prior to the two cases differed considerably. As noted in part II of this chapter, the law prior to Pickard v Smith was in a state of development and there was a confusion of legal principles as to whether a lessee could be held liable to a passer-by regardless of personal fault. In contrast, the principles governing the liability of an occupier to an invitee were relatively settled by the time Thomson v

120 (1994) 179 CLR 520.
121 Ibid 550-551.
122 (1953) 2 All ER 1185.
Cremin was decided. In *Indermaur v Dames*, it had been held that an occupier owed discrete duties to different categories of entrants depending on their status: a relatively low duty was owed to a trespasser who was thought should bear the consequences of any injury since they had no right to be there; a higher duty was owed to a licensee who the occupier was required to advise of any dangers known to the occupier; and an even higher duty was owed to an invitee which required the occupier to 'use reasonable care to prevent damage from unusual danger which [the occupier] knows or ought to know'. Each of those duties, as the language of *Indermaur v Dames* suggests, was at best a duty to use reasonable care. *Thomson v Cremin*, therefore, was a significant change in how the liability of an occupier to an invitee had previously been determined.

*Thomson v Cremin* concerned a cargo of grain on a ship being unloaded by a firm of stevedores when a heavy wooden shore attached to the hull of the ship fell on one of the stevedore's employees. The wooden shore was found to have been negligently fixed to the hull when the ship was loaded in Australia by a firm of Australian stevedores. The injured employee successfully sued the shipowner for his injuries even though the shipowner was unaware of the problem with the wooden shore and had used reasonable care in selecting the Australian stevedores. The basis of the liability was said to be the so-called 'non-delegable nature of the duty of care' owed by the occupier to the invitee. In this respect, Lord Wright held:

> The duty of the invitor towards the invitee is, in my opinion, a duty personal to the former, in the sense that he does not get rid of the obligation by entrusting its performance to independent contractors. It is true that the invitor is not an insurer: he warrants, however, that due care and skill to make the premises reasonably safe for the invitee have been exercised, whether by himself, his servants, or agents or by independent contractors whom he employs to perform his duty. He does not fulfil the warranty merely by leaving the work to contractors, however reputable or generally competent. His warranty is broken if they fail to exercise the proper care.

In reaching this conclusion, Lord Wright expressly considered the decision in *Pickard v Smith* and decided that the liability of the occupier should be

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123 (1865-66) LR 1 CP 274.
124 See *Norman v Great Western Railway Company* [1915] 1 KB 584, 592.
125 *Indermaur v Dames* (1865-66) LR 1 CP 274, 288.
126 Ibid.
127 (1953) 2 All ER 1185, 1191-1192.
determined in the same way.\textsuperscript{128} A similar analogy had been made by Luxmoore J in English Court of Appeal decision in Wilkinson v Rea\textsuperscript{129} to which Lord Wright also referred. Wilkinson v Rea concerned coal being loaded onto a ship in dry dock by a coal merchant whilst a number of minor repairs were being carried out by the employees of a repair company. In order to load the coal it was necessary to leave a hatch in the galley open. An employee of the repair company fell down the hatch after the ship’s engineer turned off the lights in the galley at the request of a Lloyd’s surveyor who was testing those lights. In finding the ship owner liable to the employee, Luxmoore LJ found, as it had been in Pickard v Smith, that a danger was created when the hatch in the galley was opened by the coal merchants and that the shipowner could not avoid liability for that danger by leaving it to the coal merchants to take steps to guard against that danger.

Given the analogies to Pickard v Smith, what appears to have been driving the decision in Thomson v Cremin and the establishment of the so-called ‘non-delegable duty of care’ owed by an occupier to an invitee was a concern with the different legal treatment of people injured as a result of the condition of an occupier’s property. The court was struggling to see why an occupier might be found liable to a passer-by injured as a result of the negligence of an independent contractor, but not to an invitee. This was a valid concern. It is not clear, however, whether at this point in time it was the decision in Pickard v Smith which was out of line with authority or the decision in Indermaur v Dames. Significantly, Luxmoore J was the only judge in Wilkinson v Rea to rely on Pickard v Smith in reaching his decision. The other judges had based the liability of the shipowner in that case on a breach of the statutory duty imposed on the shipowner under the Shipbuilding Regulations 1931 to efficiently light ‘all parts of a ship where work is being carried on’.\textsuperscript{130} Furthermore, the period between Pickard v Smith and Thomson v Cremin had seen a significant change in the willingness of the courts to hold one person liable for the wrongdoing of another. A matter of weeks before the Lords heard Thomson v Cremin, the English Court of

\textsuperscript{128} Ibid.
\textsuperscript{129} [1941] 1 KB 688.
\textsuperscript{130} Shipbuilding Regulations 1931 (UK) (St R & O, No 133), regs 42(a) and (b).
Appeal held in Haseldine v C A Daw and Son Limited\textsuperscript{131} that the duty owed by an occupier to an invitee was a duty to use reasonable care only and that an occupier could not be found liable to an invitee who was injured as a result of the negligence of an independent contractor engaged by the occupier. In reaching that decision, Scott LJ (who was also a member of the court in Wilkinson v Rea) noted:\textsuperscript{132}

To put on the occupier any higher measure of duty than that of care, seems to me to depart from first principles...to put on him a so-called 'strict liability' similar to the responsibility of an insurer seems to be unjust unless there be present other circumstances which give rise to an exceptional measure of duty or make it right that the particular action should be at the peril of the actor...

B \textit{Does the relationship between occupier and invitee give rise to strict liability for the wrongdoing of another in tort?}

There is little doubt that the liability imposed by the House of Lords in Thomson v Cremin was a form of strict liability for the wrongdoing of another in tort since there was no evidence of personal wrongdoing by the occupier in the case. As the negligent party was an independent contractor, it must also have been the relationship between the occupier and invitee which gave rise to the strict liability. Just because the relationship between occupier and invitee historically gave rise to strict liability for the wrongdoing of another in tort, however, does not necessarily mean that modern courts will impose such liability.

One reason it seems unlikely that modern courts will impose strict liability for the wrongdoing of another in tort for breach of the so-called 'non-delegable duty of care' owed by an occupier to an invitee is that it now appears that Pickard v Smith would not be decided in the same way today. Pickard v Smith was strongly influenced by public nuisance principles. The tort of public nuisance was created in the 16\textsuperscript{th} century to afford a remedy to members of the public who were injured as a result of an 'interference with a public or common right'.\textsuperscript{133} Although initially a crime, it was subsequently reasoned that a member of the public particularly damaged by an interference with a public right of way should be able to have an action in tort

\textsuperscript{131} [1941] 2 KB 343.
\textsuperscript{132} Ibid 353.
\textsuperscript{133} Fleming above n 10, 460.
just as would a private land owner whose private right of way was interfered with. This reasoning was flawed. As Professor Newark and others have noted, there was nothing but a superficial resemblance between the circumstances giving rise to an action for a private nuisance and the newly created tort of public nuisance. The circumstances giving rise to the two torts were more importantly fundamentally different because one responded to interferences in land and the other responded to interferences in personal integrity. It follows that the tort of public nuisance was nothing more than an action in negligence ‘born before its due time’.

It has taken almost 500 years to recognise that a mistake was made, but in Hunter v Canary Wharf Ltd the House of Lords finally restored the tort of private nuisance to a tort that protects against interferences with land and not against interferences with personal security. It can now be seen that by relying on Pickard v Smith and imposing strict liability in Thomson v Cremin on an occupier for the wrongdoing of another for breach of a so-called ‘non-delegable duty of care’, the House of Lords compounded this initial mistake. The Lords themselves seemed to subsequently realise their error and sought to distance themselves from the decision in Thomson v Cremin. In Davie v New Merton Board Mills Ltd, for instance, Lord Reid ‘dismissed as dicta the remarks about the responsibility of an invitnor for the negligence of a contractor’. Lord Hodson in Riverstone Meat Co Pty Ltd v Lancashire Meat Co Pty Ltd also suggested that the decision in Thomson v Cremin ‘may have to be reconsidered’. It is also not insignificant for these purposes that the decision in Thomson v Cremin took some 12 years to be published after it was decided.

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135 Ibid.
136 For example, W T S Stallybrass, Salmon’s Law of Torts (9th ed, 1936) 229.
137 Newark, above n 134, 485.
139 Although the Supreme Court of the United Kingdom is yet to take the step of denying the existence of a tort of public nuisance on this basis.
141 Voli v Inglewood Shire Council (1963) 110 CLR 74, 97 (Windeyer J).
143 Voli v Inglewood Shire Council (1963) 110 CLR 74, 97 (Windeyer J).
Changes in the law since *Thomson v Cremin* provide another reason why it is unlikely that modern courts will impose strict liability for the wrongdoing of another in tort for breach of the so-called 'non-delegable duty of care' owed by an occupier to an invitee. In the United Kingdom, the effect of *Thomson v Cremin* has been reversed by legislation. The *Occupiers' Liability Act 1957* not only collapsed the different duties owed by an occupier to entrants into a single duty owed to the occupier's visitors,144 but also expressly provided that an occupier was not strictly liable for damage to a visitor caused by an independent contractor engaged by the occupier if the occupier had acted reasonably in 'entrusting the work to an independent contractor'.145

The position in Australia is not so clear. Although some states and territories have enacted legislation similar to the legislation in the United Kingdom,146 only the legislation in Western Australia provides that an occupier will not generally be held strictly liable for the negligence of an independent contractor unless the occupier is also somehow personally at fault.147 More important is the decision of the High Court of Australia in *Australian Safeway Stores Pty Ltd v Zaluzna*.148 In that case, the High Court held that occupiers in Australia owe a single duty to all categories of entrant on their property to use reasonable care.149 As can be seen from the quote by Lord Wright in *Thomas v Cremin* above, what was thought to be 'non-delegable' was the duty of an occupier to an invitee, not the duty of an occupier to the other possible categories of entrant. Now that this specific duty no longer exists, any finding that an occupier owed a so-called 'non-delegable duty' would necessarily extend to all possible entrants, exceeding the liability imposed upon an occupier prior to *Zaluzna*. At a time where strict liability for the wrongdoing of another in tort is the exception rather than the rule, this seems quite a leap.

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144 *Occupiers' Liability Act 1957* (UK) c 31, s 2(1).
145 *Occupiers' Liability Act 1957* (UK) c 31, s 2(4)(b).
146 Victoria, South Australia, Western Australia and the Australian Capital Territory.
147 *Occupiers Liability Act 1985* (WA), s 6.
148 (1987) 162 CLR 479 ('Zaluzna').
149 Although the court arguably left open the question of what duty was owed by an occupant to a contractual entrant.
With the benefit of hindsight, the addition of the word 'arguably' by the High Court of Australia when describing the so-called 'non-delegable duty of care' owed by occupier to invitee now seems appropriate. It now seems unlikely that the relationship between an occupier and an invitee gives rise to strict liability for the wrongdoing of another in tort.

VI AGENCY RELATIONSHIP

The final relationship to be examined in this chapter is the agency relationship. Courts impose liability by reason of the agency relationship using the label 'vicarious liability'. For the purposes of this thesis, an agency relationship is defined as a relationship in which one person (the 'agent') is vested with authority to effect legal relations on behalf of another (the 'principal'). This can be justified on the basis that, as a general rule, it is only when an agent is acting in this narrow, contractual sense that the courts consistently impose what is currently called 'vicarious liability'. The definition of agency will be discussed further in chapter 6.

A 'Vicarious liability'

As with the employment relationship, courts have imposed so-called 'vicarious liability' by reason of the agency relationship since medieval times. Just as a master could be held liable for a slave who acted wrongfully in the course of their duties, so too could a master be held liable for a slave who acted wrongfully whilst entering into a contract on the master's behalf. As actions in debt developed, such liability was taken beyond the domestic sphere and businesses more generally were held liable for employees who acted wrongfully whilst entering into contracts on their employer's behalf. The liability was finally extended to agents who were not employees but independent contractors. This was first done in cases in which the independent contractor was acting on behalf of an undisclosed principal.

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150 These definitional difficulties were recently canvassed by the High Court of Australia in Sweeney v Boylan Nominees Pty Limited (2006) 226 CLR 161.
151 O W Holmes Jr, 'Agency Part II' (1891) 5 Harvard Law Review 1, 2.
152 See, eg, Guratt v Cullum T. 9 Anne, cited by Holmes ibid 3.
B  *Does the agency relationship give rise to strict liability for the wrongdoing of another in tort?*

It is not too difficult to find cases in which a principal has been held strictly liable for the wrongdoing of an agent. Consider *Hern v Nichols*. In that case, a factor selling silk on behalf of the defendant principal misrepresented the quality of the silk. The defendant principal was held liable for the misrepresentation even though no evidence of personal wrongdoing on the part of the principal was established. It may be, however, that it is not the agency relationship which gives rise to such strict liability but a co-existing employment relationship, given that an agent may also be an employee. This same issue arose in the context of both the hospital and school relationships.

In this regard, *Hern v Nichols* is particularly significant. The factor in the case was not an employee, but an independent contractor. It follows that it must have been the agency relationship which gave rise to the strict liability imposed on the principal. Consider also *Udell v Atherton*. In that case, the defendant principal was held strictly liable for a misrepresentation made by an agent appointed by the defendant principal to sell timber on a commission basis. Once again, as the agent was not an employee, the only relationship which could have given rise to the strict liability imposed on the principal was the agency relationship.

*Hern v Nichols* and *Udell v Atherton* both demonstrate that the agency relationship gives rise to strict liability for the wrongdoing of another in tort. Although both cases are quite old, they are commonly referred to by judges and *Hern v Nichols* was approved relatively recently by the House of Lords in *Armagas Ltd v Mundogas SA*. There is no reason to think that such liability would not continue to be imposed today.

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153 (1708) 1 Salk 289; 91 ER 256.
154 (1861) 7H & N 172.
VII  CONCLUSION

A number of conclusions can be drawn from the analysis in this chapter. First, the labels currently used by the courts to describe strict liability for the wrongdoing of another in tort are inadequate. Use of the labels does not necessarily indicate the presence of strict liability for the wrongdoing of another in tort, nor do the labels adequately distinguish between different forms of the liability. Consider the hospital relationship. Although it has long been recognised that a hospital owes a so-called 'non-delegable duty' to its patients, the hospital relationship does not itself appear to give rise to strict liability for the wrongdoing of another in tort. Instead such liability appears to be based on a co-existing employment relationship. The school relationship, in contrast, does give rise to strict liability for the wrongdoing of another in tort. Such liability, however, might also be based on a co-existing employment relationship and there is very little guidance available to assist judges to determine which relationship might give rise to the liability in the particular circumstances of a case.

Secondly, the willingness of the courts to impose strict liability for the wrongdoing of another in tort has narrowed over time. A good example is the relationship between adjoining land owners in relation to work threatening support or common walls. Although the relationship historically gave rise to strict liability for the wrongdoing of another in tort, courts no longer appear willing to impose such liability.

Finally, there are very few relationships which currently give rise to strict liability for the wrongdoing of another in tort. Of all the relationships identified in the table at the beginning of this chapter, the only relationships which appear to now give rise to strict liability for the wrongdoing of another in tort are the employment relationship, the school relationship and the agency relationship. Within those relationships, different forms of strict liability for the wrongdoing of another can be seen to exist. The labels used to describe such liability, however, give few clues as to why those forms of liability arise or how they might be different.
As can be seen, strict liability for the wrongdoing of another in tort as it is currently imposed by the courts is very different from the strict liability indicated by use of the labels 'vicarious liability' and 'liability for breach of a non-delegable duty of care'. It is no real surprise then, that current efforts to explain strict liability for the wrongdoing of another in tort have failed. Such theories have sought to explain a form of liability which no longer exists.
Chapter 3
The Common Feature of Authority

Having developed a clear understanding of strict liability for the wrongdoing of another in tort as that liability is currently imposed by the courts, it is now possible to examine the relationships which give rise to strict liability for the wrongdoing of another in tort to see what it is about those relationships which attracts the concern and intervention of the law.

To this end, this chapter will analyse in detail the employment, school and agency relationships. It will show that authority is a common feature of all three relationships. Furthermore, it will show that the feature of authority is capable of distinguishing the cases in which the courts impose strict liability for the wrongdoing of another in tort from the cases in which the courts do not. This chapter will then use the feature of authority to outline a new expository framework for strict liability for the wrongdoing of another in tort which will provide judges with much needed guidance and promote certainty and consistency in the law. Different forms of strict liability for the wrongdoing of another in tort will be shown to reflect differences in the nature of the authority present in the three relationships which give rise to such liability.

I THE RELATIONSHIPS

In order to determine what it is about the employment, school and agency relationships that attracts strict liability for the wrongdoing of another in tort, it is first necessary to consider why such relationships exist and how they function.

A Employment Relationship

The employment relationship plays an important role in society. It enables employers to secure long-term access to human resources on set terms
without the associated costs and risks of continual contract negotiations.\(^1\) It does this by way of the contract of employment. Under the contract of employment, an employee voluntarily submits to the authority of the employer by agreeing to do what is asked by the employer in return for a regular wage. This will include complying with express instructions given by an employer as well as any other policies, incentives or penalties instituted by an employer to shape how an employee performs their tasks (collectively, ‘directions’). Any failure to comply with such directions is capable of being addressed by the employer as a breach of contract or through some other form of disciplinary action.

The authority vested in an employer to direct the conduct of an employee is broad in scope. Under a typical employment contract, an employer is given authority by the employee to direct all of the employee’s conduct in the course of employment for the purposes of the employer’s business.\(^2\) This authority will continue until the employment relationship is brought to an end by one of the parties. An employee is consequently at their employer’s disposal for an indefinite period.\(^3\) Also significant is the fact that the terms of that authority are put in place at the beginning of the employment relationship and need not\(^4\) be reviewed for the duration of the employment relationship. This can be contrasted with any of the other types of contracts that might be entered into by an employer in order to secure the use of

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\(^1\) This is not to suggest that employment does not have its disadvantages, for example increased cost of regulatory compliance, as evidenced by the trend towards a degree of vertical disintegration; Hugh Collins, ‘Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws’ (1980) 10 Oxford Journal of Legal Studies 3. However, at the very least, employment does offer the core advantage suggested above.

\(^2\) Such authority might, however, be limited by the particular role the employee was appointed to perform where there is an express or implied term in the contract that the employee can only be asked to do a certain type of work, although redundancy laws mean that employees can be redeployed throughout a business even if their initial contract was to perform a particular task.

\(^3\) Even where an employment contract is for a fixed period, it can be distinguished from a contract with an independent contractor for a similar duration as such a contract would not generally be limited by reference to the task to be undertaken, but by time. This means that much broader use can be made of the employee by the employer than the independent contractor whose task will be much more tightly prescribed by the contract (see below). For example, contrast a lecturer employed on a one year contract to a specialist brought in to deliver and teach a particular course. The employer would generally only be able to direct the specialist with respect to things like when, where, how the course must be taught. In contrast, the employer would be able to direct the employee as to a broad range of other activities, including administration, research and community engagement.

\(^4\) Though can be, when bargaining strength allows.
human resources. For example, an employer may engage a person to do a particular thing, such as write a report or build a structure. These types of contracts have increased with the need of employers for flexibility in managing their human resources. Under these contracts, although some type of authority may be given by the person to the employer, it will necessarily be limited by reference to the task and its duration and the need to enter into a new contract if those parameters are exceeded.

The authority vested in an employer to direct the conduct of an employee is therefore an important component of the employment relationship. Such authority enables an employer to achieve the commercial objectives which led to the employment relationship being established.

B School Relationship

The school relationship exists to educate students. This is important for both the students and the broader community. As explained by Lord Clyde in *Phelps v Hillingdon London Borough Council*: 5

It is not only in the interests of the child and his or her parents that such provision should be made but also in the interest of the country that its citizens should have the knowledge, skill and ability to play their respective parts in society with such degree of competence and qualification as they may be able to develop.

Consequently, all children of a certain age are required by legislation throughout Australia and the United Kingdom to be educated.6 This generally means that parents must enrol their child in a school approved by the government,7 although parents retain a choice as to which school, and what type their child attends. Once at school, students attend classes arranged by the school and receive schooling in accordance with government set curriculum. The school also makes arrangements for the students to have breaks throughout the day. During this time, students are generally free to engage in whatever activities they like, although any inappropriate behaviour may be restrained and the students must remain within the perimeter of the school.

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6 See, eg, *Education Act 1990* (NSW) s 22. See also *Education Act 1996* (UK) c 56, s 7.
7 Although home-schooling is available in limited circumstances. See, eg, *Education Act 1990* (NSW), s 25.
From this description of the school relationship, it can be seen that a school can direct the activities and behaviour of its students. Schools are vested with authority to direct the behaviour of their students in this way. Such authority is not derived from parents,⁸ but from legislation.⁹ This legislation first gives schools the authority to require students to attend school. Once a student has been enrolled at a school, the school must monitor attendance¹⁰ and mechanisms are put in place to respond to instances of truancy.¹¹ Secondly, the legislation gives schools the express authority to maintain discipline within the school.¹² This means that schools are not only authorised to direct the behaviour of students but to discipline individual students for failing to comply with those directions.

Once again, authority to direct the conduct of a student is an important component of the school relationship. Education is unlikely to happen if students are in an environment where they are not physically safe or where there are numerous disruptions. The success of the school relationship therefore depends on a school being able to exercise authority over the students to ensure that students both attend and have a suitable environment for learning.

C Agency Relationship

An agency relationship was defined in the previous chapter as a relationship in which one person (the 'agent') was vested with authority to effect legal relations on behalf of another (the 'principal').¹³ So defined, agency

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⁸ Hole v Williams (1910) 10 SRNSW 638, 656-657 (Street J): '...but, except in so far as he is restricted, either by agreement with the parent, or by the internal regulations of the department, it appears to me that a public school teacher in teaching or correcting children, in enforcing discipline, in inculcating habits of obedience, or in exercising the various other methods of control and of influence which form part of the child's education, is exercising an authority delegated to him, not by the Government, but by the parent.'

⁹ See Ramsey v Larsen (1964) 111 CLR 16 (Taylor J): '...I prefer the view that a public schoolteacher in the exercise of his functions as such is exercising an authority delegated to him by the Crown in respect of obligations assumed by the Crown.'

¹⁰ See, eg, Education Act 1990 (NSW) s 24.

¹¹ See, eg, Education Act 1990 (NSW) s 23(5).

¹² See, eg, Education Act 1990 (NSW) s 35. See also Education and Inspections Act 2006 (UK) c 40, s 88: 'The governing body of a relevant school must ensure that policies designed to promote good behaviour and discipline on the part of its pupils are pursued at the school.'

¹³ These definitional difficulties were recently canvassed by the High Court of Australia in Sweeney v Boylan Nominees Pty Limited (2006) 226 CLR 161.
relationships exist to enable a principal to effect legal relations without being personally involved. To achieve this, a principal will vest an agent with authority to effect legal relations on their behalf. Such authority may be general or specific and can vary considerably in nature. An agent might, for instance, be authorised to enter into any and all legal relations on behalf of a principal or may be authorised only to enter into specific contracts.\(^\text{14}\) Alternatively, the authority vested in an agent might be quite limited in that the agent may not enter into legal relations on the principal's behalf at all, but may provide information in respect of such legal relations on behalf of the principal.\(^\text{15}\) Provided the authority vested by the principal relates to the process of effecting legal relations in some respect, the person upon whom such authority has been vested can be considered an 'agent'. An agent for these purposes may be an employee, an independent contractor or may even be acting gratuitously.

Where an agent has been appointed, a party wishing to enter into legal relations with the principal (the '\textit{transactional party}') will generally do so through the agent, at least initially. A transactional party will receive information about the legal relations from the agent, negotiate the terms of the legal relations with the agent and, depending on the scope of the authority, enter into legal relations with the principal through the agent. This does not mean that the agent is party to such legal relations;\(^\text{16}\) an agent instead does all of these acts on the principal's behalf. Consequently, any legal relations effected by an agent are between the principal and the transactional party and the principal will be bound by those legal relations provided the agent has been acting within the scope of their authority.\(^\text{17}\)

As with the employment and school relationships, the feature of authority can once again be seen to be a central component of the agency relationship. It explains both why the relationship exists and how it operates.

\(^{14}\) For example, an enduring power of attorney.
\(^{15}\) For example, a real estate agent.
\(^{16}\) Except where agency undisclosed. See generally Gino Dal Pont, \textit{Law of Agency (2\textsuperscript{nd}, 2008)} 496-498.
\(^{17}\) Both actual and apparent. See further chapter 6.
That authority is a common feature of the three main types of relationships which give rise to strict liability for the wrongdoing of another in tort is not of itself significant. What makes the feature of authority significant is that it can distinguish the cases in which the courts currently impose strict liability for the wrongdoing of another in tort from the cases in which the courts currently do not. The explanatory power of the feature of authority will be demonstrated in full in subsequent chapters, but can be highlighted here. As this section examines what the courts currently do, existing labels will once again be used to describe the strict liability for the wrongdoing of another in tort.

A Employment Relationship

Consider first the liability imposed by the courts by reason of an employment relationship using the label ‘vicarious liability’. Such liability is limited to damage wrongfully caused by an employee within the course of employment. As a general rule, an employee is only considered to be acting within the course of their employment when they are acting with the authority of their employer.\(^{18}\) This is evidenced by what is generally referred to as the Salmond test:\(^{19}\)

An employee’s wrongful conduct is said to fall within the course and scope of his or her employment where it consists of either (1) acts authorised by the employers or (2) unauthorised acts that are so connected with acts that the employer has authorised that they may rightly be regarded as modes – although improper modes – of doing what has been authorised.

The feature of authority is consequently used by the courts to determine when strict liability for the wrongdoing of another in tort should be imposed by reason of an employment relationship using the label ‘vicarious liability’.

There have been recent efforts to expand the concept of ‘course of employment’ to include wrongful conduct ‘connected’ with employment.\(^{20}\) The feature of authority is not so relevant under this approach. This expanded concept of ‘course of employment’ has, however, emerged from

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\(^{18}\) See further chapter 5.


cases involving the sexual assault of children by the employees of schools or similar institutions charged with their care. There is the possibility in these cases that it is not the employment relationship which attracts the liability, but the co-existing relationship between the school or institution and the child. If this is correct, the proposed ‘connection’ test does not apply to cases of strict liability for the wrongdoing of another imposed by reason of the employment relationship more generally. This possibility will be further explored in Chapter 7.

It is less clear whether the feature of authority is relevant when the courts impose strict liability for the wrongdoing of another by reason of an employment relationship using the label ‘liability for breach of a non-delegable duty of care’. A review of the cases, however, suggests that it is. The most common situation in which such liability is currently imposed on an employer for breach of the so-called ‘non-delegable duty of care’ is where an employee has been injured as a result of the wrongful conduct of an independent contractor. The decision of the High Court of Australia in *Kondis v State Transport Authority*\(^{21}\) provides a good example. Historically, the courts also imposed liability on an employer using the label ‘liability for breach of a non-delegable duty of care’ where an employee was wrongfully injured by another employee. This was because the doctrine of common employment prevented so-called ‘vicarious liability’ being imposed on the employer in such circumstances. *Wilson & Clyde Coal Company Limited v English*\(^{22}\) is a case in point. Today, such liability is relatively uncommon due to the doctrine of common employment having been abolished and there being no other legal impediment to an employer being held ‘vicariously liable’ to an employee for the wrongdoing of another employee.

Two points can be made about the circumstances in which strict liability for the wrongdoing of another is imposed by reason of an employment relationship using the label of ‘liability for breach of a non-delegable duty of care’. First, it is not the case that an employer is held strictly liable in respect of damage wrongfully caused by any person to an employee. For example,

\(^{21}\) (1984) 154 CLR 672 (‘Kondis’) (discussed more fully in chapter 2).

\(^{22}\) [1938] AC 57 (‘Wilson’) (discussed more fully in chapter 2).
an employer will not be held strictly liable to an employee wrongfully injured by another car driver whilst driving in the course of employment where that car driver is a stranger to the employer. An employer has only ever been held strictly liable to an employee in respect of damage caused by the wrongdoing of an independent contractor or another employee engaged by the employer. This suggests that it is not only injury to the employee with which the law is concerned but the person who is the cause of that injury.

Secondly, it seems that historically an employer was not held strictly liable to an employee for breach of a so-called ‘non-delegable duty’ for the wrongdoing of all employees and nor today is an employer held strictly liable to an employee for the wrongdoing of all independent contractors. Strict liability only seems to have arisen where the independent contractor or employee had some type of supervisory capacity over and in respect of the injured employee. For example, it has never been suggested that an employer could be held strictly liable to an employee wrongfully injured by a taxi driver engaged to transport an employee in the course of their employment, the taxi driver having no supervisory capacity over the employee. More specifically it seems to have been necessary that the person who wrongfully injured the employee was someone upon whom authority had been conferred by the employer to direct the behaviour of the injured employee. In Wilsons, the person who wrongfully injured the employee was the mine manager upon whom authority had been conferred to direct the activities of the mine’s employees, including the injured employee. In Kondis, the negligent crane driver had been charged with dismantling a structure and had been given a gang of men, of which the employee was a member, to assist him in performing that task. The employee was following the directions of the crane driver when he was injured.

It follows that the feature of authority plays an important role in determining whether the courts impose strict liability for the wrongdoing of another in tort by reason of an employment relationship using either the label ‘vicarious liability’ or ‘liability for breach of a non-delegable duty of care.'
School Relationship

The feature of authority is also relevant in determining whether the courts impose strict liability for the wrongdoing of another by reason of a school relationship using the label of 'liability for breach of a non-delegable duty of care'. The most common situation in which a school is held strictly liable for the wrongdoing of another person for breach of the so-called 'non-delegable duty of care' owed to a student is where the student has been injured as a result of the wrongful conduct of a teacher. The decision of the High Court in *Ramsay v Larsen*\(^{23}\) provides a good example. Strict liability for the wrongdoing of another can also be imposed on a school, though less commonly, in respect of the wrongdoing of an independent contractor. This is what occurred in *Commonwealth of Australia v Introvigne*.\(^{24}\)

A review of the circumstances in which strict liability for the wrongdoing of another is currently imposed for breach of the so-called 'non-delegable duty of care' owed by a school to a student shows them to be similar to the circumstances in which strict liability for the wrongdoing of another is imposed for breach of the so-called 'non-delegable duty of care' owed by an employer to an employee. First, it is not the case that a school is held strictly liable in respect of damage wrongfully caused by *any* person to a student. For example, a school will not be held strictly liable when one student wrongfully injures another student. Liability will only be imposed on a school in such circumstances if it can be shown that the school was personally negligent in failing to adequately supervise the students.\(^{25}\) As a general rule, schools are only held strictly liable to a student in respect of damage wrongfully caused by an independent contractor\(^{26}\) or another employee engaged by the school. This suggests that once again it is not only injury to the student with which the law is concerned but the person who is the cause of that injury.

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\(^{23}\) (1964) 111 CLR 16 (discussed more fully in chapter 2).

\(^{24}\) (1982) 150 CLR 258 (discussed more fully in chapter 2).

\(^{25}\) See *Geyer v Downs* (1977) 138 CLR 91.

\(^{26}\) See *Commonwealth of Australia v Introvigne* (1982) 150 CLR 258.
Secondly, schools are not held strictly liable for the wrongdoing of all independent contractors or employees engaged by the school. Strict liability only seems to have arisen where the independent contractor or employee had some type of supervisory capacity over and in respect of the injured student. Consider the child sexual assault cases, assuming for the moment that it is the school relationship which gives rise to strict liability for the wrongdoing of another in such cases rather than the co-existing employment relationship. In those cases, schools or similar institutions were held strictly liable for sexual assaults committed by teachers and other employees who had been conferred authority to direct the conduct of students, but not for sexual assaults committed by employees who had not been conferred any such authority. In *G(ED) v Hammer*, for instance, the court refused to impose strictly liability on a school for the sexual assault of a student committed by a janitor employed by the school. A janitor, unlike a teacher, is not conferred any authority by a school to direct the conduct of students, such authority not being necessary for a janitor to be able to perform their duties. Similar circumstances arose in *B v Order of the Oblates of Mary Immaculate*. The plaintiff in that case attended a residential school for First Nations children run by the defendant institution. The plaintiff was sexually assaulted on numerous occasions by the school baker. A baker, as with a janitor, is not conferred any authority to direct the conduct of students. Once again, the court refused to hold the institution strictly liable for the sexual assaults.

The feature of authority can be seen, therefore, to not only play an important role in determining whether courts impose strict liability for the wrongdoing of another in tort by reason of an employment relationship, but also whether such liability is imposed by reason of a school relationship.

C Agency Relationship

In the context of the agency relationship, the feature of authority is not only used by the courts to determine when strict liability for the wrongdoing of

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27 For example, a boarding school warden; *Lister v Hesley Hall Ltd* [2002] 1 AC 215.
another in tort is imposed using the label 'vicarious liability', but it is also used to determine who is an 'agent' for the purposes of the liability.

In terms of when strict liability for the wrongdoing of another is imposed, so-called 'vicarious liability' generally only arises in respect of damage wrongfully caused by an agent acting within the limits of their authority. As Lord Blackburn explained in *Houldsworth v City of Glasgow Bank*:30

> 'an innocent principal [is] civilly responsible for the fraud of his authorised agent, acting within his authority, to the same extent as if it were his own fraud.'

In terms of who is an 'agent', an 'agent' has been traditionally defined as a person who has been vested with authority by a principal to effect legal relations on their behalf. As will be demonstrated in Chapter 6, despite efforts to expand the concept of 'agency, it is only when the wrongdoer is an agent in this narrow, contractual sense that the courts regularly impose strict liability for the wrongdoing of another person in tort.

As can be seen, authority not only exists in each of the relationships in which strict liability for the wrongdoing of another in tort is imposed, but distinguishes the cases in which the courts impose strict liability for the wrongdoing of another in tort from the cases in which the courts do not.

III WHY IS AUTHORITY SIGNIFICANT?

If, as has been suggested, the feature of authority is capable of distinguishing the cases in which the courts impose strict liability for the wrongdoing of another in tort from the cases in which the courts do not, the question then is why. Why is this common feature of authority significant? It is submitted that the significance of the authority present in each of the relationships which give rise to strict liability for the wrongdoing of another in tort lies in the potential for that authority to be abused.

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30 (1880) 5 App Cas 317, 339 approved in *Lloyd v Grace, Smith & Co* [1912] AC 716, 736 (Lord Macnaghten).
A Employment Relationship

There is scope for the authority present in the employment relationship to be abused in two very different ways. First, the authority vested in an employer can be exercised by the employer for their own benefit. As a result, there is the potential for an employer to abuse that authority by creating a conflict between an employee's duties under their employment contract and other general law obligations or responsibilities an employee might owe. Secondly, an employer can confer their authority to direct the conduct of an employee upon another person, who might also abuse that authority.

1 Authority creating a conflict of duties

A significant shortcoming of the authority vested in an employer by an employee is the potential for an employer to abuse that authority by creating a conflict between an employee's duties under their employment contract and other general law obligations or responsibilities an employee might owe. This potential exists because an employer can exercise that authority for their own benefit and might do so without making adequate allowance for the discharge of other obligations or responsibilities owed by an employee. An employer, for instance, may direct an employee to act in ways that involve unreasonable risk because of the associated costs, putting members of the public at risk.

It is not that a conflict of obligations will necessarily exist. The nature of the obligations of an employee under their employment contract and at general law may coincide; for example, the term implied into an employee's contract that the employee perform their duties with reasonable care corresponds to a range of duties at general law which also require an employee to act reasonably. There is, however, arguably always the potential for an employer to create such a conflict. An employee, for instance, may still be obliged under their employment contract to follow an unreasonable (as opposed to illegal) direction.\(^{31}\) The decision of the English Court of Appeal in Johnston v Bloomsbury Health Authority\(^{32}\) provides a good example. In that


case, a majority of the court held that an employee doctor might be directed to work 88 hours in one week by a public hospital if the contract of employment stipulated the right of the hospital to make such an order. This was so, even though at some point the doctor became aware of the reasonably foreseeable risks posed by the direction for patients in the doctor’s care. It is also possible that an employee’s implied duties under their employment contract might be altered by the express terms of that contract.

By way of contrast, there is not the same potential for an employer to create such a conflict of obligations in other types of contracts securing the use of human resources. First, such contracts are often not as open-ended as an employment contract as they contain specific parameters for the task to be done with an expectation of contract renegotiation when circumstances change. Secondly, the risks and costs associated with performance of the contract are often broadly capable of being assessed and factored into the terms and price of the contract because the boundaries of the performance have been set. This includes the cost of complying with obligations outside the contract. This means that instead of there being the potential for an employer to create a conflict between contractual and general law obligations, the costs of and a mechanism for complying with both sets of obligations can be identified and provided for by the terms of the contract.

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33 This was the finding of a majority of the English Court of Appeal in Johnston v Bloomsbury Health Authority [1991] ICR 269, a case with very similar facts. The capacity of contract to ‘trump’ general law obligations in terms of directions by an employer was also upheld by the High Court of Australia in Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44.


35 This is not to say that there is no scope for such a conflict to arise in contracts securing the use of human resources other than employment contracts. There are too many different types of contracts utilised by employers with the objective of obtaining flexibility in their work practices to be able to make any such generalisations with certainty. However, it is also not the case that the law can draw a clear line between an employment contract and other types of contracts securing the use of human resources. So in passing, it should be noted that if the analysis in this thesis proves persuasive, the process for distinguishing an employment contract from other contracts securing the use of human resources may need to be re-evaluated in terms of the potential for such a conflict to arise. This will be discussed further in chapter 4.
In the employment relationship, due to the breadth of the authority vested in an employer by an employee, the long term nature of the relationship and the common disparity in bargaining power between an employer and an employee, it is very difficult for an employee to adequately assess the risks they face by entering into the employment relationship or take steps to protect themselves from those risks when negotiating the terms of the employment contract. This leaves an employee exposed to the possibility that their employer might create a conflict between the employee’s duties under their employment contract and the other general law obligations or responsibilities an employee might owe. Such a conflict can leave an employee in the unenviable position of having to weigh the potential risk of harm to a stranger to the employment relationship and the risk of being held legally responsible for that harm, against the immediate threat or fear of disciplinary action for failing to pursue or comply with the directions of their employer. This can put pressure on an employee to follow their employer’s directions rather than complying with their obligations and responsibilities at general law.

2 Authority conferred by employer upon another person

An employer creates further potential for the authority present in the employment relationship to be abused when they confer their authority to direct the conduct of an employee upon another person.

An employer is not required to exercise the authority vested in them to direct the conduct of an employee personally. They have the capacity to confer that authority upon another person. This capacity exists because the possibility of an employer meeting the commercial objectives which prompted the creation of the employment relationship would be unduly limited if such authority could be exercised by the employer alone.

When an employer confers authority to direct the conduct of an employee upon another person, however, they create a power relationship which did not previously exist. This power relationship enables the person upon whom authority has been conferred to direct the conduct of an employee and creates an expectation that the employee will obey. The power relationship
created by the employer is therefore subject to abuse. The authority conferred by the employer on the crane operator in *Kondis v State Rail Authority*, for instance, enabled the crane operator to negligently direct the employee into a position where he was at risk of harm. The potential for abuse of the authority conferred by an employer upon another person puts the employee over whom authority has been conferred at risk of harm.

As can be seen, there are two very different ways in which the authority present in the employment relationship might be abused. First, because an employer can exercise their authority to direct the conduct of an employee for their own benefit, they can potentially abuse that authority by creating a conflict between an employee’s duties under their employment contract and other general law obligations or responsibilities an employee might owe. Such a conflict can put pressure on an employee to follow their employer’s directions rather than complying with their obligations and responsibilities at general law, putting strangers to the employment relationship at risk of harm. Alternatively, an employer might confer their authority to direct the conduct of an employee upon another person. This conferral of authority creates a power relationship which enables the person upon whom authority has been conferred to direct the conduct of an employee and creates an expectation that the employee will obey, putting the employee at risk of physical harm.

**B School Relationship**

The authority present in the school relationship is very similar to the authority present in the employment relationship, but it is not the same. In the employment relationship, the authority vested in an employer is exercised by the employer for their own benefit, enabling the employer to pursue their commercial objectives. In contrast, the authority vested in a school is exercised primarily for the students’ benefit. The legislation which vests authority in a school to direct the conduct of students does so to enable a school to educate the students. This means that there is very limited potential for a conflict to arise between a student’s duty to comply with a school’s directions and other general law obligations or responsibilities the student might owe; both sets of obligations generally exist for the students’
benefit. For example, when the principal of a school gives a student a direction to sit down on their chair in class, that direction is given in order to protect the student from harm and to facilitate the education of that student and all other students in the class. The direction is consistent with the student’s obligations not to harm others and to take reasonable steps for their own safety.

Although there is only very limited potential for a conflict to arise between a student’s duty to comply with a school’s directions and other general law obligations or responsibilities the student might owe, there is still the potential for the authority present in the school relationship to be abused when that authority is conferred by a school upon another person. A school, as with an employer, is not required to exercise the authority vested in it to direct the conduct of students personally. As a school is not a natural person this would indeed be very difficult.\textsuperscript{36} Instead, a school typically confers its authority to direct the conduct of students upon teachers and other educators\textsuperscript{37} who then undertake the physical task of educating the students. When a school confers its authority to direct the conduct of students upon a teacher or other educator, however, it creates a power relationship which did not previously exist. This power relationship enables the teacher or other educator to direct the conduct of a student and creates an expectation that the student will obey. The power relationship created by the school is therefore subject to abuse. A teacher, for instance, can use the authority conferred upon them by a school to direct a student into a private room in order to perpetrate a sexual assault. A school consequently puts students at risk of physical harm when it confers authority upon teachers and other educators to direct the conduct of students.

Once again, the authority present in the school relationship is subject to abuse. When a school confers that authority upon a teacher or other educator they create a power relationship which enables the teacher or other educator to direct the conduct of a student and creates an expectation that

\textsuperscript{36} In which case the authority has to be exercised by those in the ‘managing mind’ of the school, as with corporations.

\textsuperscript{37} For example, a swimming teacher. See Woodland v The Swimming Teachers’ Association [2011] EWHC 2631 (QB), [2012] EWCA Civ 239 (CA).
the student will obey, exposing students to a risk of physical harm. The potential for abuse of the authority present in the school relationship is very similar to that which exists in the employment relationship when an employer confers their authority to direct the conduct of an employee upon another person.

C  Agency Relationship

The authority present in the agency relationship differs from the authority present in both the employment and school relationships. It is not an authority to direct the conduct of another person but an authority to effect legal relations on behalf of another person. It follows that the potential for abuse of that authority is also different.

An agency relationship is created when a principal vests authority in the agent to effect legal relations on the principal's behalf. The agent then uses that authority to effect legal relations between the principal and another person (the 'transactional party'). As a transactional party is not expected to confirm with the principal the details of those legal relations, the authority vested in an agent by a principal is subject to abuse. An agent, for instance, can use the authority conferred upon them by a principal to misrepresent the nature of property being sold by the principal to a transactional party in order to secure a higher commission. A principal therefore puts a transactional party at risk of harm when they confer authority on an agent to effect legal relations on their behalf.

As with the employment and school relationships, the authority present in the agency relationship is subject to abuse. The vesting of authority by a principal in an agent enables the agent to effect legal relations with a transactional party in circumstances in which the transactional party is not expected to confirm with the principal the details of those legal relations, consequently exposing the transactional party to a risk of harm.
IV A NEW EXPOSITORY FRAMEWORK FOR STRICT LIABILITY FOR THE WRONGDOING OF ANOTHER IN TORT

Although authority is a feature of each of the relationships which give rise to strict liability for the wrongdoing of another in tort and such authority determines the cases in which such liability will be imposed, strict liability for the wrongdoing of another in tort has never been explained in terms of authority. This thesis sets out to redress this situation by using this feature of authority to create a new expositive framework within which strict liability for the wrongdoing of another in tort can be understood.

The new framework comprises three separate forms of strict liability for the wrongdoing of another in tort. Each form of liability reflects differences in the nature of the authority present in each of the relationships which give rise to strict liability for the wrongdoing of another in tort. The first form of liability is *strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another*. This form of strict liability is found in both the employment and school relationships and responds to the potential for abuse of the power relationship created when an employer or school confers authority to direct the conduct of an employee or student upon another person. Strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another will be explained in chapter 4.

The second form of strict liability for the wrongdoing of another in tort is *strict liability for the wrongdoing of an employee*. This form of strict liability is limited to the employment relationship and responds to the potential for an employer, when exercising their authority to direct the conduct of an employee for their own benefit, to abuse that authority by creating a conflict between an employee’s duties under their employment contract and any other general law obligations or responsibilities the employee might owe. Strict liability for the wrongdoing of an employee will be explained in chapter 5.

The third form of strict liability for the wrongdoing of another in tort is *strict liability for the wrongdoing of an agent*. This form of strict liability is limited to the agency relationship and responds to the potential for abuse of the
authority vested in an agent to effect legal relations on the principal's behalf. Such potential exists because the authority vested in an agent by a principal creates a relationship between the agent and the party wishing to effect legal relations with the principal (the 'transactional party') which enables the agent to effect legal relations between the principal and the transactional party in circumstances in which the transactional party is not expected to confirm with the principal the details of those legal relations.

Each of the three forms of liability identified above roughly corresponds to an existing form of strict liability for the wrongdoing of another in tort. Strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another roughly corresponds to the strict liability currently imposed by the courts using the label of 'liability for breach of a non-delegable duty of care', whilst strict liability for the wrongdoing of an employee and strict liability for the wrongdoing of an agent roughly correspond to the strict liability currently imposed by the courts using the label 'vicarious liability'. The new expositive framework for strict liability for the wrongdoing of another in tort proposed by this thesis does not seek to change the circumstances in which strict liability for the wrongdoing of another in tort currently arises. Instead, it looks to better explain the different forms of strict liability for the wrongdoing of another in tort in terms of the authority present in each of the relationships which give rise to such liability. To this end, the flawed labels currently used by the courts to describe strict liability for the wrongdoing of another in tort will now be abandoned. For the remainder of this thesis, the different forms of strict liability for the wrongdoing of another in tort will be referred to using the terms proposed by the new expositive framework set out above.
Chapter 4
Strict Liability for the Wrongdoing of a Person upon whom Authority has been Conferred in Relation to Another

The first form of strict liability for the wrongdoing of another in tort identified by the new expositive framework put forward by this thesis is strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another. As explained in chapter 3, this form of strict liability is found in both the employment and school relationships and responds to the potential for abuse of the power relationship created when an employer or school confers their authority to direct the conduct of an employee or student upon another person.

This chapter will start by examining the basis of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another. It will then determine the nature of the strict liability, the circumstances in which it arises, the scope of the strict liability and to whom the strict liability is owed. Finally, the chapter will consider if there are any other relationships in which strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another might also be imposed.

I Basis of the Strict Liability

The authority vested in an employer or school to direct the conduct of an employee or student puts the employer or school in a position of significant power. It also makes an employee or student vulnerable to an abuse of that power. Consequently, restraints are placed on how an employer or school may exercise their authority to direct the conduct of an employee or student. An employer, for instance, is subject to an implied obligation under the contract of employment not to use their authority in a manner which is likely to destroy the mutual trust and confidence between an employee and their
employer. Legislation also restricts how a school might exercise its authority, for example, schools in a number of jurisdictions are prohibited from using corporal punishment to discipline students.

When an employer or school confers their authority to direct the conduct of an employee or student upon another person, the person upon whom that authority is conferred is not necessarily subject to the same restraints in the exercise of that authority as the employer or school. This is because the restraints placed on the exercise of that authority by an employer or school are generally incorporated into the instruments which create that authority and are not automatically transferred to the person upon whom the authority is conferred. For instance, the obligation of an employer not to use their authority to direct the conduct of an employee in a manner which is likely to destroy the mutual trust and confidence between the employee and the employer is a term of the contract of employment and will not transfer to a person upon whom the employer has conferred such authority unless the employer makes such an obligation a condition of the authority being conferred. Similarly, legislative obligations in respect of students are generally placed on schools and do not apply to a person upon whom the school has conferred their authority to direct the conduct of students unless a school also makes such obligations a condition of the authority being conferred.

Both employers and schools have the capacity to confer their authority to direct the conduct of employees and students upon another person. This capacity exists because the possibility of meeting the objectives for which the authority was created would be unduly limited if such authority could be exercised by an employer or school alone. The capacity of an employer or school to confer their authority to direct the conduct of an employee or

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2 See, eg, Education Act 1990 (NSW) s 47(h). See also Education Act 1996 (UK) c 56, s 548.
3 For example, Education Act 1990 (NSW) s47 requires a school to put in place school policies which do not ‘permit corporal punishment of students’ but such policies will not necessarily extend to external service providers of activities such as swimming lessons or camps.
student upon another person, however, is not without its problems. When an employer or school confers their authority to direct the conduct of an employee or student upon another person, they create a power relationship which did not previously exist. This power relationship enables the person upon whom authority has been conferred to direct the conduct of an employee or student and creates an expectation that the employee or student will obey. As the person upon whom authority has been conferred is not necessarily subject to the same restraints in the exercise of that authority as the employer or school, there is significant potential for this power relationship to be abused. A teacher, for instance, may direct a student to perform a scientific experiment, but fail to provide that student with appropriate safety equipment.\(^4\) Employees and students are consequently put at risk of physical harm whenever their employer or school confers upon another person authority to direct the conduct of the employee or student.

It is submitted that it is this potential for a person upon whom authority has been conferred by an employer or school to abuse the power relationship created by the employer or school's conferral of authority which attracts the concern and the intervention of the law. Strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another responds to the potential for abuse of the power relationship created by the employer or school's conferral of authority by holding the employer or school liable regardless of personal fault for any harm wrongfully caused to an employee or student by the person upon whom authority has been conferred. The liability effectively holds an employer or school to account for damage wrongfully caused to an employee or student by a person upon whom the employer or school has conferred their authority to direct the conduct of the employee or student. In so doing, the liability provides employees and students with a degree of protection from an abuse of the authority conferred by their employer or school upon another person.

It is relatively unusual in tort law for one person to be held strictly liable for the wrongdoing of another. As the defendant did not personally engage in

\(^4\) Williams v Eady (1893) 10 TLR 41.
wrongdoing, some other connection between the defendant and the wrongdoing needs to be drawn. It has never been sufficient for such purposes that a defendant merely provided an opportunity for wrongdoing to occur.\(^5\) When an employer or school confers authority on another person to direct the conduct of an employee or student, however, they do more than provide a mere opportunity for wrongdoing to occur.\(^6\) The power relationship created by the conferral of authority can provide the means by which wrongdoing might occur. A teacher, for instance, can use the authority conferred upon them by a school to direct a student into a private room in order to perpetrate a sexual assault. It is not that an abuse of authority will necessarily occur, but there is always an inherent risk that the authority conferred by the employer or school upon another person to direct the conduct of an employee or student will be abused. As will be seen from the cases, that risk appears sufficient for strict liability for the wrongdoing of another in tort to be imposed.

\[\text{II NATURE OF THE STRICT LIABILITY}\]

Strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another is not an absolute form of liability; it is not imposed in the absence of wrongdoing.\(^7\) It still needs to be shown that the person upon whom the employer or school conferred authority to direct the conduct of the employee or student engaged in wrongful conduct which caused the employee or student harm. The liability is, however, imposed regardless of wrongdoing by the employer or school.\(^8\) This means that strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another can be imposed even though an employer or school may be able to adduce evidence that the conferral of authority by the employer or school did not wrongfully contribute to the damage suffered by

\(^6\) It being noted by McLachlin CJ in *Bazley v Curry* (1999) 174 DLR (4th) 45 at 63-64 that a mere opportunity for wrongdoing was an insufficient basis upon which to impose strict liability for the wrongdoing of another in tort.
\(^8\) Ibid.
the employee or student. The liability can also be imposed even though an employer or school may be able to adduce evidence that an abuse of the authority conferred by the employer or school upon the person who wrongfully injured the employee or student did not actually take place. This is because strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another responds to a potential rather than an actual abuse of the authority conferred by the employer or school.

Although it may seem harsh that an employer or school can be subject to strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another regardless of personal wrongdoing, an employer or school need not necessarily bear such liability alone. In certain circumstances, an employer or school will be entitled to seek contribution and/or an indemnity from the person upon whom authority has been conferred in respect of the damages paid to the injured employee or student.9

III IN WHAT CIRCUMSTANCES DOES THE STRICT LIABILITY ARISE?

Strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another can be imposed on an employer or school whenever an employer or school confers authority upon another person to direct the conduct of an employee or student and that person wrongfully injures the employee or student in the course of exercising the conferred authority.10

Two points can be made about the general circumstances in which strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another arises. First, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another is limited to physical damage.11 It is unlikely, for instance, that an employer or

9 Hence an employer's right of indemnity from an employee, for instance. See further chapter 5.
10 What constitutes wrongdoing in the 'course of exercising the conferred authority' will be discussed in the next section.
11 Including damage consequential upon such physical damage and nervous shock.
school would be held strictly liable to an employee or student defamed by a person upon whom the employer or school had conferred authority to direct the conduct of the employee or student. As the authority conferred by an employer or school is an authority to direct the physical conduct of an employee or student, the potential for abuse of the power relationship created by the conferral of that authority is limited to physical harm only.

Secondly, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another generally only arises in respect of damage wrongfully caused by a person upon whom an employer or school has conferred authority to direct the conduct of an employee or student. This is because it is only when such authority has been conferred by an employer or school that there is the potential for that authority to be abused by someone other than the employer or school. It does not matter for these purposes whether the person is an employee, an independent contractor or acting gratuitously. What matters is that the person has been conferred authority by an employer or school to direct the conduct of an employee or student. This is borne out by the cases.

A Employees

As noted in chapter 3, employers are only held strictly liable to employees wrongfully injured by certain types of people; that is, people who have been conferred authority by an employer to direct the conduct of an employee. Consider Davie v New Merton Board Mills Ltd.\(^{12}\) In that case, the House of Lords held that an employer could not be held strictly liable for the negligence of a tool manufacturer. Although the employee was injured when his employer supplied him with a negligently manufactured tool purchased from the tool manufacturer, the negligence involved in the manufacture of the tool was thought an insufficient basis on which to hold the employer liable. This case has always been thought somewhat anomalous and was ultimately reversed by the Employer’s Liability (Defective Equipment) Act 1969 (UK)\(^{13}\) in order to promote employee safety. The decision of the House of Lords, however, can be explained on the grounds that the manufacturer had not

\(^{12}\) [1959] AC 64 (‘Davie’).

\(^{13}\) c 37.
been conferred any authority to direct the conduct of the injured employee. Arguably, a different conclusion would have been reached on facts such as *Kondis v State Transport Authority*\(^\text{14}\) if the crane driver had given the employee an inappropriate tool to perform a task with the result that the employee was injured. The difference is that in the *Davie* situation no authority over the employee had been conferred upon the tool manufacturer by the employer, whereas in the *Kondis* situation the employee is required by their employer to follow the directions of the independent contractor.\(^\text{15}\)

Consider also cases where an employee is sent by their employer to another person’s premises and the employee is injured whilst on those premises as a result of that other person not taking reasonable care for the safety of the employee at those premises. Where the other person is a customer, the courts have generally refused to hold the employer strictly liable to the injured employee. The central concern expressed by the courts in such cases has been that the employer had not been to the customer’s premises and could not exert any control at the customer’s premises.\(^\text{16}\) These cases can, however, be better explained on the grounds that no authority has been conferred upon the customer by the employer to direct the conduct of the employee. In *Atkinson v Gameco (NSW) Pty Ltd*,\(^\text{17}\) for example, the employee had been sent to Thailand with a view to persuading a Thai company to purchase the employer’s products. The employee was injured whilst at the premises of the Thai company when inspecting a truck to which it was proposed the employer’s products could be fitted. The employer was not held strictly liable even though the ladder on which the employee was climbing had been inadequately secured by the customer. Similarly, the employer was not held strictly liable in *Estate of the Late M T Mutton by its Executors & R W Mutton trading as Mutton Bros v Howard Haulage Pty Ltd*\(^\text{18}\)

\(^\text{14}\) (1984) 154 CLR 672 ("Kondis").

\(^\text{15}\) Similarly, it is has not been suggested that an employer is liable to a taxi driver who negligently injures an employee being transported in the course of their employment. Although the taxi driver is an independent contractor, a taxi driver has no supervisory capacity over the employee they are transporting.


\(^\text{17}\) [2005] NSWCA 338 ("Atkinson").

\(^\text{18}\) [2007] NSWCA 340 ("Mutton").
where an employee was injured in the process of delivering grain to a customer of the employer as a result of the customer providing unsafe equipment. The key feature in both of these cases is that no authority had been conferred upon either customer by the employer to direct the conduct of the employee.\footnote{19} Instead, the employees were making their own decisions as to their conduct at the time they were injured. In Atkinson, the employee had requested to inspect the truck and had made his own decision to climb the ladder in order to do so. In Mutton, the employee had driven his truck to the position directed by the customer, but had made his own decisions as to when and how the truck was used to unload the grain.

Cases such as Atkinson and Mutton can be contrasted with those involving a ‘borrowed’ employee; that is an employee who has been hired out by their employer to another business (the ‘temporary hirer’).\footnote{20} Where the person who wrongfully injures an employee is a temporary hirer of that employee, the courts have typically held the employer strictly liable to the employee even though the employee was injured at the premises of the temporary hirer. The decision of the New South Wales Court of Appeal in English v Rogers\footnote{21} provides a good example. In that case, the employee was a cleaner who had been directed to clean a hotel each night in performance of a contract entered into by his employer and the hotel. Whilst cleaning the hotel one night, the employee was taken hostage by a masked gunman when emptying rubbish at the back of the hotel and suffered psychological trauma as a result. In emptying the rubbish, the employee was following the directions of the hotel owner both as to what to do and how to do it. As the hotel owner had not installed adequate lighting or taken other reasonable security measures, the employee was injured. Although not personally negligent, the employer was held strictly liable to the employee for the negligence of the hotel owner. The decision can be explained in terms of the authority conferred by the employer upon the temporary hirer (in this case, the hotel owner) to direct the conduct of the employee in the course of the temporary hirer’s business. Unlike the facts in Atkinson and Mutton, the

\footnote{19 For an example from the United Kingdom, see Cook v Square D Ltd [1992] ICR 262.\footnote{20 See Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd [1947] AC 1.\footnote{21 (2005) Aust Torts Reports ¶81-800.}}
employee had been placed under the direction of another person and was injured in the course of complying with those negligent directions.\textsuperscript{22}

Regrettably, courts have not always been alert to the distinction between the two categories of case in which an employee is sent to the workplace of a third party. The resulting confusion can be seen in the decision of the New South Wales Court of Appeal in \textit{Nationwide News Pty Ltd v Naidu}.\textsuperscript{23} In that case, the employee was a security guard who was employed by the security firm ISS Security and lent to Nationwide News to provide security services. In lending the employee to Nationwide News, it was agreed that the employee would report directly to the head of security at Nationwide News.\textsuperscript{24} Over a period of five years, the head of security repeatedly bullied and abused the employee with the result that the employee suffered a serious psychiatric illness. Two of the judges in the case, Spigelman CJ and Basten JA, held that ISS Security could not be held strictly liable for the wrongdoing of the head of security at Nationwide News because ISS Security had no control over the workplace at Nationwide News. This reasoning is very similar to that used in cases such as \textit{Atkinson} and \textit{Mutton}. In contrast, Beazley JA distinguished cases such as \textit{Atkinson} on the basis that ISS Security had conferred upon the head of security in Nationwide News authority to direct the conduct of the employee.\textsuperscript{25} She would have imposed strict liability on ISS Security in much the same way as strict liability was imposed in \textit{English v Rogers}. The reasoning of Beazley JA reflects the broader body of cases and might have been adopted by the other two judges had cases such as \textit{English v Rogers} been brought to their attention.

\textsuperscript{22} Ibid \textit{¶67700} (Mason P): ‘…the employer submitted that it was not within his power to insist on changes to the physical layout of the hotel premises or the security arrangements that were in place there. I am certainly prepared to accept that the employer was entitled to take these matters into account. But to go further is to argue that the employer’s non-delegable duty can be sloughed off by sending the employee to a remote location under another’s control. This is not the law.’

\textsuperscript{23} (2007) 71 NSWLR 471.

\textsuperscript{24} Ibid 492.

\textsuperscript{25} Ibid 515 (Beazley J): ‘In ISS Security’s case, it had a non-delegable duty to provide him with a safe place and system of work. It breached that duty by having a system of work whereby Mr Naidu was placed under the \textit{supervisory management} of a third party who maltreated him.’ (emphasis added)
Cases in which an employee has been injured by a fellow employee in the course of some kind of workplace prank also indicate the significance of an employer having conferred upon another person authority to direct the conduct of an employee before the employer can be held strictly liable for the wrongdoing of that person. In *Smith v Crossley Bros Ltd*,\(^{26}\) for instance, an apprentice was severely injured when two fellow apprentices inserted a compressed air pipe into the boy’s rectum. In *McCready v Securicor Ltd*\(^{27}\) an employee’s hand was caught in a vault door as the result of the prank of a fellow employee of equal rank. As none of the employees involved in the cases had been conferred any authority over the other employees, no strict liability was imposed on the employers in respect of the pranks. In contrast, strict liability for injuries caused as a result of a workplace prank was imposed on the employer in *Petrou v Hatzigeorgio*.\(^{28}\) In that case, an employee was injured as a result of the prank of a partner in the business that employed him. The employee was working in a car repair shop when he was covered in paint thinner as a result of horseplay with a fellow employee. The employee then approached the partner complaining that he was wet and asking what he should do to address the situation. The partner lit a cigarette lighter and suggested (in jest) that he could dry himself with that. Unfortunately, the naked flamed got too close to the employee’s clothes, causing them to catch alight. The difference between *Petrou* and cases such as *Smith* and *McCready* is that the person responsible for the prank had been conferred authority to direct the conduct of the employee by the employer. The cases therefore confirm the hypothesis that strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another generally only arises by reason of an employment relationship where the person who wrongfully injures the employee has been conferred authority by the employer to direct the conduct of the injured employee.

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\(^{26}\) (1951) 95 Sol. J. 655.

\(^{27}\) [1991] 81 NI 229. For a more recently example, see *Blake v J R Perry Nominees Pty Ltd* (2010) 195 IR 336, where the Victorian Supreme Court refused to hold an employer liable when one employee hit a fellow employee of equal rank over the back of the legs as a practical joke.

B Students

As with employers, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another is generally only imposed on schools where a school has conferred upon another person authority to direct the conduct of a student. This is best seen in the child sexual assault cases where strict liability was imposed on schools or closely analogous institutions for some sexual assaults, but not all.

The first case in which an institution was held strictly liable for the sexual assault of a child within its care was *Bazley v Curry.*\(^{29}\) In that case, the defendant institution operated 'two residential care facilities for the treatment of emotionally troubled children'.\(^{30}\) The plaintiff had been placed into full-time care at one of these facilities as a young boy.\(^{31}\) Whilst at the facility, the plaintiff was sexually assaulted repeatedly by Leslie Curry, an employee of the institution.\(^{32}\) The Supreme Court of Canada found the institution strictly liable for the sexual assaults.

The circumstances in which strict liability was imposed on the institution in *Bazley v Curry* were as follows. Children were placed in the care of the facilities operated by the defendant institution when those children could no longer be cared for by their parents or foster parents. Whilst at the facility, the institution was solely responsible for the care of the children. It was vested with the same authority to direct the conduct of the children as a parent has to direct the conduct of their own children. This authority was vested in the institution by the government of British Columbia\(^ {33}\) and included the right to discipline the children should they not comply with a direction. Leslie Curry was employed by the institution as a childcare counsellor.\(^ {34}\) His role was to act a surrogate parent to the children in the facility.\(^ {35}\) This included 'ensuring various house rules were obeyed' and 'ensuring the

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29 (1999) 174 DLR (4th) 45
30 Ibid 50.
31 *B.(P.A.) v. Curry* (1997) 146 DLR (4th) 72, 76 (Court of Appeal for British Columbia).
32 Ibid.
33 Protection of Children Act RSBC 1960, c 303, s10. This section made the institution the legal guardian of the children in its care.
34 (1997) 146 DLR (4th) 72, 76.
35 Ibid.
children got to school on time.\textsuperscript{36} To enable him to perform his duties, the institution conferred its authority to direct the conduct of the children in its care upon Curry. Curry was purporting to exercise that authority immediately prior to committing the assaults.

Similar circumstances existed in \textit{Lister v Hesley Hall Ltd},\textsuperscript{37} the first case in which the House of Lords found an institution strictly liable for the sexual assault of a child within its care by an employee. The defendant institution in that case operated a school and boarding annex for boys. A number of boys were sexually assaulted at the boarding annex by Dennis Grain, who was employed as warden and housemaster of the boarding annex. Boys were sent to the school and boarding annex by local authorities, often because they had 'emotional and behavioural difficulties'.\textsuperscript{38} Whilst at the school and boarding annex, the institution was solely responsible for the care of the children. It was vested with the same authority to direct the conduct of the boys as a parent has to direct the conduct of their own children. This authority was vested in the institution by the local authorities\textsuperscript{39} and included the right to discipline the children should they not comply with a direction. Dennis Grain's duties as warden and housemaster of the boarding annex included 'making sure the boys went to bed at night, got up in the morning and got to and from school'.\textsuperscript{40} It was necessary for the institution to confer its authority to direct the conduct of the boys upon Grain to enable him to perform his duties. Grain was purporting to exercise that authority immediately prior to assaulting the boys.

In \textit{New South Wales v Lepore}\textsuperscript{41} and the associated cases, the High Court of Australia considered whether State governments in Australia\textsuperscript{42} could be held strictly liable for the sexual assault of children by teachers at government schools. The outcome is of little probative value as the various cases were affected by factual deficiencies and procedural inadequacies which ultimately

\textsuperscript{36} Ibid.
\textsuperscript{37} [2002] 1 AC 215.
\textsuperscript{38} Ibid 220.
\textsuperscript{39} \textit{Children Act 1975 (UK)} c 72, s 60. This section vested in the institution parental rights and duties in respect of the child.
\textsuperscript{40} [2002] 1 AC 215, 220.
\textsuperscript{41} (2003) 212 CLR 511.
\textsuperscript{42} There being a number of cases which were heard together.
determined the decisions reached. The factual circumstances of the various cases were not, however, dissimilar to those which were before the courts in *Bazley v Curry* and *Lister v Hesley Hall*. The various assaults in *New South Wales v Lepore* were alleged to have occurred at schools by teachers in the performance of the teachers’ duties. The different schools in those cases, like the residential care facility and boarding annex in the previous cases, were vested with authority to direct the conduct of the children in their care. This authority was similar to that exercised by the parents of the children when they were not at school and was vested in the schools by legislation. That legislation required all children of a certain age to attend school and gave schools the express authority to compel attendance and to maintain discipline within the school. The schools necessarily conferred this authority upon the teachers at the school to enable them to perform their duties. If the teachers were purporting to exercise this authority immediately prior to the assaults in *New South Wales v Lepore* and the associated cases, it is difficult to distinguish the circumstances in *New South Wales v Lepore* and the associated cases from those in *Bazley v Curry* and *Lister v Hesley Hall*.

Importantly, schools and closely analogous institutions have not been held strictly liable for all sexual assaults of children within their care. Consider *Jacobi v Griffiths*, a case decided by the Supreme Court of Canada at the

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43 In *New South Wales v Lepore* itself, Gleeson CJ, Gaudron, Kirby, Gummow and Hayne JJ ordered a new trial. In *Samin v Queensland* and *Rich v Queensland*, McHugh J allowed the appeal which was dismissed by the remainder of the other judges. As Gleeson CJ noted at 548, however, no evidence as to the nature of the functions and responsibilities' of the teachers in these cases had been put before the court.

44 *Hole v Williams* (1910) 10 SRNSW 638, 656-657 (Street J): ‘...but, except in so far as he is restricted, either by agreement with the parent, or by the internal regulations of the department, it appears to me that a public school teacher in teaching or correcting children, in enforcing discipline, in inculcating habits of obedience, or in exercising the various other methods of control and of influence which form part of the child’s education, is exercising an authority delegated to him, not by the Government, but by the parent.’

45 See, eg, *Education Act 1990 (NSW)* s 22. *Education Act 1996 (UK)* c 56, s 7 is similar.

46 Once a student has been enrolled at a school, the school is required to monitor attendance and mechanisms are put in place to respond to instances of truancy. See, eg, *Education Act 1990 (NSW)* s 24 and s 23(5) respectively.

47 See, eg, *Education Act 1990 (NSW)* s 35. See also *Education and Inspections Act 2006 (UK)* c 40, s 88 which says that ‘The governing body of a relevant school must ensure that policies designed to promote good behaviour and discipline on the part of its pupils are pursued at the school.’

same time as *Bazley v Curry*. The defendant institution in that case operated a recreational club for boys and girls held after school and on Saturdays.\(^{49}\) The plaintiffs, a pair of siblings who regularly attended the club, were sexually assaulted by Harry Griffiths, the club’s Program Director. Although the defendant institution employed Harry Griffiths, it was not held strictly liable for the assaults. An examination of the relationship between the institution and the children who attended the club indicates why. Attendance at the club in *Jacobi v Griffiths* was voluntary and children were free to come and go as they pleased.\(^{50}\) There was no legislation in place to give the institution authority to direct the conduct of the children at the club or to discipline those children in the event of non-compliance. The children were not engaged in dangerous activities for which disciplinary acts might be justified on the grounds of keeping the children safe (as with a school bus driver or school-crossing supervisor, for example\(^{51}\)). Nor was it apparent that the parents of the children had vested any such authority in the institution. The circumstances of the cases can be distinguished, therefore, from cases such as *Bazley v Curry, Lister v Hesley Hall* and *New South Wales v Lepore* in which the institutions were vested with authority either by legislation or principal carers to direct the conduct of the children in their care and had conferred that authority upon the employee who sexually assaulted the child.\(^{52}\)

*G(ED) v Hammer*\(^{53}\) is another case in which an institution was not held strictly liable for the sexual assault of a child within its care by an employee. The plaintiff in that case attended a government school at which she was sexually assaulted by a janitor employed by the School Board.\(^{54}\) As in *New South Wales v Lepore*, the School Board was vested with authority to direct

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49 Ibid 76-77.
50 Ibid 83.
52 Even if some type of authority could be found to have been vested in the club in certain limited circumstances (either because dangerous activities were being engaged in or because parents had conferred specific authority upon the club), most of the assaults in *Jacobi v Griffiths* occurred at Harry Griffith’s home so that it could not have been said that he was exercising any authority to direct the conduct of the children that had been conferred upon him at the time the assaults occurred.
the conduct of the children in its care. Unlike *New South Wales v Lepore*, however, that authority had not been conferred upon the janitor. It was not necessary for the janitor to be conferred any authority to direct the conduct of the children in order for the janitor to perform his duties. As McLachlin CJC commented in delivering the judgment of the Supreme Court of Canada: 55

Janitors had no direct duties relating to the care or instruction of students. Nor did they have direct authority over the students — not even the authority to discipline them. If a janitor saw a student misbehaving, the most he could do was report the behaviour to the principal, who would then discipline the child herself.

Similar circumstances arose in *B v Order of the Oblates of Mary Immaculate*. 56 The plaintiff in that case attended a residential school for First Nations children run by the defendant institution. The plaintiff was sexually assaulted on numerous occasions by Martin Saxey, the school baker. 57 The baker, like the janitor in *G(ED) v Hammer*, did not need to be able to direct the conduct of children at the school to perform his duties. As no such authority had been conferred upon Martin Saxey, the institution was not held strictly liable for the sexual assaults.

The conferral of authority can be seen, therefore, to be as significant in the school relationship, as it is in the employment relationship. The cases concerning the school relationship confirm the hypothesis that strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another generally only arises where the person who wrongfully injures the student has been conferred authority by a school or closely analogous institution to direct the conduct of the student.

### IV SCOPE OF THE STRICT LIABILITY

Employers and schools are not held strictly liable whenever a person upon whom authority has been conferred to direct the conduct of an employee or student wrongfully injures the employee or student. Strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another is generally limited to circumstances in which the person upon

55 Ibid 557-558.
57 Ibid 389.
whom authority has been conferred by an employer or school wrongfully injures the employee or student in the course of exercising the conferred authority. The reason is that unless the authority conferred by an employer or school is first being exercised, the power relationship created by the conferral of authority is not in a position to be abused. Without the potential for the power relationship created by the conferral of authority to be abused, there is no basis upon which strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another can be imposed.

Importantly, whether a person upon whom authority has been conferred by an employer or school to direct the conduct of an employee or student wrongfully injures the employee or student in the course of exercising the conferred authority is determined by reference to the terms of the apparent authority conferred by the employer or school, as opposed to the terms of the actual authority conferred by the employer or school. Provided an employee or student reasonably believes that the person upon whom authority has been conferred by their employer or school is acting within the terms of the apparent authority conferred by the employer or school immediately prior to the wrongdoing occurring, any wrongdoing by the person upon whom authority has been conferred will be taken to have occurred in the course of exercising the conferred authority. It follows that strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another can still be imposed even when the person who wrongfully injures an employee or student is acting outside the terms of the actual authority conferred by the employer or school. This is best demonstrated by the child sexual assault cases.

In the child sexual assault cases, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another could not have been imposed if the scope of the strict liability was determined by reference to the terms of the actual authority conferred by the schools or closely analogous institutions upon their employees. The employees who committed the assaults in those cases had not been conferred any actual authority to sexually assault a child in their care or to engage in conduct with
the purpose of sexually assaulting a child.\textsuperscript{58} Immediately prior to the assaults occurring, however, the employees were engaged in activities within the terms of the apparent authority that had been conferred upon them by the schools or closely analogous institutions, activities such as putting a child to bed\textsuperscript{59} or disciplining a child.\textsuperscript{60} As the employees were acting within the terms of the apparent authority conferred upon them by the schools or closely analogous institutions, there was the potential for the conferred authority to be abused. It follows that the assaults occurred in the course of exercising the conferred authority so that strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another could be imposed.

The reason the scope of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another is determined by reference to the terms of the apparent (as opposed to the actual) authority conferred by an employer or school is because the employee or student over whom authority has been conferred will interact with the person upon whom authority has been conferred on the basis of the terms of the apparent authority conferred by the employer or school. One reason a student will go with a teacher into a storeroom, for instance, is because the teacher has the apparent authority to direct the student to do so.\textsuperscript{61} The power relationship between the person upon whom authority has been conferred and the employee or student over whom authority has been conferred is therefore shaped by the terms of the apparent authority conferred by the employer or school upon that person and not by the terms of the actual authority that has been conferred. It is the potential for this power relationship to be abused which puts employees and students at risk of physical harm.

The terms of the apparent (as opposed to the actual) authority conferred by an employer or school are also used in the employment context to determine

\textsuperscript{58} It was acknowledged by the Supreme Court of New Zealand in Dollars & Sense Finance Ltd v Rerekohu Nathan [2008] 2 NZLR 557 (at 576) that acts knowingly done for the purpose of enabling wrongdoing to occur could not be considered to have been done within the actual authority of the wrongdoer.

\textsuperscript{59} See, eg, Lister v Hesley Hall Ltd [2002] 1 AC 215.

\textsuperscript{60} See, eg, New South Wales v Lepore (2003) 212 CLR 511.

\textsuperscript{61} Ibid.
the scope of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another. Consider *Petrou v Hatzigeorgio*\(^62\) which was mentioned above. The partner in that case had not been conferred any actual authority to physically threaten the employee or set the employee on fire. Despite this, the partnership was still held strictly liable to the employee. The decision can be explained on the basis that, immediately prior to the wrongdoing occurring, the partner was acting within the terms of the apparent authority conferred by the partnership by directing the employee as how best to deal with the problem of the spilt paint thinner. As the employee in such circumstances would have been expected to stand and listen to the partner's response, limiting the options the employee might have had in responding to the impending danger, there was the potential for the power relationship created by the conferral of authority to be abused. This is subsequently what happened when the partner struck the match. It follows that the wrongdoing occurred in the course of the partner exercising the conferred authority and strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another could be imposed.

The facts of the Scottish case of *MacMillan v Wimpey Offshore Engineers and Constructors Ltd*\(^63\) provide another example, even though the case was decided under statute. In that case, the pursuer was employed on an oil rig. He was standing outside his employer's office on the oil rig discussing with his foreman and another employee a job he was required to do in the course of his employment when the foreman grabbed the pursuer and 'battered his head against a metal skip'.\(^64\) The employer was held liable under the statute for this battery,\(^65\) but arguably could also have been held strictly liable at common law. Once again, although neither the battery nor the acts leading


\(^{63}\) [1991] SLT 515 ("MacMillan").

\(^{64}\) Ibid 516.

\(^{65}\) *Offshore Installations (Operational Safety, Health and Welfare) Regulations 1976 (UK)* No 1672, reg 32(3) enacted under the *Mineral Workings (Offshore Installations) Act 1971 (UK)* c 61 stated that every person on the oil rig had a duty 'not to do anything likely to endanger the safety or health of himself or any other person on or near the installation' and reg 32(2) made it the duty of the employer to ensure that every employee complied with reg 32(3). The liability of the employer under these regulations was described as a 'direct' liability rather than a vicarious liability by the court.
up to the battery were within the terms of the actual authority conferred upon the foreman by the employer to direct the conduct of the pursuer, the foreman was acting within the terms of the apparent authority that had been conferred upon him by the employer immediately prior to the wrongdoing as he was directing the pursuer as to the work he was required to do on the rig. As the pursuer was expected to stand and listen to those directions, there was the potential for the foreman to abuse the power relationship created by the employer’s conferral of authority. This is subsequently what happened when the foreman thrust the pursuer’s head into the metal skip. These facts are indistinguishable from a case such as Kondis. This is not a situation where two employees of equal rank fight in the staff room. In that type of situation, neither employee has been conferred authority to direct the conduct of the other by the employer. Consequently, both employees are in a position where they can take steps for their own protection and there is no power relationship created by the conferral of authority which is subject to abuse.

Consider further cases in which an employee has been sexually assaulted in the workplace. In Reilly v Devereux, a gunner in the army was sexually assaulted by his Sergeant. Despite the Supreme Court of Ireland refusing to hold the army strictly liable for the sexual assault, the facts are indistinguishable from those in MacMillan. The assaults took place in the Sergeant’s office and the Sergeant was acting within the terms of the apparent authority conferred upon him by the army to direct the conduct of the gunner immediately prior to the assaults occurring. Reilly v Devereux can be contrasted with Antoniak v Commonwealth in which the Commonwealth government was not held strictly liable for a sexual assault committed by one soldier against another of equal rank.

As the scope of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another is not limited by the terms of the actual authority conferred by an employer or school upon the person

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68 (1962) 4 FLR 454.
who wrongfully injured the employee or student, the scope of the strict liability is broader than it otherwise would be. It is not, however, unlimited. It is still possible to envisage situations in which an employer or school will not be held strictly liable for the wrongdoing of a person upon whom authority has been conferred to direct the conduct of an employee or student.

It is unlikely, for instance, that an employer would be held strictly liable if a foreman upon whom authority had been conferred in relation to another employee walked into the staff room and shot that employee whilst the employee was at lunch. As the employee in such circumstances is on a break and not dealing with the foreman in any official capacity, the apparent authority conferred by the employer upon the foreman to direct the conduct of the employee is not being exercised. As the foreman is not exercising the conferred authority immediately prior to the wrongdoing, the power relationship created by the conferral of authority is not in a position to be abused and there is no basis upon which strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another can be imposed. At best, the employer provided an opportunity for the wrongdoing to occur by giving the employees access to the staff room and it has long been recognised that providing a mere opportunity for wrongdoing to occur is an insufficient basis upon which strict liability for the wrongdoing of another in tort can be imposed.

Nor is it likely that a school would be held strictly liable to a student sexually assaulted by a teacher at the teacher's home on the weekend. The authority conferred upon a teacher by a school is limited to the school relationship so that the teacher cannot reasonably be considered to be exercising that authority outside the school relationship. Once again, if the teacher is not exercising the conferred authority, the power relationship created by the conferral of authority is not in a position to be abused and there is no basis upon which strict liability for the wrongdoing of a person

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69 For a similar factual scenario, where one employee shot another outside the work premises see Gittani Stone Pty Limited v Pavkovic (2007) Aust Torts Reports ¶¶81-924.
70 As occurred in Jacobi v Griffiths (1999) 174 DLR (4th) 71.
71 The school relationship extends to school excursions; cf ST v North Yorkshire County Council [1999] LGR 584 which was overruled by Lister v Hesley Hall Ltd [2002] 1 AC 215.
upon whom authority has been conferred in relation to another can be imposed.

Any concern that strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another is still too broad\textsuperscript{72} needs to be considered in light of the principal requirement that needs to be satisfied for the strict liability to be imposed. The key feature of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another is that it only arises where the person who wrongfully injured an employee or student has been conferred authority by an employer or school to direct the conduct of an employee or student. This narrows considerably the scope of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another.

V TO WHOM IS THE STRICT LIABILITY OWED?

As strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another arises by reason of both the employment and school relationships, the strict liability is owed to both employees and students.

A Employees

It is not always easy to determine who is an employee for the purposes of tort law. Currently, a range of indicia are used to determine whether a contract securing the use of human resources is an employment contract. Those indicia include:\textsuperscript{73}

the right to have a particular person do the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like.

\textsuperscript{72} See, eg, \textit{New South Wales v Lepore} (2003) 212 CLR 511, 601-603 (Gummow and Hayne JJ). See also \textit{Reilly v Devereux} [2009] IESC 22 (Kearns J): 'To hold otherwise would be to extend to the Defence Forces a virtual new species of liability where the defendants would be liable for virtually every act or omission of an employee.'

\textsuperscript{73} \textit{Stevens v Brodribb Sawmilling Company Pty Ltd} (1986) 160 CLR 16, 36 (Wilson and Dawson JJ).
They also include control. Control has often been criticised as an indicium of employment on the basis that it is very difficult to say that an employer can control how a skilled employee does their work. Despite such criticisms, 'control' continues to be used as an indicium of employment, although in the more refined sense of an employer having the authority to direct the behaviour of an employee. As the High Court of Australia explained in Zuijis v Wirth Brothers Pty Ltd:

The duties to be performed may depend so much on special skill or knowledge or they may be so clearly identified or the necessity of the employee acting on his own responsibility may be so evident, that little room for direction or command in detail may exist. But this is not the point. What matters is lawful authority to command so far as there is scope for it. And there must always be room for it, if only in incidental or collateral matters...

This more modern sense of 'control' reflects the notion of authority which is at the centre of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another. It follows that for strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another to be imposed, a person needs at the very least to have been engaged under a contract which vests an employer with general authority to direct the conduct of the person in the course of the employer's business. Such authority is broad in scope and has the potential, when conferred upon another person, to be abused. This can be contrasted with any of the other types of contracts that might be entered into by an employer in order to secure the use of human resources. For example, an employer may engage a person to do a particular thing, such as write a report or build a structure. Under such contracts, although some type of authority may be vested in the employer, it will necessarily be limited by reference to the task and its duration. The narrow nature of such authority and its limited duration is therefore generally insufficient to attract strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another as there is only limited capacity for such authority to be abused.

74 Ibid 24.
76 (1955) 93 CLR 561, 571.
B Students

It is not too difficult to identify who is a student for the purposes of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another. A student is any child enrolled at a private or public institution regulated as a school by legislation in the jurisdiction in which it is situated. Schools, however, are not the only institutions which care for children and the child sexual assault cases show that institutions other than schools might be subject to strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another. The question then is what other child care institutions are sufficiently analogous to a school that strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another can be imposed in respect of children attending those institutions.

It is very difficult to make generalisations as to what types of child care organisations other than schools might be subject to strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another. Ideally, each child care organisation would have to be individually assessed to see whether the organisation was vested with sufficient authority to direct the conduct of the children in its care. Although such an analysis is beyond the scope of this thesis, over time what could foreseeably emerge is a scale of child care organisations with child care organisations at one end of the scale which are analogous to schools so that they are subject to strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another, and child care organisations at the other end of the scale which are not subject to strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another. Where a child care organisation sat on this scale would depend on the degree of authority vested in the child care organisation to direct the conduct of the children in its care.

For instance, it is possible to analyse the relationship between long-day child care centres and the children in their care in very similar terms to the relationship between a school and a student. A long-day child care centre,
for example, will organise certain activities throughout the day, will arrange for children to eat and take naps and will even, where necessary, take steps to discipline children. The centre is essentially appointed to act as a surrogate parent of a child whilst the child is in its care. The centre is authorised to do this by way of the contractual relationship between the centre and the parent of the child. In this sense, a long-day child care centre is quite like the care facility upon which strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another was imposed in *Bazley v Curry*.77 There is also an increasing amount of government regulation of such centres.78 Governments in a number of jurisdictions have advocated the use of the centres so as to encourage women with children into the workplace.79 Consequently, it might be possible in future to say that the authority to direct the conduct of children is derived from legislation, as has since become the case with schools.80

In contrast, it is difficult to analyse the relationship between children and organisations which provide a range of recreational activities in similar terms. It is not clear what authority can be exercised by these organisations over the children in their care. For instance, is an organisation like Scouts vested with authority to discipline a child? If not, it is likely to be seen as analogous to the recreational child care provider in *Jacobi v Griffiths*81 such that strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another cannot be imposed.82

VI OTHER RELATIONSHIPS

Are there relationships other than the employment and school relationships by reason of which strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another might be imposed?

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78 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW).
80 See Ramsay v Larsen (1964) 111 CLR 16, cf Hole v Williams (1910) 10 SRNSW 638.
82 cf *Fitzgerald v Hill* (2008) 51 MVR 55 which involved a Tae Kwon Do academy.
Possibly; but it would need to be shown that one of the parties in the relationship was vested with authority to direct the conduct of the other party and that such authority could be conferred upon another person in circumstances in which there was the potential for such authority to be abused.

A Police

One such relationship which gives rise to strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another is the relationship between a State and its citizens in respect of the wrongdoing of a member of the police force. A State is vested with coercive authority to direct the conduct of its citizens which is then conferred upon members of the police force to uphold the laws of the State. This authority is closely analogous to that found in the employment and school relationships.

Consider the decision of the Supreme Court of California in Mary M v City of Los Angeles. In that case, a police officer, whilst in uniform and driving a marked police vehicle, pulled over a female driver and subjected her to a sobriety test. When she failed the test, the police officer drove her home and raped her. Her efforts to resist the attack were rebuffed with threats that the police officer would take her to jail. The female driver successfully sued the governmental authority that employed the police officer for the injuries she sustained as a result of the rape. In holding the City of Los Angeles strictly liable for the rape, the court focussed on the coercive authority conferred upon the police officer by the City.

Police officers occupy a unique position of trust in our society. They are responsible for enforcing the law and protecting society from criminal acts. They are given the authority to detain and to arrest and, when necessary, to use deadly force. As visible symbols of that formidable power, an officer is furnished a distinctively marked car, a uniform, a badge, and a gun. Those who challenge an officer’s actions do so at their peril; anyone who resists an officer’s proper exercise of authority or who obstructs the performance of an officer’s duties is subject to criminal prosecution.

Immediately prior to the assault in Mary M, the police officer was exercising the authority which had been conferred upon him by the city of Los Angeles.

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83 (1991) Cal 3d 202 ('Mary M').
84 Ibid 219.
85 Ibid 206 (Kennard J).
It is unlikely, for instance, that the female driver would have allowed herself to be pulled over or gone with the police officer other than for the reason that he was a police officer who was exercising the authority conferred upon him by the government authority to direct her conduct. In such circumstances, there was the potential for the police officer to abuse the conferred authority. This is subsequently what happened when the police officer raped her. It follows that, in the circumstances of the case, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another could be imposed.

The Privy Council reached a similar decision in *Bernard v Attorney General of Jamaica*. In that case a uniformed police officer had jumped in at the front of a queue waiting to use a telephone at the Central Sorting Office in Kingston. The plaintiff, who was next in line, refused to let go of the phone, even after the police officer asserted that the telephone was needed for police business. In response, the police officer shot him in the head at point-blank range. It was later established that there was no emergency for which the police officer needed the phone. The plaintiff succeeded in suing the governmental authority responsible for employing the police officer in respect of the injuries he sustained as a result of the shooting. The basis of the judgment was the fact that the police officer ‘had purported to act as a policeman immediately before he shot the plaintiff’. Once again, as the police officer was exercising the apparent authority conferred upon him by the governmental authority immediately before the shooting, there was the potential for the police officer to abuse the conferred authority. This is subsequently what happened when the police officer shot the plaintiff. It follows that, in the circumstances of the case, there was a sufficient basis for strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another to be imposed.

Before strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another can be imposed on the State in respect of the wrongdoing of a police officer, it first needs to be shown that the

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87 Ibid [26].
wrongdoing occurred in the course of the police officer exercising the apparent authority conferred upon the police officer by the State. This is because it is only in such circumstances that there is the potential for the power relationship created by the conferral of authority to be abused. This requirement was satisfied in both of the above cases as the police officers were both in uniform and acting within the terms of the apparent authority conferred upon the police officers immediately prior to the wrongdoing occurring. By way of contrast, consider the decision of the Privy Council in Attorney-General of the British Virgin Islands v Hartwell.\textsuperscript{88} The police officer in that case was based in the British Virgin Islands. Whilst on duty, he abandoned his post and went to look for his life partner who he suspected of having an affair. He took a gun with him from a cabinet at the police station, but was not wearing his police uniform at the time.\textsuperscript{89} When the police officer found the bar at which his life partner was having dinner with another man, he fired four shots without warning, one of which struck the plaintiff causing him serious injuries. At no time in the lead up to the shooting did the police officer identify himself as a police officer. The plaintiff failed in his attempt to hold the governmental authority which employed the police officer liable for the shooting. The court found that the shooting 'had nothing whatever to do with any police duties, either actually or ostensibly'.\textsuperscript{90} As the police officer did not shoot the plaintiff in the course of exercising the authority conferred upon him by the State, the power relationship created by the conferral of authority was not in a position to be abused. Consequently, there was no basis upon which strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another could be imposed.

Unfortunately, it is not always easy to determine whether or not a police officer wrongfully injures another person in the course of exercising the authority conferred upon them by a State. It can be quite difficult, as seen in the English decision of \textit{N v Chief Constable of Merseyside Police}.\textsuperscript{91} The police officer in this case had gone off duty at about 2am in the morning.

\textsuperscript{88} [2004] 1 WLR 1273.  
\textsuperscript{89} Ibid 1276.  
\textsuperscript{90} Ibid 1278.  
\textsuperscript{91} [2006] 1 Pol LR 160.
Whilst remaining in uniform, he got into his car and parked outside a night club. He was still there at 4am in the morning when a woman left the club to run across the road to get a kebab. The woman was under the influence of both drugs and alcohol and the first aid officer at the club was trying to encourage her to get in a cab and go home. The police officer had the window of his vehicle down and asked the first aid officer if everything was ok. The first aid officer explained what he was trying to do and the police officer said he would ‘sort it’. He told the women that he was the police and that he would drive her to the police station. Instead of driving her to the police station, however, the police officer drove her to his own home and raped her. Justice Nelson in the High Court found that the governmental authority which employed the police officer could not be held strictly liable for the rape. The basis of his judgment appears to be the judge’s view that the police officer was ‘on the prowl’ for a victim at the time he came across the plaintiff, which was why he was sitting in his car outside the night club at 4am in the morning. The judge was therefore concerned that the police officer was out on a ‘frolic of his own’. This might be true, but given that the police officer was exercising his apparent authority as a member of the police force immediately prior to the woman getting into his car, it is very difficult to say that the potential for the police officer to abuse the conferred authority did not exist. It is very unlikely that the woman would have got in the car, or the first aid officer would have allowed her to get in the car, but for the fact that it was driven by a police officer who said he was going to take her to the police station. On this basis, it is very difficult to distinguish *N v Chief Constable of Merseyside Police* from a case such as *Mary M*.

It follows that strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another can be imposed on a State in respect of the wrongdoing of a police officer when the police officer wrongfully injures another person in the course of exercising the authority conferred upon the police officer by the State. Such liability arguably also

\(^92\) See *Bugge v Brown* (1919) 26 CLR 110.
\(^93\) [2006] 1 Pol LR 160, [33].
\(^94\) Previous restrictions on the capacity of the Crown to be sued in respect of the wrongdoing of police officers has been removed by legislation in most Australian states and Territories.
extends to the wrongdoing of prison officers who are conferred similar authority in respect of prison inmates.95

B Churches

With the recent publicity surrounding the abuse of children in churches and church run organisations throughout the world,96 there has been speculation as to whether strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another might be imposed on a church in respect of the wrongdoing of a priest. It is not clear, however, whether the relationship between a church and its parishioners is sufficiently analogous to the employment and school relationships for such liability to be imposed.

Courts have traditionally been very reluctant to impose strict liability on a church in respect of the wrongdoing of a priest. In Rita M v Roman Catholic Archbishop of Los Angeles,97 for instance, the Californian Court of Appeal refused to hold the Roman Catholic Church strictly liable when six parish priests conspired to use their position to have regular sexual intercourse with a 16 year old girl in the parish. The girl fell pregnant, was sent by the priests to the Philippines to have her baby and subsequently abandoned. The Californian Court of Appeal also refused to hold the Baptist Church strictly liable in Jeffrey E v Central Baptist Church98 for a series of sexual assaults committed by a Sunday school teacher of a six year old boy.

Part of the reason why courts have been reluctant in the past to impose strict liability on a church in respect of the wrongdoing of a priest was that the type of wrongdoing involved went so far beyond the ideology of the church that it was difficult to make a connection between the church and the wrongdoing. As Sonenshine J commented in Jeffrey E, 'the acts were independent, self-

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99 (1988) 197 Cal App 3d 718 ('Jeffrey E').
serving pursuits unrelated to church activities'. There have also been difficulties assessing whether a priest is an employee in the traditional sense and if so, whether there is a single entity that can be identified as their employer.

More recently, however, courts have started to hold churches strict liability for the wrongdoing of a priest. In *John Doe v Bennett*, the Supreme Court of Canada held the Roman Catholic Church strictly liable when a priest sexually assaulted a number of choir boys in his parish over a period of almost two decades. In *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church*, the English Court of Appeal held the Roman Catholic Church liable for the sexual abuse of a 12 year old boy who had come into contact with the priest in a shopping centre carpark, although the boy was not actually a parishioner of the church.

This shift towards imposing strict liability on a church in respect of the wrongdoing of a priest has been prompted by the recent cases in which schools and closely analogous institutions have been held strictly liable for the wrongdoing of a teacher or other carers, including sexual assaults. The courts have reasoned that just as a school puts a teacher into a position of intimacy with respect to students, a church puts a priest into a position of psychological intimacy with respect to the children of the parish. This analogy, however, is not precise. Schools are vested with legally recognised authority to direct the conduct of students and confer that authority on a teacher to enable students to be educated. Churches might be intimate with their parishioners but they are not vested with any formal authority to direct the conduct of the parishioners.

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99 Ibid (5b).
100 Such issues are canvassed in Ian R Stauffer and Christian Bourbonnais Hyde, 'The sins of the Fathers: Vicarious liability of Churches' (1993) 25 Ottawa Law Review 561. They were also recently considered by the New South Wales Court of Appeal in *Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565.
Whether strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another can be imposed on a church in respect of the wrongdoing of a priest is a difficult question. It might be possible to develop an authority based analogy which relates more closely to the strict liability imposed on schools or closely analogous institutions than the current analogy based on intimacy. It could be argued, for instance, that although churches are not vested with formal authority to direct the conduct of their parishioners, they are vested with a different type of authority in respect of the spiritual behaviour of their parishioners. Such authority is not dissimilar in nature to the authority vested in a school authority or an employer as a failure to obey directions may be perceived as having disciplinary consequences (though perhaps not immediate). The strength of such authority will also tend to increase the more 'immature and inexperienced' members of the congregation are, as is the case with children. The danger with this kind of analogy, however, is that the concept of 'authority' is weakened to the point that it can be found in any relationship in which an opportunity for wrongdoing is provided. This is not what the cases suggest strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another is about. It has been said time and time again that something more is needed to impose strict liability on one person for the wrongdoing of another than a defendant simply providing the opportunity for wrongdoing to occur. Hospitals, for instance, are not held strictly liable when a doctor sexually assaults a patient. Although a hospital provides an opportunity for a sexual assault to occur, doctors are not conferred any authority to direct the conduct of the patient by the hospital. Consequently, there is an insufficient connection between the hospital and the wrongdoing for strict liability to be imposed.

The dangers of extending strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another to churches in respect of the wrongdoing of priests can be seen in Maga v The Trustees of

106 Ibid 304 (Werdegar J): 'Hospital did not give Tripoli any power to exercise general control over plaintiff's liberty. He was not vested with any coercive authority, and the trust plaintiff was asked to place in him was limited to conduct of an ultrasound examination.'
the Birmingham Archdiocese of the Roman Catholic Church. The church was held strictly liable for the assault of the boy in that case even though the church 'did not seek to engage with the boy' on any religious level.

Various reasons were given for the strict liability, including the 'degree of general moral authority' vested in the priest by the church. It is very difficult, however, to say that the church in that case was vested with any authority over the boy given that the boy was not a parishioner and did not engage with the priest on a religious level (if indeed he had any faith at all).

It is very difficult, therefore, to see how the church might have created a power relationship between the priest and the boy by vesting the priest with authority to direct the conduct of the boy which the priest was then in a position to abuse.

C Parents

Another relationship within which authority is present is the relationship between a parent and child. In much the same way as an employer or school is vested with authority to direct the conduct of an employee or student, a parent is able to direct the conduct of their child. Such authority, however, arises without the intervention of the State. It is an authority which arises naturally by virtue of established non-legal social practice as opposed to being created and enforced by the law.

Although a parent is able to direct the conduct of their child, courts have not been very willing to impose civil liability on parents in respect of the exercise of that authority. Parents, for instance, have long been thought not to owe their child a duty of care unless the harm to the child results from some type of action by the parent that places the child in danger. In contrast, schools are subject to a positive duty to take reasonable steps for the safety of the

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108 Ibid 1447.
109 Ibid 1455.
110 The authority is not created by legislation and cannot be upheld by the courts by way of a civil action. In contrast, an employer can approach the courts to enforce their authority over an employee through an action for breach of contract.
111 For example, the parent of a child hit by a car was held liable to the child in McCallion v Dodd [1966] NZLR 710 because the parent had required the child to walk on the side of the road at night.
children in their care.\textsuperscript{112} Compare the following cases. In \textit{Arnold v Teno}\textsuperscript{113} the Supreme Court of Canada found that a mother was not liable to her daughter who had been struck by a car on a busy road after purchasing an ice-cream at an ice-cream van after the mother had given her daughter money for that purpose and sent her off alone. In contrast, the House of Lords in \textit{Barnes v Hampshire County Council}\textsuperscript{114} found a school liable to a student that was injured by a truck on her way home from school after the children were released from school five minutes before the official closing time.

Various reasons have been given for the reluctance of the courts to impose liability on parents, including difficulties in setting the standard of care,\textsuperscript{115} a concern not to interfere in family relationships,\textsuperscript{116} or even a concern that if liability were imposed no one would be prepared to assist parents in looking after their children.\textsuperscript{117} Whatever the reason, there do not appear to be any cases in which strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another has been imposed on a parent; for instance, in respect of the wrongdoing of a babysitter who has

\textsuperscript{112} See, eg, \textit{Geyer v Downs} (1977) 138 CLR 91.
\textsuperscript{113} (1978) 83 DLR (3rd) 609.
\textsuperscript{114} [1969] 1 WLR 1563.
\textsuperscript{115} See \textit{Surtees v The Royal Borough of Kingston Upon Thames} [1992] PIQR 101,123-124 (Vice-Chancellor): 'The studied calm of the Royal Courts of Justice, concentrating on one point at a time, is light years away from the circumstances prevailing in the average home. The mother is looking after a fast moving toddler at the same time as cooking the meal, doing the housework, answering the telephone, looking after the other children and doing all the other things that the average mother has to cope with simultaneously or in quick succession in the normal household. We should be slow to characterize as negligent the care which ordinary loving and careful mothers are able to give to individual children, given the rough and tumble of home life.'
\textsuperscript{116} \textit{Posthuma v Campbell} (1984) 37 SASR 321, 329 (Jacobs J): '...to assert that the duty is absolute an unqualified, and that only the breach of that duty, as distinct from the existence of the duty, is to be determined by what is reasonable in the circumstances, represents to my mind a wholly unacceptable intrusion of the law of negligence into family and domestic relationships. It would impose a fetter on parental judgment and discretion, presumably by reference to some imaginary norm.'
\textsuperscript{117} \textit{Robertson v Swincer} (1989) 52 SASR 356, 361-362 (King CJ): 'The threat to the financial security of parents and families is by no means the only adverse social consequences to be feared. Parents and children in our society are very depending upon the support and assistance of benefactors. Children are cared for frequently by supportive relatives and friends and by kindly neighbours. What would be the effect upon such supportive arrangements of the knowledge that a failure of care in supervision might expose the benefactor to being stripped of his assets in consequence of an action for damages?'}
injured a child. In fact, it would be quite odd if the courts did impose such liability given that the courts rarely impose liability when the authority is exercised by parents themselves.

VII Conclusion

Strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another was previously imposed under the label ‘liability for breach of a non-delegable duty of care’. Such a label gave few clues as to basis of the liability or its limits. By focussing on the one feature which the various relationships in which the courts impose strict liability for the wrongdoing of another in tort have in common, it can now be seen that strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another responds to the potential for abuse of the power relationship created by the conferral of authority by an employer or school on another person to direct the conduct of an employee or student by holding the employer or school strictly liable for the wrongdoing of the person upon whom authority has been conferred. Unlike previous explanations, the conferral of authority by an employer or school upon the person who wrongfully harms the plaintiff is both necessary and sufficient for strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another to be imposed.

118 Though see Horejsi v Anderson (1984) 353 NW 2d 316 (Supreme Court of North Dakota).
Chapter 5
Strict Liability for the Wrongdoing of an Employee

The second form of strict liability for the wrongdoing of another in tort identified by the new expositive framework put forward by this thesis is strict liability for the wrongdoing of an employee. As explained in chapter 3, this form of strict liability is limited to the employment relationship and responds to the potential for an employer, when exercising their authority to direct the conduct of an employee for their own benefit, to abuse that authority by creating a conflict between an employee's duties under their employment contract and any other general law obligations or responsibilities the employee might owe.

This chapter will start by examining the basis of strict liability for the wrongdoing of an employee. It will then determine the nature of the strict liability, the circumstances in which it arises, the scope of the strict liability and who is an employee for the purposes of the strict liability. Finally, the chapter will consider the associated doctrine of imputed contributory negligence and whether it is appropriate to describe strict liability for the wrongdoing of an employee as either liability for a master's or a servant's tort.

I BASIS OF THE STRICT LIABILITY

The authority vested in an employer to direct the conduct of an employee is unique, for it is an authority that can be exercised by an employer for their own benefit. This enables an employer to use the authority to further their business objectives.\(^1\) It can, however, also put strangers to the employment relationship at risk of harm.

Consider a scenario where an employee is allocated a number of jobs to do by her employer on a particular day. The jobs are at different locations so that, in order to complete the jobs, the employee needs to travel by car. Her employer, however, has made inadequate allowance for travel times when

\(^1\) Subject to the terms of the employment contract.
allocating the employee her jobs. This means that to get her jobs done, the employee will have to rush whilst travelling between jobs. Alternatively, she might drive with reasonable care and risk failing to complete her allocated tasks. The employee is therefore faced with a choice. She must either comply with the directions of her employer and risk harming a stranger to the employment relationship and being held legally responsible for that harm, or comply with her general law obligations and responsibilities and risk the immediate threat or fear of disciplinary action for failing to pursue or comply with the directions of her employer.

As this scenario demonstrates, the problem with an employer being able to exercise their authority to direct the conduct of an employee for their own benefit is that the employer might do so without making adequate allowance for the discharge of other obligations or responsibilities owed by the employee. In such circumstances, there is the potential for an employer to create a conflict between an employee’s duties under their employment contract and other general law obligations or responsibilities the employee might owe.\(^2\) This conflict can put pressure on an employee to follow their employer’s directions rather than complying with their obligations or responsibilities at general law. The exercise of authority by an employer over an employee is therefore subject to abuse. An employer, for instance, may direct an employee to act in ways that involve unreasonable risk because of the associated costs. Strangers to the employment relationship are consequently put at risk because an employer can exercise their authority to direct the conduct of an employee for their own benefit.

It is submitted that it is this potential for an employer to abuse their authority to direct the conduct of an employee by creating a conflict between an employee’s duties under their employment contract and other general law obligations or responsibilities the employee might owe which attracts the concern and the intervention of the law. Strict liability for the wrongdoing of an employee responds to the potential for abuse of the authority vested in an employer by holding an employer liable regardless of personal fault for any

\(^2\) Remember that the conflict will not always exist, but there is arguably always the potential for such a conflict to arise. See further chapter 3.
harm wrongfully caused by an employee to a stranger to the employment relationship. The liability effectively holds an employer to account for damage wrongfully caused by an employee to a stranger to the employment relationship in the course of their employment. In so doing, the liability provides strangers to the employment relationship with a degree of protection from an abuse of the authority vested in an employer to direct the conduct of an employee for their own benefit.

As noted in the previous chapter, it is relatively unusual in tort law for one person to be held strictly liable for the wrongdoing of another in tort, and a defendant has to do more than merely provide an opportunity for wrongdoing to occur for such liability to be imposed. Because an employer can exercise their authority to direct the conduct of an employee for their own benefit, an employer does do more than merely provide an employee with an opportunity to engage in wrongdoing. An employer may induce an employee to engage in wrongdoing by pressuring the employee to follow the employer’s directions rather than complying with their obligations or responsibilities at general law. It is not that a conflict of obligations will necessarily arise, but there is always an inherent risk that an employer will abuse their authority to direct the conduct of an employee by creating a conflict between an employee’s duties under their employment contract and any other general law obligations or responsibilities the employee might owe. As will be seen from the cases, this risk appears sufficient for strict liability for the wrongdoing of another in tort to be imposed.

II NATURE OF THE STRICT LIABILITY

As with strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another, strict liability for the wrongdoing of an employee is not an absolute form of liability; it is not imposed in the absence of wrongdoing. It still needs to be shown that the employee engaged in wrongful conduct which caused a stranger to the employment

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relationship harm. The liability is, however, imposed *regardless* of wrongdoing by the employer. This means that strict liability for the wrongdoing of an employee can be imposed even though an employer may be able to adduce evidence that the directions given by the employer did not wrongfully contribute to the damage suffered by the stranger to the employment relationship. It is also not possible for an employer to escape strict liability for the wrongdoing of an employee by adducing evidence that the employer did not abuse the authority vested in them by the employee by creating an actual conflict between the employee's duties under their employment contract and other general law obligations or responsibilities the employee owed. This is because the liability responds to a *potential* rather than an *actual* abuse of the authority vested in an employer.

Although it may seem harsh that an employer can be subject to strict liability for the wrongdoing of an employee regardless of personal wrongdoing, an employer need not necessarily bear such liability alone. In certain circumstances, an employer will be entitled to seek an indemnity from the employee.⁴

It has not always been clear why an employer should have the right to be indemnified by an employee against any loss sustained by the employer in meeting a claim brought by a stranger to the employment relationship for strict liability for the wrongdoing of an employee. Indeed, the right of indemnity has been removed by statute in a number of jurisdictions.⁵ The indemnity does, however, play an important role in strict liability for the wrongdoing of an employee. It enables an employer to recover the loss sustained in meeting a claim brought by a stranger to the employment relationship where the employer's exercise of authority did not wrongfully contribute to the stranger's harm.⁶ This does not mean that an employer will necessarily call on the indemnity.⁷ There are a number of reasons why an

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⁴ *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555.
⁵ See, eg, *Employees Liability Act 1991* (NSW), s 3.
⁶ Although it is a right rarely exercised by employers, it is a right which exists should they choose to exercise it.
⁷ See references to the 'gentleman's agreement' entered into by insurers not to enforce the indemnity in *Morris v Ford Motor Co Ltd* [1973] 1 QB 792, 799.
employer might choose not to do so. What is important is that the indemnity exists and may be called upon by an employer. This will generally be in those circumstances in which an employer did not actually abuse their authority to direct the conduct of an employee by creating a conflict between the employee’s duties under their employment contract and other general law obligations or responsibilities the employee might owe.

Should an employer choose to call on the indemnity, the extent to which the employer might have contributed to the employee’s wrongful conduct will need to be assessed. It follows that the employer’s indemnity from an employee is not absolute. An employer should only have a right to be indemnified up to the point at which they themselves did not wrongfully contribute to the stranger’s harm by abusing their authority over the employee by creating a conflict between the employee’s duties under their employment contract and other general law obligations or responsibilities the employee might owe. Were the indemnity to go further than this it would remove the basis for imposing strict liability for the wrongdoing of an employee in the first place; it would effectively shift the risk that an employer might abuse their authority to direct the conduct of an employee away from the employer and onto the employee. That there are limitations on the capacity of an employer to call on the indemnity was acknowledged by Singleton LJ in Jones v Manchester Corporation:

It may well be that in the ordinary simple case a servant must indemnify his master against his wrongful acts for which the master is made liable. A chauffeur who, through negligence, causes damage for which his employer is held responsible, may well be liable to his master. On the other hand, if the chauffeur is young and inexperienced, and is suddenly told to drive another and bigger car, or lorry, which he does not understand, and an accident follows, it is by no means certain that the employer would be entitled to an indemnity.

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8 For example, to maintain good workplace relations.
9 For example, where one employee shoots another outside the work place; Gittini Stone Pty Limited v Pavkovic (2007) Aust Torts Reports ¶81-924. To prevent an employer’s hand being forced into taking such a decision, some jurisdictions have now removed the right of insurers to be subrogated to an employer’s right of indemnity. See, eg, Insurance Contracts Act 1984 (Cth), s 66.
10 [1952] 2 QB 852, 865. Although this decision predated Lister v Romford Ice and Cold Storage Co Ltd [1957] AC 555, Singleton LJ was prepared to acknowledge the existence of an employer’s right of indemnity against their employee in accordance with the suggestion made in the 10th edition of Salmond on the Law of Torts (London: Sweet & Maxwell, 1945).
The existence of such limitations can also be seen in those jurisdictions where steps have been taken to remove the indemnity.\textsuperscript{11} In those jurisdictions, an employer may still resort to the indemnity where the employee has engaged in 'serious or wilful misconduct'.\textsuperscript{12} This qualification can be seen as an attempt to enunciate those circumstances in which it is unlikely that an employer abused their authority to direct the conduct of an employee by creating a conflict between the employee’s duties under their employment contract and other general law obligations or responsibilities the employee might owe.

\textbf{III IN WHAT CIRCUMSTANCES DOES THE STRICT LIABILITY ARISE?}

Strict liability for the wrongdoing of an employee can be imposed on an employer whenever an employee wrongfully injures a stranger to the employment relationship whilst acting within the course of their employment.

Three points can be made about the general circumstances in which strict liability for the wrongdoing of an employee arises. First, unlike strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another, strict liability for the wrongdoing of an employee is not restricted to physical damage. Although the authority vested in an employer is an authority to direct the physical conduct of an employee, it is not the fact that an employer can direct the conduct of an employee which gives rise to a risk of harm to strangers to the employment relationship per se, but the fact that an employer may potentially abuse that authority by creating a conflict between an employee’s duties under their employment contract and other general law obligations or responsibilities the employee might owe.\textsuperscript{13} As this conflict (where it eventuates) may impact strangers to the employment relationship in different ways, there is no reason to limit strict liability for the wrongdoing of an employee to physical damage. Employers have consequently been held strictly liable for types of damages other than

\textsuperscript{11} See, eg, \textit{Employees Liability Act 1991} (NSW), s 3.
\textsuperscript{12} See, eg, \textit{Employees Liability Act 1991} (NSW), s 5.
\textsuperscript{13} Such as an obligation to use reasonable care not to cause damage to a stranger to the employment relationship.
physical damage. For instance, employers have been held strictly liable for
damage caused by defamatory comments made by their employees.¹⁴
Employers have also been held strictly liable for economic loss wrongfully
caused by an employee, such as when an employee wrongfully procures a
breach of contract.¹⁵

Second, unlike strict liability for the wrongdoing of a person upon whom
authority has been conferred in relation to another, strict liability for the
wrongdoing of an employee only arises in respect of damage wrongfully
cau sed by an employee; it does not generally arise in respect of damage
wrongfully caused by an independent contractor. As explained in chapter 3,
this is because an employer does not have the general authority to direct the
conduct of an independent contractor. As an employer does not have such
authority, there is only limited potential for an employer to create a conflict
between an independent contractor's contractual duties and their obligations
or responsibilities at general law. Even in those relatively unusual
circumstances where there may be a risk of such a conflict being created,
such a risk can be anticipated and addressed by the independent
contractor's contractual terms of engagement.

Finally, unlike strict liability for the wrongdoing of a person upon whom
authority has been conferred in relation to another, there is no restriction on
the type of person to whom strict liability for the wrongdoing of an employee
is owed. As demonstrated in chapter 4, strict liability for the wrongdoing of a
person upon whom authority has been conferred in relation to another is
owed only to persons over whom authority has been conferred. In contrast,
anyone wrongfully injured by an employee can seek to impose strict liability
for the wrongdoing of an employee on an employer. This is because the
authority in question arises in respect of the relationship between the
employer and the employee and not the relationship between the employer
and the person who is wrongfully injured.

¹⁴ See Bonette v Woolworths Ltd (1937) 37 SRNSW 142, where an employee at Woolworths
wrongfully accused the plaintiff of shoplifting.
Before strict liability for the wrongdoing of an employee can be imposed, it needs to be shown that an employee was acting within the *course of their employment* immediately prior to the wrongdoing occurring. This is because it is only where an employee is acting within the course of their employment that there is the potential for an employer to abuse their authority to direct the conduct of an employee by creating a conflict between the employee’s duties under their employment contract and other general law obligations or responsibilities the employee might owe. Where an employee is acting outside the course of their employment, the employee is no longer subject to their employer’s authority and the employee can comply with their general law obligations or responsibilities in the ordinary course. As there is very little potential, in such circumstances, for the employer to abuse their authority to direct the conduct of an employee by creating a conflict between the employee’s duties under their employment contract and other general law obligations or responsibilities the employee might owe, there is no basis upon which strict liability for the wrongdoing of an employee can be imposed.

It is submitted that whether or not an employee is acting within the course of their employment is to be determined by reference to what it is an employee is *actually* (as opposed to apparently) directed by their employer to do.

Whether or not an employee is acting within the course of their employment has traditionally been determined by reference to the *Salmond* test. [16]

An employee’s wrongful conduct is said to fall within the course and scope of his or her employment where it consists of either (1) acts authorised by the employers or (2) unauthorised acts that are so connected with acts that the employer has authorised that they may rightly be regarded as modes – although improper modes – of doing what has been authorised.

As can be seen, the *Salmond* test focuses on what an employee is authorised, or to save confusion with how the term ‘authority’ is used in this thesis, directed to do. This is consistent with the general basis of strict liability for the wrongdoing of an employee proposed by this thesis. If an employee is following their employer’s directions, there is the potential for an

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employer to abuse their authority to direct the conduct of the employee by creating a conflict between the employee's duties under their employment contract and other general law obligations or responsibilities the employee might owe. If an employee is not following their employer's directions, they are not subject to their employer's authority and can comply with their general law obligations or responsibilities in the ordinary course.

The first limb of the *Salmond* test essentially refers to conduct which an employer has *expressly* directed an employee to engage in. It is not the wrongdoing itself which the employer must have directed the employee to engage in for these purposes, but the conduct which the employee was engaged in immediately prior to the wrongdoing. For example, an employer will be viewed as having expressly directed the negligent driving of an employee under the first limb of the *Salmond* test if the employer has directed the employee to drive from A to B and the negligent driving occurs in the course of that journey. An employer may issue an employee with express directions personally, or such directions may be set out in the express or implied terms of the employment contract.

Conduct which an employer has expressly directed an employee to engage in is not the only type of conduct which has been found to fall within the course of employment. The second limb of the *Salmond* test provides that improper modes of performing an act which the employer has expressly directed an employer to engage in can also fall within the course of employment. This has been found, in certain circumstances, to extend to conduct which an employer may even have expressly prohibited. This broad approach to determining the course of employment can be difficult to explain when just focussing on the express directions issued by an employer in respect of the specific conduct engaged in by an employee immediately prior to the wrongdoing occurring. More sense of the approach can be made by examining the directions issued by an employer to an employee as a

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17 Where an employer directly instructs an employee to engage in wrongdoing, the employee will be viewed as having engaged in such wrongdoing personally; see, eg, Atiyah, P S, *Vicarious Liability in the Law of Torts* (1967) 4.
18 Ibid 178-179.
19 See *Limpus v London General Omnibus Co.* (1862) 1 HC & C 526; 158 ER 993. Discussed below.
whole. The reason is that although an employer might expressly prohibit certain conduct or modes of performance, if they issue other directions which can be construed as promoting the conduct, there is still the potential for the employer to abuse their authority to direct the conduct of an employee by creating a conflict between the employee’s duties under their employment contract and other general law obligations or responsibilities the employee might owe. In such circumstances, although the employer did not expressly direct the employee to engage in the conduct which occurred immediately prior to the wrongdoing, such conduct can still be seen to fall within the employer’s implied directions and therefore within the course of employment.

Consider the decision of the High Court of Australia in Bugge v Brown. In that case, an employee was sent to clear thistles from a field on the employer’s property. He was provided with a lunch of raw meat and potatoes and told to take it to a nearby house to be cooked. As the house was a considerable distance from the field, the employee decided to cook his lunch in an old chimney near the field in order to save time. The employee subsequently lost control of the fire and the employer was found strictly liable for the damage it caused to a neighbouring property. At first glance, it is difficult to explain how the employee’s wrongful conduct in this case can be construed as having been within the course of his employment when the fire would not have been lit if the employer’s express directions about cooking the lunch had been followed. The reason becomes apparent, however, when the employer’s directions are examined as a whole. Although the employer had told the employee to go to the house to have his lunch cooked, the employer had also provided the employee with a lunch which needed cooking and had set the employee a time sensitive task. These other directions could be construed as actually promoting the employee’s conduct. Consequently, when the employer’s directions were viewed as a whole, there was still the potential for the employer to have abused his authority to direct the conduct of the employee by creating a conflict between the employee’s

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20 Defined broadly as including express directions given by an employer as well as any other policies, incentives or penalties instituted by an employer to shape how an employee performs their tasks. See further chapter 3.
21 (1919) 26 CLR 110. (‘Bugge’).
duties under his employment contract and other general law obligations or responsibilities the employee might have owed. It followed that the employer had impliedly directed the employee to engage in the conduct which occurred immediately prior to the wrongdoing so that it could be construed as falling within the course of employment.

Consider also the English case of *Limpus v London General Omnibus Co.* 22

The employee in that case was a bus driver who had been expressly directed by his employer not to drive in such a way as to obstruct the buses of a rival company. Despite the direction, the employee drove in front of a rival company’s bus when it attempted to overtake him, causing an accident. The employee’s wrongful conduct was found to be within the course of employment. Once again, an examination of the employer’s directions as a whole may explain why. Although the employer had prohibited the employee from obstructing the buses of the rival company, the employer had directed the employee to drive the bus on the bus route and may have issued any one of a number of other directions which might have encouraged the employee’s behaviour; for example, offering the bus driver a bonus for completing his route ahead of the bus of the rival company. The possibility that such directions might have been issued by the employer was expressly acknowledged by Willes J. 23

The law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability.

It was not too difficult, therefore, for the judges to see the potential in the circumstances for the employer to abuse its authority to direct the conduct of the employee by creating a conflict between the employee’s duties under their employment contract and other general law obligations or responsibilities the employee might have owed by issuing directions in addition to the direction not to obstruct the buses of the rival company. This could explain why the judges found the employee to have been acting within the course of employment immediately prior to the wrongdoing, even though

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22 (1862) 1 HC & C 526; 158 ER 993 ('Limpus')

23 Ibid 998.
the employer had expressly prohibited the specific conduct engaged in by the employee.

As can be seen, in determining whether an employee’s conduct falls within the course of employment, the Salmond test focuses on what it is that an employee is actually directed by their employer to do (either expressly or impliedly). To this extent, the test reflects the basis of strict liability for the wrongdoing of an employee put forward by this thesis. Where an employee is following their employer’s actual directions, there is the potential for an employer to abuse their authority to direct the conduct of an employee by creating a conflict between the employee’s duties under their employment contract and other general law obligations or responsibilities the employee might owe. Where an employee is acting outside their employer’s actual directions, the employee is no longer subject to their employer’s authority and the employee can comply with their general law obligations or responsibilities in the ordinary course. As this rationale is supported by a broader analysis of the relationships within which strict liability for the wrongdoing of another in tort arises, there is no reason to think that the Salmond test, which has been in use for the best part of a century, 24 should not continue to be used as the test for determining whether an employee’s wrongful conduct falls within the course of employment. Concerns have, however, recently been raised as to whether the Salmond test accurately captures all the circumstances in which an employee’s wrongful conduct has been found by the courts to fall within the course of employment. 25 Specifically, it is now being suggested that strict liability for the wrongdoing of an employee can be imposed on an employer even where an employee was not following their employer’s actual directions (express or implied) immediately prior to the wrongdoing occurring. 26 Such concerns reflect the confused state of the cases, but do not necessarily suggest that the Salmond test is out of date.

26 As is the case with the sexual assault of a child.
The cases show that there are two broad categories of case in which employers typically escape strict liability for the wrongdoing of an employee because the employee was not following the employer’s actual directions (express or implied) immediately prior to the wrongdoing occurring so that the wrongdoing did not fall within the course of employment. The first are cases in which the conduct engaged in by the employee immediately prior to the wrongdoing occurring was not just an ‘improper’ or prohibited mode of doing something the employee had actually been directed to do but was conduct which the employer had no reason to believe that the employee would be engaged in at all. For example, where a bus conductor decides to drive the bus or a miner fires a shot ‘instead of leaving it to the shotfirer’. In such cases, even when viewing an employer’s directions as a whole, it is unlikely that an employer would have been minded to exercise their authority to direct the conduct of the employee in such a way as to abuse their authority by creating a conflict between the employee’s duties under his employment contract and other general law obligations or responsibilities the employee might have owed because the employer had no reason to suspect that the employee was engaging in such activities in the first place. Without the potential in such circumstances for an employer to abuse their authority to direct the conduct of an employee by creating a conflict between the employee’s duties under his employment contract and other general law obligations or responsibilities the employee might have owed, there is no basis upon which strict liability for the wrongdoing of an employee can be imposed. It follows that such conduct is generally viewed as falling outside the course of employment.

Included in this category is conduct which a stranger to the employment relationship might view as being within an employee’s apparent course of employment, but which was engaged in contrary to the actual directions (express or implied) issued by an employer. Paula Giliker provides an

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29 As will be explored further in chapter 7, although strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another extends to circumstances in which the person upon whom authority has been conferred is acting within the terms of the apparent authority that has been conferred upon that person, strict liability
account of a French case, the facts of which provide a useful example. The employee in the case was an ‘aide-chauffeur’ employed at a garage. He had been directed by his employer to drive a truck to a mechanic for repairs and was given the keys to the garage for this purpose. Rather than returning the truck to the garage straight away, the employee decided to make some money and use the truck to drive a group of people to a local dance. Due to the negligence of the employee, the truck crashed and one of the passengers was killed. On these facts, even when viewing the employer’s directions as a whole, it is very difficult to view the employee’s conduct immediately prior to the wrongdoing as falling within the course of his employment. The employer had no reason to believe that the employee would be engaged in the activity of carrying people in the truck, even though the employee worked at the garage and the passengers might have presumed he had such authority. It is therefore unlikely in such circumstances that the employer would have been minded to exercise his authority to direct the conduct of the employee in such a way as to abuse that authority by creating a conflict between the employee’s duties under his employment contract and other general law obligations or responsibilities the employee might have owed. Without the potential for abuse, there was no basis upon which strict liability for the wrongdoing of an employee could be imposed.

Similar facts were considered by the Privy Council in an appeal from the Supreme Court of New South Wales in *Koorang Investments Pty Ltd v Richardson & Wrench Ltd*. In that case, the employee valuer had been carrying out valuations on behalf of his employer’s former client after being given explicit instructions not to do so. Although the valuations were on the employer’s letterhead and within the apparent scope of his employment, the

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30 Although not the result, as the French court imposed liability on the employer. Gilliker, above n 24, 182.
31 Cf Limpus v London General Omnibus Co (1862) 1 HC & C 526; 158 ER 993 where the employer knew the bus driver would be driving on the bus route with passengers in the bus. The decision of the English Court of Appeal in *Twine v Bean’s Express Ltd* [1946] 1 All ER 202 can be explained on similar grounds.
Privy Council found the employee's conduct to fall outside the course of employment. Once again, as the employer had no reason to believe that the employee would be engaged in preparing such valuations, it is unlikely that the employer would have been minded to exercise its authority to direct the conduct of the employee in such a way as to abuse that authority by creating a conflict between the employee's duties under his employment contract and other general law obligations or responsibilities the employee might have owed. Without the potential for abuse, there was no basis upon which strict liability for the wrongdoing of an employee could be imposed.

The second broad category of case in which an employee's wrongful conduct is typically found to fall outside the course of employment are cases in which the employee's wrongful conduct was intentional or wilful. For example, where a barmaid glasses an abusive customer,\(^{34}\) a security guard sets fire to a customer's property\(^ {35}\) or a cleaner decides to use a customer's phone to make £1,400 worth of calls.\(^ {36}\) Once again, even when viewing the employer's directions as a whole, there is very limited potential in such cases for an employer to abuse their authority to direct the conduct of an employee by creating a conflict between the employee's duties under their employment contract and other general law obligations or responsibilities the employee might owe because the employer has no reason to expect that the employee would be engaged in such activities in the first place. The only conflict which existed on the facts of such cases was created by the employee's own motivations rather than the employer. Without the potential in such circumstances for an employer to abuse their authority to direct the conduct of an employee by creating a conflict between the employee's duties under his employment contract and other general law obligations or responsibilities the employee might have owed, there was no basis upon which strict liability for the wrongdoing of an employee could be imposed. It follows that such conduct is generally viewed as falling outside the course of employment.

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\(^{34}\) See *Deatons Pty Ltd v Frew* (1949) 79 CLR 370.


\(^{36}\) See *Heasmans v Clarity Cleaning Co. Ltd* [1987] ICR 949.
Exceptions to these two general categories of case do exist. There are a number of cases which notionally fit within one or the other of the above categories of case in which the courts have imposed strict liability on an employer for the wrongdoing of an employee. Most of those cases, however, can be explained by alternate means. For instance, a large number of such cases involve property. The classic example of intentional misconduct found to be within the course of employment is *Morris v C W Martins & Sons Ltd.*  
In that case the employee of a furrier ran off with a mink stole owned by a customer which had been given to the employee for the purposes of cleaning. The employer was held strictly liable to the customer for the theft. It does not necessarily follow, however, that just because a wrongdoer is an employee, the liability imposed on an employer is strict liability for the wrongdoing of an employee. *Morris v C W Martins & Sons Ltd* can alternatively be explained on the basis that the employer was a bailee and had conferred authority upon the employee to deal with the bailor’s mink stole.  
This form of liability is closer in nature to strict liability for the wrongdoing of a person upon whom authority has been conferred and is discussed in chapter 8.

Other cases of intentional misconduct involve employees who have been vested with authority by their employer to effect legal relations on the employer’s behalf; that is, they were agents. In *Barwick v English Joint Stock Bank*, a bank was held strictly liable when a bank manager gave a fraudulent guarantee to the plaintiff that the bank would honour a cheque written by a customer of the bank in favour of the plaintiff even though the bank manager was aware that the customer was heavily indebted to the bank. As bank manager, the employee in that case had been vested with authority to issue guarantees and enter into other contracts on behalf of the bank and was acting within the terms of that apparent authority immediately prior to the wrongdoing occurring. *Armagas Ltd v Mundogas SA* concerned the vice-president of a company who had been vested with authority to

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38 Atiyah, above n 17, 200.  
39 (1867) II LR Exch 259.  
40 [1966] 1 AC 717.
negotiate and enter the sale and charter of a ship on behalf of the company. The House of Lords held that the company would have been strictly liable for the fraudulent conduct of the vice-president in negotiating the transaction had the vice-president been acting within the terms of his apparent authority. Once again, it does not necessarily follow that just because the wrongdoer is an employee, that the strict liability imposed on an employer is strict liability for the wrongdoing of an employee. Cases such as these can alternatively be explained on that the basis that the employees were agents who had been vested with authority to effect legal relations on behalf of their employers. Strict liability for the wrongdoing of an agent is discussed in chapter 6.

The most recent cases in which intentional misconduct has been found to fall within the course of employment are the child sexual assault cases. Quite remarkably courts have been prepared to find that such a self-serving act as sexually assaulting a child can fall within the course of employment.41 As outlined in chapter 4, however, these cases can alternatively be explained on the basis that the employee had been conferred authority by their employer to direct the conduct of the child who was abused. Such liability might therefore be better described as strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another rather than strict liability for the wrongdoing of an employee.42

A similar approach can be taken to explain the increasing willingness of courts to impose strict liability on the employers of security guards who physically assault patrons at pubs and clubs.43 The decision of the Queensland Court of Appeal in Ryan v Ann St Holdings Pty Ltd44 provides a good example. The patron in that case had left a nightclub and was talking on the street outside where he was being 'quiet and well-behaved'.45 One of the security guards then asked the patron to return to the club where he was assaulted. It is very difficult to see the conduct of the security guard in this

42 This issue will be discussed further in chapter 7.
44 [2008] 2 Qd R 486.
case as within the course of his employment given that the patron had left the club prior to the assault. The decision might be explained, however, on the basis that the employer had conferred authority upon the security guard to direct the conduct of the patron and the security guard was acting within the terms of that apparent authority immediately prior to the assault.\textsuperscript{46} In such circumstances, there was the potential for the security guard to abuse the authority that had been conferred by his employer, which subsequently occurred when the security guard assaulted the plaintiff. Consequently, the strict liability imposed on the employer in respect of the wrongdoing of the security guard can be better described as strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another rather than strict liability for the wrongdoing of an employee.

Historically, it has not been easy to make sense of the cases concerning the course of employment for the purposes of strict liability for the wrongdoing of an employee. A lack of understanding as to the basis of the liability\textsuperscript{47} has left the cases in a considerable state of confusion. The \textit{Salmond} test does, however, suggest a basis for strict liability for the wrongdoing of an employee which can provide a way through the maze. In accordance with the test, an employee’s wrongful conduct does not fall within the course of their employment unless the conduct engaged in by the employee immediately prior to the wrongdoing occurring was actually directed (either expressly or impliedly) by the employer. This is because where conduct is actually directed (either expressly or implied) by an employer, there is the potential for an employer to abuse their authority to direct the conduct of an employee by creating a conflict between the employee’s duties under their employment contract and the other general law obligations or responsibilities the employee might owe. Without the potential for conflict, it is difficult to make a connection between the wrongdoing of the employee and the employer which is sufficient for strict liability for the wrongdoing of an employee to be imposed. Once it is recognised that not all strict liability imposed on an employer for the wrongdoing of an employee is strict liability for the

\textsuperscript{46} In the same way that cases involving errant police officers can be explained. See further chapter 4.

\textsuperscript{47} See further chapter 1.
wrongdoing of an employee, but may instead be strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another or strictly liability for the wrongdoing of an agent, the *Salmond* test can be seen to accurately explain the cases in which strict liability for the wrongdoing of an employee has been imposed.

Furthermore, accepting the basis of strict liability for the wrongdoing of an employee suggested by the *Salmond* test can promote greater consistency in the application of the *Salmond* test into the future. Consider one of the more difficult types of situations to determine whether an employee’s wrongdoing falls within the course of employment; the situation where an employee has been skylarking. It was noted in chapter 4 that employers are generally not held strictly liable when one employee plays a prank on a fellow employee of equal rank, causing that employee harm. Such conduct can be seen as self-serving and ill-thought out. The act of lighting a cigarette whilst delivering petrol can be similarly described. Unlike the prank cases, however, the employer in *Century Insurance Co Ltd v Northern Ireland RTB*[^48] was held strictly liable for the damage caused by the foolishness of its employee. When faced with facts such as these, how is a judge to determine whether an employee’s wrongdoing falls within the course of employment? If the basis for strict liability for the wrongdoing of an employee suggested by the *Salmond* test is accepted, one approach will be to consider whether the employer had the potential to abuse their authority to direct the conduct of an employee by creating a conflict between the employee’s duties under their employment contract and other general law obligations or responsibilities the employee might have owed. From this perspective, it can be seen that the two factual scenarios are quite different. In the cigarette case there was potential for the employer to abuse their authority by creating such a conflict because the time at which the employee decided to have a cigarette could have been affected by how many breaks the employee had been allowed by his employer to take. In contrast, it is very difficult to see how an employer could have abused their authority by creating a conflict in the prank cases as the employees were at no time

meant to be engaging in pranks, so the employer would not have been minded to exercise their authority to direct the conduct of the employee in such a way as to abuse that authority by creating a conflict between the employee’s duties under their employment contract and the other general law obligations or responsibilities the employee might owe.

V 

WHO IS AN EMPLOYEE?

Chapter 4 canvassed the difficulties associated with determining who is an employee for the purposes of tort law. It also noted that, for a person to be considered an employee for the purposes of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another, it was necessary for that person to have been engaged under a contract which vested the employer with general authority to direct the conduct of that person in the course of the employer’s business. The analysis in this chapter elaborates on the nature of the authority which needs to be vested in an employer for a person to be considered an employee. It can now be seen that an employer must not only have authority to direct the conduct of a person, but that such authority must be broad enough for there to be the potential when exercising that authority for an employer to create a conflict between the person’s duties under their contract with the employer and the other general law obligations or responsibilities the person might owe.

Consider the example of a contractor engaged to work on a construction site. The contractor might agree that the employer can direct their conduct whilst on the construction site for safety reasons. The granting of such authority, however, does not necessarily turn the contractor into an employee. The contractor might retain sufficient discretion under the contract of engagement to regulate their own behaviour so that there is very limited potential for the employer to abuse their authority by creating a conflict between the contractor’s duties under their contract with the employer and any other

49 Note, that although strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another is a different form of strict liability to strict liability for the wrongdoing of an employee, the definition of who is an employee is the same for both forms of strict liability.
general law obligations or responsibilities the contractor might owe. Alternatively, a mechanism for allocating the risks and costs of complying with obligations outside the contract may be included which could prevent a potential conflict arising.\textsuperscript{50} In neither of these situations can the contractor be considered an employee. It is necessary therefore to carefully examine the nature of the authority vested in an employer under a contract securing the use of human resources, as well as the terms of that contract, to see whether there is the potential for the employer to create a conflict between the person’s duties under that contract and the other general law obligations or responsibilities the person might owe. Without this potential, it is very difficult to say that the person engaged under the contract is an employee.

An employee for the purposes of strict liability for the wrongdoing of an employee includes not only an employee who works for their employer but an employee who has been hired out by their employer (‘hired employee’) to another business (the ‘temporary hirer’). The House of Lords confirmed in Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Limited\textsuperscript{51} that an employer may still be held strictly liable for the wrongdoing of a hired employee even though the hired employee was working for the temporary hirer when the wrongdoing occurred. The reason is that, although a hired employee works for the temporary hirer, the hired employee’s contract of employment remains with their employer.\textsuperscript{52} Consequently, the employer still has the right to discipline the hired employee in accordance with the employment contract and may retain sufficient authority to direct the conduct of the hired employee under the arrangements with the temporary hirer for there to be the potential for the employer to abuse their authority to direct the conduct of the hired employee by creating a conflict between the hired employee’s duties under their employment contract and the other general law obligations or responsibilities the hired employee might owe. Two questions generally arise with respect to the potential liability of an employer for the wrongdoing of a hired employee. First, will an employer always be

\textsuperscript{50} See further chapter 3.
\textsuperscript{51} [1947] 1 AC 1 (‘Mersey Docks’).
\textsuperscript{52} Despite anything the contract between the general employer and the temporary employer might say to the contrary, see Mersey Docks ibid.
held strictly liable for the wrongdoing of a hired employee? Second, if a
temporary hirer can be held strictly for the wrongdoing of a hired employee,
can the employer be held strictly liable at the same time?

In respect of the first question, an employer will not always be held strictly
liable for the wrongdoing of a hired employee. Whether an employer is
held strictly liable for the wrongdoing of a hired employee will depend upon
the facts of the case. In *Mersey Docks*, for instance, the hired employee was
a crane operator who had been hired out by the harbour authority along with
a crane to a firm of stevedores for the purposes of unloading ships. In
imposing strict liability on the harbour authority for the negligence of the
crane operator, the House of Lords thought it important that, although the
stevedores could direct the crane operator where to move things on the
dock, they could not direct what the crane operator did with the crane as it
remained the property of the harbour authority. In contrast, the courts
have been much more prepared to impose strict liability on a temporary hirer
for the wrongdoing of a hired employee where the hired employee was
operating equipment owned by the temporary hirer. At the turn of the 20th
century, for instance, it was relatively common for a temporary hirer to be
held strictly liable for the wrongdoing of a hired employee engaged to drive
the temporary hirer’s horse and carriage. A temporary hirer might also be
held strictly liable for the wrongdoing of a hired employee who has not been
engaged to operate equipment but to provide more general labour. The
circumstances giving rise to such liability are, however, considered quite
limited; for instance, where the hired employee is ‘seconded for a substantial
period of time to the [temporary hirer], to perform a role embedded in [the
temporary hirer’s] organisation.’

There is no settled test for distinguishing the circumstances in which the
employer or temporary hirer will be held strictly liable for the wrongdoing of a

53 See generally Atiyah, above n 17, 158-168.
54 *Mersey Docks* [1947] 1 AC 1, 13 (Lord Macmillan): ‘The stevedores were entitled to tell
him where to go, what parcels to lift and where to take them, that is to say, they could direct
him as to what they wanted him to do; but they had no authority to tell him how he was to
handle the crane in doing his work.’
55 Atiyah, above n 17, 165-166.
56 *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] QB 510, 536 (Rix LJ).
hired employee. The cases set out above suggest that the more authority a temporary hirer has been conferred by an employer to direct the conduct of a hired employee, the more likely it is that the temporary hirer will be held strictly liable for the wrongdoing. A temporary hirer, for instance, will generally be conferred greater authority to direct the conduct of a hired employee where the hired employee is operating equipment owned by the temporary hirer than where the hired employee is providing general labour for a short period of time. A temporary hirer will usually seek such authority in order to protect the equipment the hired employee is using. Similarly, a temporary hirer will generally be conferred greater authority to direct the conduct of a hired employee who is performing a role ‘embedded in that [temporary hirer’s] organisation for a considerable period of time than where the hired employee is providing general labour for a short period of time only. It is submitted, therefore, that for a temporary hirer to be held strictly liable for the wrongdoing of a hired employee, the temporary hirer must have been conferred sufficient authority to direct the conduct of a hired employee by the employer so that it is the temporary hirer, rather than the employer, who has the greater potential to abuse their authority to direct the conduct of the hired employee by creating a conflict between the hired employee’s duties under their employment contract (including the duty to obey the directions of the temporary hirer) and the other general law obligations or responsibilities the hired employee might owe. Admittedly, such circumstances will be quite rare; but as the horse and carriage cases suggest, it is possible. Note that as the temporary hirer is not party to the employment contract, for the temporary hirer to be in a position to abuse their authority by creating such a conflict they will also need to have been conferred some rights to discipline the hired employee; at the very least, the right to return the hired employee to the employer if the hired employee’s work proves unsatisfactory. Without this capacity, a temporary hirer is in

57 Atiyah, above n 17, 158.
58 Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd [2006] QB 510, 536 (Rix L.J).
59 Mersey Docks [1947] 1 AC 1, 10 (Viscount Simon).
60 For instance, although a building contractor might be given the right to return an electrician hired from a labour firm to provide electrical services on site, the building contractor will have very limited rights to insist on a change of staff where the provision of electrical services on site has been subcontracted to an independent firm. In the latter
much the same position as any other stranger to the employment relationship.

That a temporary hirer can be held strictly liable for the wrongdoing of a hired employee does not mean that the temporary hirer and the hired employee are in an employment relationship. The hired employee remains in the employ of their employer. It follows that the imposition of strict liability for the wrongdoing of an employee on a temporary hirer is an exception to the general rule that strict liability for the wrongdoing of an employee only arises in respect of the wrongdoing of an employee. The exception is allowed because a temporary hirer who has been conferred sufficient authority to direct the conduct of a hired employee for their own benefit puts strangers to the relationship between the temporary hirer and the hired employee at risk of harm in much the same way as an employer puts strangers to the employment relationship at risk of harm because the employer can exercise its authority to direct the conduct of an employee for their own benefit. In both situations, there is the potential for the employer or temporary hirer to abuse their authority to direct the conduct of the hired employee by creating a conflict between the hired employee’s duties under their employment contract and the other general law obligations or responsibilities the hired employee might owe. As the risks created by the potential for the abuse of the employer’s or temporary hirer’s authority to direct the conduct of the hired employee are closely analogous, strict liability for the wrongdoing of an employee can be imposed on the temporary hirer even though the temporary hirer and the hired employee are not strictly in an employment relationship.

The second question in respect of the imposition of strict liability on an employer for the wrongdoing of a hired employee is that, once it has been shown that a temporary hirer can be held strictly liable for the wrongdoing of a hired employee, is it possible for both the employer and the temporary hirer to be held strictly liable for the wrongdoing of a hired employee at the same time? Historically, it seems to have been assumed that only one person could be held strictly liable for the wrongdoing of a hired employee; that is

situation, the building contractor will have bargained for the provision of the services and not necessarily for the right to control who the subcontractor uses to provide such services.
either the employer or the temporary hirer.\(^61\) The basis of this assumption appears to have been a concern that the hired employee could not be transferred from one employer to another without their consent.\(^52\) As has already been pointed out, however, it is not necessary for the employment of the hired employee to have been transferred to the temporary hirer for the temporary hirer to be held strictly liable for the wrongdoings of the hired employee. Once this is acknowledged, there does not seem to be any obvious reason why both the employer and the temporary hirer could not be held strictly liable for the wrongdoings of the hired employee\(^63\) where both the employer and the temporary hirer had sufficient authority to direct the conduct of the hired employee so that there was the potential for both the employer and the temporary hirer to abuse that authority by creating a conflict between the hired employee’s duties under their employment contract and the other general law obligations or responsibilities the hired employee might owe.

Courts have recently started to consider the possibility of imposing strict liability for the wrongdoing of an employee on both the employer and the temporary hirer. This can be seen in the English Court of Appeal decision in Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd.\(^64\) In that case, a labour hire company lent a fitter and his young mate to a subcontractor charged with installing air conditioning in a factory. The fitter’s young mate accidentally set off the factory’s fire protection sprinkler system when he selected an inappropriate route to return to the fitter after he had been sent to retrieve some fittings. Both the labour hire company and the subcontractor were held strictly liable for the damage caused by the sprinkler system. The reason appears to be that the fitter’s young mate was not only under the supervision of the fitter supplied by the labour hire company at the time of his wrongdoing, but was also answerable to another fitter engaged by the subcontractor who was coordinating the air conditioning work.\(^65\) Whether

\(^{61}\) Atiyah, above n 17, 156-158.
\(^{62}\) Mersey Docks [1947] 1 AC 1, 14 (Lord Macmillan).
\(^{63}\) Atiyah, above n 17, 156-158.
\(^{64}\) [2006] QB 510.
\(^{65}\) Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd [2006] QB 510, 518-519 (May LJ).
Viasystems was an appropriate case for strict liability for the wrongdoing of an employee to be imposed on both the employer and the hirer is not entirely clear on the facts. The capacity of the subcontractor to discipline the fitter's young mate, for instance, was not considered. Nor was the duration of the contract between the labour hire company and the subcontractor. What is evident from Viasystems is that the circumstances in which strict liability for the wrongdoing of an employee can be imposed on both the employer and the temporary hirer will be relatively rare. This is confirmed by subsequent cases which have so far refused to impose such strict liability in respect of the wrongdoing of a hired employee.

VI IMPUTED CONTRIBUTORY NEGLIGENCE

An employee's wrongdoing is not only relevant where a stranger to the employment relationship seeks to hold the employer strictly liable for damage wrongfully caused by an employee, but can also be relevant where an employer is seeking to hold a stranger to the employment relationship liable in respect of damage the stranger wrongfully caused the employer. Under the 'both ways' test, an employer's claim for damages against a stranger to the employment relationship will be reduced to the extent that an employee wrongfully contributed to such damage. A common example of the 'both ways' test being applied is where an employer brings a claim in respect of damage to a motor vehicle involved in an accident where the accident was partly caused by the negligence of the employee driving the vehicle and partly by the negligence of a stranger to the employment relationship. The contributory negligence of the employee in such circumstances is imputed to the employer, so that the employer's claim against the stranger to the employment relationship is reduced accordingly. The New South Wales Court of Appeal also applied the 'both-ways' test in a claim brought by a company against its auditors for negligence in Daniels v Anderson. The damages payable by the negligent auditors to the company were reduced

because the management of the company had also been 'grossly negligent'.

The 'both ways' test only applies to the contributory negligence of an employee. It does not apply to the contributory negligence of an independent contractor engaged by the employee. The negligence of a taxi-driver, for instance, is not imputed to a passenger injured in a car accident which was partly caused by the negligence of the taxi-driver and partly by the negligence of another driver. It is more than likely, therefore, that the basis for the 'both ways' test is the same as the basis for imposing strict liability for the wrongdoing of an employee itself. Just as an employer creates a risk that an employee might injure a stranger to the employment contract because the employer may potentially abuse their authority to direct the conduct of their employee by creating a conflict between the employee's duties under their employment contract and other general law obligations or responsibilities the employee might owe, the employer also creates a risk that the employee might damage the employer's own property. The 'both ways' test responds to this risk by reducing an employer's claim for damages against a stranger to the employment relationship by the extent to which an employee wrongfully contributed to such damage.

VII Master's Tort or Servant's Tort

It has long been debated whether strict liability for the wrongdoing of an employee is best seen as liability for the master's tort or liability for the servant's tort. Under the master's tort theory, an employee's wrongdoing is attributed to an employer so that any liability imposed on the employer is considered personal. Alternatively, under the servant's tort theory, it is accepted that the wrongful conduct is that of the employee so that any liability imposed on the employer is a form of strict liability for the wrongdoing of another in tort.

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70 Ibid 576.
Over time, most courts and academics have accepted the servant’s tort theory as the basis of strict liability for the wrongdoing of an employee.\textsuperscript{72} This has come from a concern with the fictitious nature of attributing or identifying the acts of one person with that of another. Some academics, however, have preferred to hold on to the master’s tort theory\textsuperscript{73} and the ease with which it can explain some of the more difficult cases, such as where an employee enjoys some type of immunity from suit in respect of the wrongdoing. In \textit{Broom v Morgan},\textsuperscript{74} for instance, the employer of a husband and wife team argued in accordance with the servant’s tort theory that she could not be held strictly liable for the negligence of the husband in leaving open a trap door in which his wife fell, because, as the wife was prohibited from suing the husband by legislation at the time of the accident, there was no tort for which the employer could be held strictly liable. The court, however, had no problem in finding the employer liable using the master’s tort theory. Lord Goddard CJ explained:

\begin{quote}
...although it is common to speak of the master’s liability as vicarious, it is none the less regarded as the liability of a principal. The master is just as much liable as though he commits the tort himself because the servant’s act is his act.\textsuperscript{75}
\end{quote}

Although much energy has been poured into the debate as to whether strict liability for the wrongdoing of an employee is best described as liability for the master’s tort or liability for the servant’s tort, it is not clear whether the question underlying the debate is either useful or appropriate. When strict liability for the wrongdoing of an employee is seen in terms of the risk of harm to strangers to the employment relationship that exists because an employer may potentially abuse their authority to direct the conduct of an employee by creating a conflict between the employee’s duties under their employment contract and other general law obligations or responsibilities the employee might owe, the liability can be seen to be triggered by the wrongdoing of the employee because it is only when such potential converts to actual wrongdoing by the employee that the strict liability arises. The

\textsuperscript{72} Atiyah, above n 17, 6.
\textsuperscript{73} See Gianville Williams, ‘Vicarious Liability: Tort of the master or of the servant’ (1956) 72 \textit{Law Quarterly Review} 522 and, more recently Stevens, above n 71.
\textsuperscript{74} [1952] 2 QB 1007.
\textsuperscript{75} Ibid 1009. Similar sentiments were expressed on appeal which upheld Lord Goddard C.J’s decision, [1953] 1 QB 597.
extent of the strict liability is also quantified by reference to the damage caused by the wrongdoing of the employee. But the employer is held strictly liable because of the potential for the employer to have contributed to that risk of harm by abusing their authority to direct the conduct of an employee by creating a conflict between the employee’s duties under their employment contract and other general law obligations or responsibilities the employee might owe. On this basis, strict liability for the wrongdoing of an employee can be seen to reflect different aspects of both the master’s and the servant’s tort theories. Labelling the strict liability one or the other, however, does not seem particularly helpful.

It is also possible to deal with cases such as Broom v Morgan without having to resort to the master’s tort theory. It did not matter in that case that the employee could not be held personally liable to his wife because of spousal immunity. Strict liability for the wrongdoing of an employee is not triggered because the employee is liable to the plaintiff but because the employee wrongfully caused the plaintiff harm. Provided such wrongdoing occurred in the course of employment, there was a risk that the employer might have wrongfully contributed to that harm by abusing their authority to direct the conduct of an employee by creating a conflict between the employee’s duties under their employment contract and other general law obligations or responsibilities the employee might owe. The employer was held liable for creating that risk and it therefore did not matter that the employee could not be held personally liable to the plaintiff.

VIII CONCLUSION

Strict liability for the wrongdoing of an employee was previously imposed under the label ‘vicarious liability’. Such a label gave few clues as to the basis of the strict liability or its limits. By focussing on the one feature which the various relationships in which the courts impose strict liability for the wrongdoing of another in tort have in common, it can now be seen that strict liability for the wrongdoing of an employee responds to the potential for an employer, when exercising their authority to direct the conduct of an
employee for their own benefit, to abuse that authority by creating a conflict between an employee's duties under their employment contract and any other general law obligations or responsibilities the employee might owe. Unlike previous explanations, the potential for an employer to abuse their authority to direct the conduct of an employee for their own benefit is both necessary and sufficient for strict liability for the wrongdoing of an employee to be imposed. It also explains why employers are not held strictly liable for all damage caused by employees whilst carrying out the employer's business. The law is not concerned with the possibility that an employee might cause damage of itself, but the possibility that such damage might be brought about by an employer abusing their authority to direct the conduct of an employee for their own benefit.
Chapter 6
Strict Liability for the Wrongdoing of an Agent

The third and final form of strict liability for the wrongdoing of another in tort identified by the new expositive framework put forward by this thesis is \textit{strict liability for the wrongdoing of an agent}. As explained in chapter 3, this form of strict liability is limited to the agency relationship and responds to the potential for an agent to abuse the authority vested in them by a principal to effect legal relations on the principal's behalf.

This chapter will start by examining who is an agent for the purposes of strict liability for the wrongdoing of an agent. It will then determine the basis of the strict liability, its nature, the circumstances in which the strict liability arises and its scope. Finally, the chapter will explore whether it is possible to combine the conduct of a principal and an agent in order to establish a legal wrong, examine the strict liability imposed on a solicitor for the wrongdoing of an employee who has been vested with authority to effect legal relations on behalf of the solicitor's clients and consider whether the basis of strict liability for the wrongdoing of an agent lies in contract or tort.

I \hspace{10pt} \textbf{WHO IS AN AGENT?}

To understand strict liability for the wrongdoing of an agent, it is first necessary to define who is an 'agent' for the purposes of the strict liability. This is no easy task given Lord Herschell's comment in \textit{Kennedy v de Trafford} that '[n]o word is more commonly and constantly abused than the word "agent"'.\textsuperscript{1} It is appropriate then that this chapter starts by tracing the historical use of the term to see how the definition has developed.

One of the first cases to impose strict liability on a principal for the wrongdoing of an agent was \textit{Hern v Nichols}.\textsuperscript{2} The case involved the sale of silk, the quality of which had been misrepresented. The misrepresentation

\textsuperscript{1} [1897] AC 180, 188.
\textsuperscript{2} (1708) 1 Salk 289 [91 ER 256] ('Hern').
had been made by a factor who had been entrusted with the silk by the vendor for the purposes of arranging a sale. Similar facts arose in Udell v Atherton, except that rather than selling silk, the vendor was selling a mahogany log. Once again, there had been a misrepresentation as to the quality of the log made by an agent appointed by the vendor to sell timber on a commission basis. The vendor was held strictly liable for the agent’s misrepresentation by two of the four judges, the views of whom are now generally considered to be correct. In both these cases, the agents had been vested with authority to effect legal relations on behalf of their vendors. The term ‘agent’ was therefore being used in the narrow, contractual sense of the word. It follows, that an ‘agent’ for the purposes of strict liability for the wrongdoing of an agent was originally quite limited.

Confusion as to the meaning of the term ‘agent’ seems to have started with its use in cases concerning strict liability for the wrongdoing of an employee, specifically those in which an employee had engaged in some type of intentional misconduct. By using the term ‘agent’ the courts tried to take advantage of cases such as Hern and Udell to smooth over difficulties in finding that the wrongful conduct of an employee had occurred within the course of employment. The decision of the Court of the Exchequer Chamber in Barwick v English Joint Stock Bank provides a good example. The question in that case was whether a bank could be held strictly liable for a bank manager who had fraudulently issued a guarantee on behalf of the bank in order to encourage the plaintiff to continue dealing with a customer of the bank. When explaining the general rule as to when an employer could be held strictly liable for the wrongdoing of an employee, Willes J applied the rule to agents also:

The general rule is, that the master is answerable for every wrong of the servant or agent as is committed in the course of the service and for the master’s benefit, though no express command or privity of the master be proved.

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4 (1861) 7H & N 172 (‘Udell’).
6 The award in both cases was for damages rather than rescission of the contract.
7 (1867) II LR Exch. 259.
8 Ibid 265 (emphasis added).
When it came to explaining why the bank should be held strictly liable for the manager’s fraud on the facts of the case, Willes J dropped the reference to ‘employee’ altogether.9

It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.

Throughout his judgment, Willes J can be seen to use the terms ‘employee’ and ‘agent’ interchangeably. It was this interchangeable use of the terms which first suggested that the term ‘agent’ might not be restricted to a person who had been vested with authority by a principal to effect legal relations on the principal’s behalf.10

One category of case in which particular use was made of this technique of describing employees as agents were cases involving the employees of solicitors who defrauded clients, the most well-known being the decision of the House of Lords in Lloyd v Grace Smith & Co.11 The employee in that case was engaged by a solicitor as a conveyancing manager and had been vested with authority by the solicitor ‘to arrange and negotiate sales of real property and to carry them out, and also to receive deeds for safe custody’.12 A client of the solicitor gave the conveyancing manager the title deeds to a property so that he could arrange a sale. Instead of arranging the sale, the conveyancing manager tricked the client into signing a transfer document in his favour and used the deeds to mortgage the property and misappropriate the proceeds. In holding the solicitor strictly liable for the fraud of the conveyancing manager, the House of Lords relied heavily on the earlier decision of Barwick. Lord Macnaughten said of that decision:13

And I think it follows from the decision, and the ground on which it was based, that in the opinion of the Court a principal must be liable for the fraud of his agent committed in the course of his agent’s employment and not beyond the scope of his agency, whether the fraud be committed for the principal’s benefit of not.

9 Ibid 266.
10 Although in Barwick v English Joint Stock Bank (1867) II LR Exch 259 the employee had been given such authority. See below.
11 [1912] AC 716.
12 Ibid 717
13 Ibid 731.
Once again, although the conveyancing manager was an employee, the concepts of employment and agency were being used interchangeably.

Further confusion as to the meaning of the term ‘agent’ arose with its use in a series of cases in which the owners of motor vehicles were held strictly liable for damage caused by a person who was driving the vehicle on the owner’s behalf.\(^\text{14}\) Earlier cases involving a horse and carriage had identified the driver with the owner, essentially treating the driver and the owner as one and the same for the purposes of tort law.\(^\text{15}\) Such reasoning lost favour with the rise of the fault-based tort of negligence towards the end of the 19th century\(^\text{16}\) and it became necessary to find an alternate ground upon which to base such liability. In the motor vehicle cases, the courts took the lead of Willes J in *Barwick* and chose to describe the driver of a motor vehicle who was driving the vehicle on the owner’s behalf as the owner’s ‘agent’. The basis of the motor vehicle owner’s liability was explained by du Parcq LJ in *Hewitt v Bonvin* in the following terms:\(^\text{17}\)

> The driver of a car may not be the owner’s servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner’s behalf. Such liability depends not on ownership, but on the delegation of a task or duty.

This was a much broader use of the concept of ‘agency’ in that it was not limited to a person who had been vested with authority by a principal to effect legal relations on the principal’s behalf, but extended to include a person who had been asked to drive a motor vehicle on the motor vehicle owner’s behalf.

The varied senses in which the term ‘agent’ was being used meant that the courts had to try and rationalise the meaning of the term ‘agent’ for the purposes of strict liability for the wrongdoing of an agent. This can be seen in the decision of the High Court of Australia in *Colonial Mutual Life Assurance Society Limited v The Producers and Citizens Cooperative Assurance Company of Australia Limited*.\(^\text{18}\) The case concerned a life insurance agent who had been appointed to canvass members of the public.

\(^{14}\) Culminating with the House of Lords decision in *Morgans v Launchbury* [1973] AC 127.

\(^{15}\) See, eg, *Wheatley v Patrick* (1837) 6 LJ Ex 193.


\(^{17}\) [1940] 1 KB 188, 194-195.

\(^{18}\) (1931) 46 CLR 41 (‘CML’).
for life insurance proposals. In explaining why the life insurance company could be held strictly liable for the wrongful conduct of the life insurance agent but not for other independent contractors engaged by the life insurance company, Dixon J said:\(^{19}\)

The independent contractor carries out his work, not as a representative but as a principal. But a difficulty arises when the function entrusted is that of representing the person who requests its performance in a transaction with others, so that the very service to be performed consists in standing in his place and assuming to act in his right and not in an independent capacity.

On the facts of CML, there was very little doubt that the life insurance agent was an agent; he had been vested with authority to obtain proposals and collect premiums on behalf of the life insurance company\(^{20}\) and was therefore an agent in the narrow, contractual sense of the word.\(^{21}\) The decision has been significant, however, because in distinguishing an agent from an independent contractor Dixon J drew on the 'representative' capacity of an agent. Subsequent judges have taken Dixon J's use of the term 'representative' to mean that an agent is not just a person who has been vested with authority by a principal to effect legal relations on the principal's behalf, but can include a person engaged to do any other number of things on behalf of another. In this way, CML has provided a means by which the definition of 'agent' might be expanded.

Perhaps the judge most well-known for using CML to expand the definition of the term 'agent' is Justice McHugh. His first attempt came in the decision of the High Court of Australia in Scott v Davis,\(^{22}\) a case involving a plane accident in which the pilot was killed and a young boy severely injured. In determining whether the parents of the young boy could hold the owner of the plane strictly liable for the pilot's negligence, McHugh J looked to the ratio decidendi of CML which he described as follows:\(^{23}\)

\[\ldots\text{a principal is liable for the wrongful act of an agent causing damage to a third party when that act occurred while the agent was carrying out some activity as the principal's authorised representative in a dealing with a third party.}\]

\(^{19}\) Ibid 48-49.

\(^{20}\) But not to issue policies.

\(^{21}\) See further chapter 3.

\(^{22}\) (2000) 204 CLR 333.

\(^{23}\) Ibid 357.
As the owner of the plane had asked the pilot to take the young boy up on a joy ride, McHugh J was of the view that the pilot was acting as the owner's authorised representative and was therefore an 'agent'. It followed that the owner could be held strictly liable for the pilot's negligence. He was supported in this conclusion by the motor vehicle cases mentioned above.\textsuperscript{24} The remainder of the High Court,\textsuperscript{25} however, were not convinced that the pilot could be considered an 'agent' on the facts of the case. The following statement by Gummow J is typical:\textsuperscript{26}

> It may be conceded...that the activities of an agent with authority to bring about a contractual or other legal relationship between the principal and third parties may have legal consequences in tort for which the principal is responsible. But the pilot was not an agent in this sense.

Nor could the remaining members of the High Court find any other basis upon which to hold the owner of the plane liable for the pilot's negligence.

Justice McHugh had a further opportunity to try and expand the definition of the term 'agent' (and attendant legal consequences) in \textit{Hollis v Vabu Pty Ltd.}\textsuperscript{27} The case involved the liability of a courier company for a bicycle courier who had struck a pedestrian whilst delivering packages in Sydney. The bicycle courier had not been identified, but was wearing the defendant courier company's uniform at the time. The central issue in the case was whether a bicycle courier engaged by the courier company was an employee or an independent contractor. After much discussion, a majority of the High Court found the bicycle courier to be an employee.\textsuperscript{28} It followed that strict liability for the wrongdoing of an employee could be imposed on the courier company for the bicycle courier's negligence. Justice McHugh, however, was concerned that the majority's decision might unduly extend the 'classical tests' of employment.\textsuperscript{29} He consequently decided to take a different route. Rather than find that the bicycle courier was an employee, he instead found the bicycle courier to be an 'agent'.\textsuperscript{30}

\textsuperscript{24} Ibid 359-369.
\textsuperscript{25} Gleeson CJ, Gummow, Hayne and Callinan JJ.
\textsuperscript{26} Scott \textit{v} Davis (2000) 204 CLR 333, 423.
\textsuperscript{27} (2001) 207 CLR 21.
\textsuperscript{28} Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ.
\textsuperscript{29} \textit{Hollis v Vabu Pty Ltd} (2001) 207 CLR 21, 49.
\textsuperscript{30} Ibid 57.
Rather than expanding the definition of employee or accepting the employee/independent contractor dichotomy, the preferable course is to hold that employers can be vicariously liable for the tortious conduct of agents who are neither employees nor independent contractors... To hold an employer vicariously liable for the conduct of a worker who is not an employee or independent contractor does not affect their relationship in other areas of the law or their freedom to contract between themselves or to arrange their business affairs. And it has the great advantage of ensuring that the doctrine of vicarious liability remains relevant in a world of rapidly changing working practices.

In finding the bicycle courier to be an ‘agent,’ McHugh J again relied on the earlier decision of the High Court in CML.31

Another judge to have used CML to expand the definition of the term ‘agent’ is Justice Kirby. In Sweeney v Boylan Nominees Pty Limited32 the High Court of Australia had to decide whether a fridge owner who had leased a fridge to a service station could be held strictly liable for the negligence of a refrigeration mechanic sent by the fridge owner to repair the fridge under the terms of the lease. Justice Kirby was of the view that the fridge owner could be held so liable on the basis that the refrigeration mechanic was an agent of the fridge owner. The basis of his reasoning was once again the decision in CML:

Whilst the rule in CML remains, it should be applied by this Court in accordance with its terms. It is part of Australian law. Its terms apply in the present case. The [refrigeration mechanic] was the representative of [the fridge owner] which afforded him the means to persuade others that he should be admitted to their premises, permitted to repair a refrigerator placed there for which [the fridge owner] was responsible by lease and even allowed to receive [the fridge owner’s] money and to give a receipt for what he received.

As with McHugh’s previous efforts to expand the definition of the term ‘agent’, however, the majority of the High Court disagreed. The majority noted that McHugh J’s views in both Scott and Hollis had been a minority position and returned to a more traditional definition of the ‘term’ agency.33

But neither in Scott nor in Hollis, nor earlier in CML, was there established the principle that A is vicariously liable for the conduct of B if B ‘represents’ A (in the sense of B acting for the benefit or advantage of A). On the contrary, Scott rejected contentions that, at their roots, were no different from those advanced in this case under the rubric of ‘representation’ rather than, as in Scott, under the rubric ‘agency’. As was said in Scott of the word ‘agent’, to use the word ‘representative’ is to begin but not to end the inquiry.

31 Ibid 58-60.
32 (2006) 226 CLR 161 (‘Sweeney’).
33 Ibid 172.
In reviewing the historical use of the term 'agent', it is not difficult to see why Lord Herschell said that '[n]o word is more commonly and constantly abused than the word "agent"'. Ever since strict liability for the wrongdoing of an agent was first recognised, there seems to have been constant pressure to expand the meaning of the term 'agent'. Constant pressure, however, does not equate to success. There are actually very few higher court cases in either Australia or the United Kingdom in which a person has been held strictly liable for the wrongdoing of an agent where that agent was not an agent in the narrow, contractual sense of the term. As noted by a majority of the High Court of Australia in Sweeney, support for expanding the meaning of the term 'agent' in Scott, Hollis and indeed Sweeney was a minority position. The majority instead endorsed the traditional, narrow definition. In CML, despite the use of the word 'representative', the life insurance agent had been vested with authority to effect legal relations on behalf of the life insurance company. Similarly, in Barwick, although the term 'agent' was used interchangeably with the term 'employee', the employee in that case was an agent because, as bank manager, he had been vested with authority to execute guarantees and other contracts on behalf of the bank.

This just leaves the cases involving the employees of solicitors who have defrauded the solicitor's clients (the 'solicitor's employee' cases) and the motor vehicle cases. With respect to the solicitor's employee cases, although the employees in those cases had not been vested with authority to effect legal relations on behalf of the solicitor, they had been vested with authority to effect legal relations on behalf of the solicitor's clients. This authority had been vested in the employee by the solicitor who was ultimately held strictly liable for the fraud. This is a very similar notion to agency in its narrow, contractual sense, although the notion has been modified for the particular role played by members of the legal profession in arranging legal transactions on behalf of their clients. Indeed the similarities are so great, that the reasons for imposing strict liability in both situations appear to be the same (see part VI below). It can be argued, therefore, that

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34 [1897] AC 180, 188.
35 Although such authority did not extend to issuing policies.
the solicitor’s employee cases are an exception to the general rule that an ‘agent’ is a person who has been vested with authority by a principal to effect legal relations on the principal’s behalf. The exception is confined to very specific facts and the general principles of strict liability for the wrongdoing of an agent apply.

With respect to the motor vehicle cases, to the extent that drivers in the motor vehicle cases have been described as ‘agents’ it might be argued that the term ‘agent’ for the purposes of strict liability for the wrongdoing of an agent means more than someone who has been vested with authority by a principal to effect legal relations on the principal’s behalf. The concept of ‘agency’ used in the motor vehicle cases was, however, restricted to cases involving motor vehicles by a majority of the High Court of Australia in Scott v Davis. This means that whatever the basis of the strict liability in those cases, it is a basis which cannot be applied more generally. Furthermore, it will be shown in chapter 8 that the courts are no longer as willing as they once were to impose such strict liability. It follows that there is no longer any reason to treat the motor vehicle cases as instances of ‘agency’ and the cases can be left to one side.

Although there are numerous cases which have purported to impose strict liability for the wrongdoing of an agent, once the solicitor’s employee cases and the motor vehicles cases are addressed, it can be seen that who is an ‘agent’ for the purposes of strict liability for the wrongdoing of an agent has been drawn quite narrowly. The cases show that it is only when an ‘agent’ has been vested with authority by a principal to effect legal relations on the principal’s behalf that strict liability for the wrongdoing of an agent is consistently imposed.

II BASIS OF THE STRICT LIABILITY

Traditionally, the basis of strict liability for the wrongdoing of an agent was thought to be very similar to the basis of strict liability for the wrongdoing of

an employee. As both a principal and an employer received the benefit of an agent or an employee's work, it was considered appropriate that they should both also bear the burden of any damage wrongfully caused by an employee or agent in obtaining that benefit.\footnote{The flaws associated with this approach were demonstrated in chapter 1.}

The new expositive framework for strict liability for the wrongdoing of another in tort put forward by this thesis has proposed an alternative basis for strict liability for the wrongdoing of an employee. In chapter 5 it was argued that strict liability for the wrongdoing of an employee responds to the potential for an employer, when exercising their authority to direct the conduct of an employee for their own benefit, to abuse that authority by creating a conflict between an employee's duties under their employment contract and any other general law obligations or responsibilities the employee might owe. When viewed in such terms, it is not possible for the basis of strict liability for the wrongdoing of an agent to be the same as that of strict liability for the wrongdoing of an employee. This is because an agent may be an employee, an independent contractor or may even be acting gratuitously. Consequently, not all principals are vested with authority to direct the conduct of an agent so that not all principals have the potential to create a conflict between an agent's contractual duties and any other general law obligations or responsibilities the agent might owe.

Rather than being similar to strict liability for the wrongdoing of an employee, it now appears that the basis of strict liability for the wrongdoing of an agent is more closely aligned with that of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another. As explained in chapter 4, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another responds to the potential for abuse of the power relationship created when an employer or school confers their authority to direct the conduct of an employee or student upon another person. In much the same way, strict liability for the wrongdoing of an agent can be seen to respond to the potential for abuse of the authority vested in an agent by a principal. Such potential exists.
because the authority vested in an agent by a principal creates a relationship between the agent and the party wishing to effect legal relations with the principal (the ‘transactional party’) which enables the agent to effect legal relations between the principal and the transactional party in circumstances in which the transactional party is not expected to confirm with the principal the details of those legal relations.

Consider a scenario where a vendor is selling a property through a real estate agent. The vendor vests the real estate agent with authority to negotiate the sale of the property on the vendor’s behalf. The real estate agent then provides prospective purchasers with information about the property on the vendor’s behalf. In such circumstances, a prospective purchaser is not expected to confirm with the principal the information provided by the real estate agent. Were a prospective purchaser to take such steps they would effectively negate the advantages of using a real estate agent in the first place. Instead, a prospective purchaser is entitled to rely on the information provided by the agent.

As this scenario demonstrates, the problem with a principal vesting authority in an agent to effect legal relations on the principal’s behalf is that because a transactional party is not expected to confirm with the principal the details of those legal relations, the authority vested in the agent by the principal is subject to abuse. An agent, for instance, can use the authority vested in them by a principal to misrepresent the nature of property being sold by the principal to a prospective purchaser. A principal consequently puts a transactional party at risk of harm whenever they confer authority upon an agent to effect legal relations on their behalf. It is submitted that it is this potential for an agent to abuse the authority vested by the principal in the agent which attracts the concern and the intervention of the law. Strict liability for the wrongdoing of an agent responds to the potential for an agent to abuse the authority vested in them by a principal to effect legal relations on the principal’s behalf by holding the principal liable regardless of personal fault for any harm wrongfully caused to a transactional party by an agent in the course of effecting legal relations on the principal’s behalf. The liability effectively holds a principal to account for damage wrongfully caused by an
agent in the course of effecting legal relations on the principal's behalf. In so doing, the liability provides transactional parties with a degree of protection from an abuse of the authority vested in the agent by the principal. This is important given that any restraints placed on how an agent exercises their authority typically protect the principal rather than a transactional party. For instance, although an agent owes a fiduciary duty to the principal, they owe no equivalent duty to a transactional party.

As noted in the previous chapters, it is relatively unusual in tort law for one person to be held strictly liable for the wrongdoing of another, and a defendant has to do more than merely provide an opportunity for wrongdoing to occur for such liability to be imposed. When a principal vests an agent with authority to effect legal relations on their behalf, a principal does do more than merely provide the agent with an opportunity to engage in wrongdoing. A modification to the above real estate scenario demonstrates the point. If a vendor not only appoints a real estate agent, but engages an electrician to repair a faulty stove to be sold with the property, the vendor will provide the electrician with an opportunity to engage in wrongdoing which might harm a prospective purchaser. The vendor, however, does no more than that. There is nothing the vendor does that can be seen to assist or enable the electrician to wrongfully harm a prospective purchaser. Consequently, the vendor will not be held strictly liable the wrongdoing engaged of the electrician.\(^{38}\) In contrast, where a vendor appoints a real estate agent, the authority vested in the real estate agent by the vendor can provide the means by which wrongdoing might occur. A real estate agent, for instance, can use the authority vested in them by a vendor to obtain money from a prospective purchaser (perhaps in the form of a deposit) and then appropriate that money for their own purposes.\(^{39}\) It is not that an abuse of authority will necessarily occur, but there is always an inherent risk that the authority conferred by the principal upon the agent to effect legal relations on their behalf will be abused. As will be seen from the cases, that

\(^{38}\) *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

\(^{39}\) As occurred in *Lloyd v Grace, Smith & Co* [1912] AC 716.
risk appears sufficient for strict liability for the wrongdoing of another in tort to be imposed.

III  NATURE OF THE STRICT LIABILITY

As with the previous forms of strict liability for the wrongdoing of another in tort identified by this thesis, strict liability for the wrongdoing of an agent is not an absolute form of liability; it is not imposed in the absence of wrongdoing.\(^ {40}\) It still needs to be shown that an agent wrongfully harmed a transactional party in the course of effecting legal relations between the principal and the transactional party. The liability is, however, imposed regardless of wrongdoing by the principal. This means that strict liability for the wrongdoing of an agent can be imposed even though a principal may be able to adduce evidence that the vesting of authority in the agent did not wrongfully contribute to the damage suffered by the transactional party. The liability can also be imposed even though a principal may be able to adduce evidence that an abuse of the authority vested in the agent did not actually take place. This is because strict liability for the wrongdoing of an agent responds to the potential rather than an actual abuse of the authority vested in an agent by the principal.

Although it may seem harsh that a principal can be subject to strict liability for the wrongdoing of an agent regardless of personal wrongdoing, a principal need not necessarily bear such liability alone. In certain circumstances, a principal will be entitled to seek an indemnity from the agent in respect of the damages paid to the transactional party wrongfully harmed by the agent.\(^ {41}\)

IV  IN WHAT CIRCUMSTANCES DOES THE STRICT LIABILITY ARISE?

Strict liability for the wrongdoing of an agent can be imposed on a principal whenever an agent wrongfully harms a transactional party in the course of effecting legal relations between the principal and a transactional party.


\(^{41}\) F M B Reynolds, Bowstead and Reynolds on Agency (16th ed, 2006) 165.
Three points can be made about the general circumstances in which strict liability for the wrongdoing of an agent arises. First, strict liability for the wrongdoing of an agent is generally limited to economic loss. The reason is that the authority vested in an agent by the principal is an authority to effect legal relations on the principal's behalf. The potential for abuse of that authority is therefore typically limited to harm to the contractual expectancies of a transactional party. Such harm generally materialises in the form of economic loss. Strict liability for the wrongdoing of an agent may also extend in certain circumstances to property loss, given that a transactional party may hand over property to an agent in the course of effecting legal relations with the principal with which the agent may subsequently abscond. What strict liability for the wrongdoing of an agent does not extend to is personal injury or damage to other personal interests. As the authority conferred by a principal upon an agent does not include authority to direct the conduct of a transactional party, there is very limited potential for abuse of that authority to result in physical harm. Consequently, whilst a vendor might be held strictly liable to a prospective purchaser induced to buy a property as a result of a negligent misrepresentation made by a real estate agent or to part with a deposit with which the real estate agent absconds, a vendor will not be held strictly liable to a prospective purchaser injured in a car accident negligently caused by a real estate agent whilst driving the purchaser to view the property.\(^{42}\)

There is one case in which the High Court of Australia has imposed strict liability on a principal for something other than economic loss or property loss, but it is the only higher court case in either Australia or the United Kingdom to do so. In *CML*, which was discussed above, the life insurance company was held strictly liable for defamatory statements made by its agent about a rival life insurance company whilst the agent was canvassing members of the public for life insurance proposals. A defamatory statement, however, is not like a negligent misrepresentation; the authority vested in an agent by the principal does not provide the means by which an agent might

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\(^{42}\) See, eg, the South African case of *Colonial Mutual Life Assurance Society Ltd v McDonald* 1931 AD 412 cited by P S Atiyah, *Vicarious Liability in the Law of Torts* (1967) 109 and 113-114.
make a defamatory statement. A defamatory statement is more like the
negligent driving of the real estate agent in that, at best, the life insurance
company created an opportunity for the defamatory statement to be made.
On this basis, it is submitted that the decision of the High Court in CML is
incorrect.\textsuperscript{43} Although CML has been referred to by Australian courts on
numerous occasions, the possibility that the decision is incorrect is plausible
since the references to CML have been to Justice Dixon’s emphasis on the
need for an agent to be acting in a ‘representative’ capacity rather than to the
actual decision that a principal can be held strictly liable for defamatory
statements made by an agent.

A second and closely associated point that can be made about the general
circumstances in which strict liability for the wrongdoing of an agent arises is
that the strict liability is owed only to transactional parties. A principal will not
be held strictly liable to any person wrongfully injured by an agent, only a
transactional party wrongfully injured in the course of effecting legal relations
with the principal through the agent. This is because the vesting of authority
by a principal in an agent creates a relationship between the agent and a
transactional party and it is only within that relationship that there is the
potential for the authority vested in the agent by the principal to be abused.

A final point that can be made about the general circumstances in which
strict liability for the wrongdoing of an agent arises is that there are not any
restrictions on who can be an agent for the purposes of the strict liability. An
agent for these purposes may be an employee, an independent contractor or
may even be acting gratuitously. What is important is not who the agent is or
how they were appointed, but that they have been vested with authority by
the principal to effect legal relations on the principal’s behalf. In cases such
as Hern v Nichol, for instance, the agent for whom the principal was held
strictly liable was an independent contractor. In other cases, such as
Barwick v English Joint Stock Bank, the agent for whom the principal was
held strictly liable was an employee.

\textsuperscript{43} Note that it was a 4 (Gavan Duffy CJ, Rich, Starke and Dixon JJ)/2 (Evatt and
McTiernan JJ) decision.
V Scope of the Strict Liability

Strict liability for the wrongdoing of an agent is generally limited to circumstances in which an agent wrongfully harms a transactional party in the course of effecting legal relations between the principal and the transactional party. This is because the strict liability responds to the potential for the authority vested in an agent by a principal to be abused and such potential generally only exists where the agent is using that authority to effect legal relations with a transactional party on the principal’s behalf.

Importantly, whether an agent wrongfully harms a transactional party in the course of effecting legal relations between the principal and the transactional party is determined by reference to the terms of the apparent authority vested in the agent by the principal, as opposed to the terms of the actual authority vested in the agent by the principal. Provided the transactional party reasonably believes that the agent is acting within the terms of the apparent authority vested in the agent by the principal immediately prior to the wrongdoing occurring, any wrongdoing by the agent will be taken to have occurred in the course of effecting legal relations between the principal and the transactional party. This is best demonstrated by the fraud cases referred to above.44 In those cases, strict liability for the wrongdoing of an agent could not have been imposed if the scope of the strict liability was determined by reference to the terms of the actual authority vested in the agent by the principal. This is because none of the agents in those cases had been conferred any actual authority to commit fraud or engage in conduct with the purpose of committing a fraud. Immediately prior to the frauds occurring, however, the agents in those cases were engaged in activities within the terms of the apparent authority that had been vested in them by a principal, activities such as the negotiating the issue of a guarantee. As the agents were acting within the terms of the apparent authority vested in them by their principals, there was the potential for the authority to be abused. It follows that the frauds occurred in the course of

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44 See, eg, Barwick v English Joint Stock Bank (1867) 11 LR Exch 259.
effecting legal relations between the principal and the transactional party and strict liability for the wrongdoing of an agent could be imposed.

The reason the scope of strict liability for the wrongdoing of an agent is determined by reference to the terms of the apparent (as opposed to the actual) authority vested in an agent by a principal is because a transactional party will interact with an agent on the basis of the terms of the apparent authority vested in the agent by the principal. One reason a transactional party will hand over money to an agent, for instance, is because the agent has the apparent authority to collect that money on the principal’s behalf. The relationship between the agent and the transactional party is therefore shaped by the terms of the apparent authority vested in the agent by the principal and not by the terms of the actual authority that has been so vested. It is the potential for this authority to be abused which puts transactional parties at risk of harm.

Arguably, it is this potential for strict liability for the wrongdoing of an agent to extend beyond the terms of the actual authority vested in an agent by a principal which has made it an attractive, alternative form of strict liability in cases involving the wrongdoing of employees. Chapter 5 showed that an employee’s wrongful conduct does not fall within the course of their employment for the purposes of strict liability for the wrongdoing of an employee unless the employee is acting in accordance with their employer’s actual directions (express or implied) immediately prior to the wrongdoing. This is because it is only where the employee is acting in accordance with their employer’s actual directions (express or implied) that there is the potential for the employer to abuse their authority to direct the conduct of an employee by creating a conflict between an employee’s duties under their employment contract and the other general law obligations or responsibilities the employee might owe. Strict liability for the wrongdoing of an agent is therefore potentially much broader in scope than strict liability for the wrongdoing of an employee. It follows that there might be circumstances in which strict liability for the wrongdoing of an agent can be imposed but strict liability for the wrongdoing of an employee cannot.
Consider *Barwick v English Joint Stock Bank*.\(^{45}\) In that case strict liability for the wrongdoing of an employee could not have been imposed on the bank because the bank manager intentionally issued the fraudulent guarantee. Immediately prior to the wrongdoing, therefore, the bank manager was engaged in conduct with the purpose of committing a fraud. Such conduct was not within the terms of the actual directions (express or implied) issued by the bank to the bank manager and the only conflict which existed on the facts of the case was created by the employee’s own motivations rather than the bank. In contrast, strict liability for the wrongdoing of an agent could be imposed because the bank manager had been vested with authority to issue guarantees and enter into other contracts on behalf of the bank and was acting within the terms of that apparent authority immediately before he issued the guarantee. The issue of the fraudulent guarantee could therefore be seen as an abuse of the authority vested in the bank manager by the bank to issue guarantees on its behalf. The boundary between strict liability for the wrongdoing of an agent and strict liability for the wrongdoing of an employee will be discussed further in chapter 7.

Using the terms of the apparent authority vested in an agent by a principal to determine the scope of strict liability for the wrongdoing of an agent does not mean that a principal will be held strictly liable for all harm wrongfully caused by an agent to a transactional party. It still has to be shown that the agent was acting within the terms of the apparent authority vested in the agent by the principal immediately prior to the wrongdoing, for it is only then that the authority vested in the agent is in a position to be abused. The decision of the House of Lords in *Armagas Ltd v Mundogas SA*\(^{46}\) provides a good example. The case involved the sale and charter-back of a ship owned by Mundogas. The deal was negotiated on Mundogas’ behalf by the company’s vice-president (transportation) who had been vested with authority by Mundogas to effect legal transactions on its behalf, making him also an agent. In the course of the negotiations with Armagas, the vice president fraudulently misrepresented to Armagas that he was authorised to charter-

\(^{45}\) (1867) II LR Exch. 259.
\(^{46}\) [1986] 1 AC 717.
back the ship for a period of 3 years. Armagas knew that a person in the position of the vice-president was generally only authorised to enter into charter parties of up to 12 months and the terms of the actual authority vested in the vice-president was limited to entering into charter parties of 12 months. As Armagas was aware that the vice-president was acting outside the terms of his apparent authority, they could not hold Mundogas strictly liable for the vice-president’s deceit. As Lord Keith of Kinkel explained, Mundogas had not done anything to induce Armagas’ belief as to the authority of the vice-president.\(^\text{47}\)

At the end of the day the question is whether the circumstances under which a servant has made the fraudulent misrepresentation which has caused loss to an innocent party contracting with him are such as to make it just for the employer to bear the loss. Such circumstances exist where the employer by words or conduct has induced the injured party to believe that the servant was acting in the lawful course of the employer’s business. They do not exist where such belief, although it is present, has been brought about through misguided reliance on the servant himself, when the servant is not authorised to do what he is purporting to do, when what he is purporting to do is not within the class of acts that an employee in his position is usually authorised to do, and when the employer has done nothing to represent that he is authorised to do it.

It follows that the fraudulent misrepresentation made by the vice-president could not be considered an abuse of the authority vested in the vice-president by Mundogas because Armagas did not reasonably believe that the vice-president was acting within the terms of his apparent authority immediately prior to the wrongdoing. In explaining what would have been necessary to impose strict liability on Mundogas for the fraudulent misrepresentation of the vice-president, Lord Keith of Kinkel said:\(^\text{48}\)

\begin{quote}
The essential feature for creating liability in the employer is that the party contracting with the fraudulent servant should have altered his position to his detriment in reliance on the belief that the servant’s activities were within his authority, or, to put it another way, were part of his job, this belief having been induced by the master’s representations by way of words or conduct.
\end{quote}

Such reasoning reinforces the basis of strict liability for the wrongdoing of an agent proposed by this thesis. Such liability is imposed because a principal vests authority in an agent to effect legal relations on their behalf and there is an expectation that a transactional party will enter into those legal relations without confirming any of the details with the principal. A transactional party

\(^{47}\) Ibid 782-783.
\(^{48}\) Ibid 781.
is therefore entitled to rely on an agent in the course of entering into legal relations with the principal. Such reasoning also provides further support for the view that CML was incorrectly decided. The plaintiff in CML cannot be said to have 'altered his position to his detriment in reliance' on the agent's defamatory statement. Note that as the vice-president's fraudulent misrepresentation in Armagas v Mundogas was intentional, there was not any possibility of imposing strict liability for the wrongdoing of an employee on the facts of the case.

The reasoning in Armagas v Mundogas also explains the unusual series of cases involving companies who have not been held strictly liable for the fraudulent misconduct of company secretaries. Typical of those cases is the decision of the House of Lords in Ruben v Great Fingall Consolidated.\footnote{[1906] AC 439.} That case involved a company secretary who fraudulently issued a share certificate in his own favour which he then used to secure a loan from Rubens. Although the company secretary had been vested with authority to record transfers of shares and to keep the share register, the company secretary had not been vested with actual or apparent authority to issue shares. It was therefore not open to Rubens to argue that the company secretary had been acting within the terms of his apparent authority when he issued the share certificate. Once again, as the fraudulent misconduct of the company secretary was intentional, strict liability for the wrongdoing of an employee could not be imposed.

\section*{VI \ COMPOSITE WRONGS}

Can the conduct of both an agent and a principal be combined so that strict liability for the wrongdoing of an agent is imposed even though the agent has not on their own committed any legal wrong? This is the question which arose in Armstrong v Strain.\footnote{[1952] 1 KB 232.} In that case, the purchaser of a bungalow tried to hold a vendor strictly liable for a misrepresentation made by the vendor's real estate agent in the course of the sale. This would have been a
straight forward case of strict liability for the wrongdoing of an agent except that, although the vendor knew the misrepresentation to be false, the real estate agent thought the misrepresentation to be true. The real estate agent had therefore not actually made a fraudulent misrepresentation for which the principal could be held strictly liable.

In most situations the idea of a composite wrong would not even be raised. As a general rule, a person either commits a legal wrong or they do not. The reason it arises in the context of strict liability for the wrongdoing of an agent is the same reason why debates still occur as to whether strict liability for the wrongdoing of an employee is liability for the master's tort or liability for the servant's tort. The issue is whether strict liability for the wrongdoing of an agent attributes an agent's conduct to a principal so that the principal is held liable for their own wrongdoing or attributes liability for the conduct to the principal so that the principal is held strictly liable for the agent's wrongdoing. If strict liability for the wrongdoing of an agent attributes an agent's conduct to the principal, perhaps it is possible for there to be a composite wrong. If only liability is being attributed, there is no basis upon which the conduct of two separate individuals can be combined.

In terms of what is being attributed to a principal for the purposes of strict liability for the wrongdoing of an agent, the same response can be given as that provided in chapter 5 in respect of strict liability for the wrongdoing of an employee; what is being attributed to the principal is liability for the wrongdoing of the agent rather than the conduct constituting the wrongdoing. As strict liability for the wrongdoing of an agent responds to the potential for abuse of the authority vested in an agent by a principal to effect legal relations on their behalf, the liability can be seen to be triggered by the wrongdoing of the agent. The extent of the strict liability is also quantified by reference to the damage caused by the wrongdoing of the agent. It follows that strict liability for the wrongdoing of an agent cannot be imposed unless an agent has themselves done something wrong. This does not mean that

51 Though see Fleming's comment on Anderson v Rhodes [1967] 2 All ER 850, above n 16, 700.
52 See further chapter 5.
strict liability for the wrongdoing of an agent is imposed solely because the
agent did something wrong. The principal is held strictly liable because the
principal created a risk that a transactional party might be harmed by vesting
authority in the agent to effect legal relations on the principal’s behalf which
was subject to abuse. Despite the principal’s conduct, however, there is no
reason for strict liability for the wrongdoing of an agent to be imposed on a
principal unless an agent actually engages in wrongdoing. It follows that
there is no such thing as a composite wrong for the purposes of strict liability
for the wrongdoing of an agent. 53 This was confirmed by the English Court of
Appeal in Armstrong v Strain. 54

VII SORCITOR’S EMPLOYEES

It was suggested in section 1 of this chapter, in the discussion of who is an
‘agent’ for the purposes of strict liability for the wrongdoing of an agent, that
there is an exception to the general rule that an ‘agent’ is a person vested
with authority by a principal to effect legal relations on the principal’s behalf.
That exception is a solicitor’s employee where that employee has been
vested with authority by the solicitor to effect legal relations on behalf of the
solicitor’s clients. In such circumstances a solicitor, just like a principal, will
be held strictly liable for damage wrongfully caused by such an employee in
the course of effecting legal relations between the solicitor’s clients and a
transactional party. In order for the exception to be considered sound,
however, it first needs to be shown that the basis for holding a solicitor
strictly liable for the wrongdoing of an employee who has been vested with
authority by a solicitor to effect legal relations on behalf of the solicitor’s
clients is similar to the basis for imposing strict liability for the wrongdoing of
an agent. For if the basis is different, the liability imposed in such
circumstances cannot be considered a form of strict liability for the
wrongdoing of an agent.

53 Although this does not stop the principal being personally liable in such situations, for
example, where the principal authorises the wrongdoing or uses an ignorant agent to
deliberately deceive the plaintiff of the truth. See Fleming, above n 16.
54 [1952] 1 KB 232.
Looking first at the cases. Most cases in which solicitors have been held strictly liable for the wrongdoing of an employee who has been vested with authority to effect legal relations on behalf of the solicitor’s clients are cases in which the employee has defrauded a client. The classic case is *Lloyd v Grace Smith & Co*,\(^{55}\) mentioned above, which concerned a solicitor’s conveyancing manager who tricked a client into transferring property to him, enabling him to mortgage the property and misappropriate the proceeds.

Defrauded clients are not, however, the only people to whom a solicitor has been held strictly liable for the wrongdoing of an employee vested with authority by the solicitor to effect legal relations on behalf of the solicitor’s clients. Solicitors have also been held strictly liable to third parties looking to enter into legal relations with the solicitor’s clients. The decision of the English Court of Appeal in *Uxbridge Permanent Benefit Building Society v Pickard*\(^{56}\) provides a good example. The solicitor in that case carried on business in London, but had a branch office at Slough. As the solicitor was not permanently based at Slough, he appointed a managing clerk to run the branch office. The managing clerk was conferred ‘full authority to conduct the business of a solicitor’s office’\(^{57}\) by the solicitor. That authority included:\(^{58}\)

> ...not merely acting for clients, but the carrying through of all transactions which would normally be carried through by a solicitor – namely, completion of conveyancing business with third parties having dealings with clients and the obtaining from such third parties upon completion of the transaction sums of money and giving receipts therefor.

One of the third parties from whom the managing clerk had regularly obtained sums of money for and on behalf of the solicitor’s clients was the plaintiff building society. The managing clerk took advantage of the regular dealings with the plaintiff building society by forging documents and securing loans on behalf of clients who did not exist. The solicitor was held strictly liable for the managing clerk’s fraud.

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\(^{55}\) [1912] AC 716.

\(^{56}\) [1939] 2 KB 248.

\(^{57}\) Ibid 253.

\(^{58}\) Ibid.
On what basis might a solicitor be held strictly liable for the wrongdoing of an employee in such cases? The problem seems to be that when a solicitor vests an employee with authority to effect legal relations on behalf of the solicitor’s clients the solicitor creates a relationship between the employee and the solicitor’s client or the employee and a third party wishing to enter into legal relations with the solicitor’s client which enables the solicitor’s employee to effect legal relations on behalf of the solicitor’s client in circumstances in which neither the solicitor’s client nor any third party wishing to enter into legal relations with the solicitor’s client is expected to confirm with one another the details of those legal relations. In Lloyd v Grace Smith & Co, for instance, the client relied on the solicitor’s employee to prepare appropriate documentation for her to sign. In Uxbridge Permanent Benefit Building Society v Pickard, the building society relied on the representation of the solicitor’s employee that he was acting for genuine clients. It follows that the authority vested by a solicitor in an employee to effect legal relations on behalf of the solicitor’s clients is subject to abuse. A solicitor consequently puts both their clients and third parties wishing to enter into legal relations with their clients at risk of harm when they vest authority in an employee to effect legal relations on behalf of the solicitor’s clients.

Although a solicitor’s employee is not an ‘agent’ in the narrow, contractual sense of the term, the vesting of authority in an employee by a solicitor to effect legal relations on behalf of the solicitor’s clients creates the same type of risk of harm that exists when a principal vests authority in an agent to effect legal relations on the principal’s behalf. The only difference is that in the solicitor’s employee cases, the risk of harm is borne by both the solicitor’s clients and third parties wishing to enter into legal relations with those clients. In contrast, where a principal vests an agent with authority to effect legal relations on the principal’s behalf, the only risk created by the principal is a risk to transactional parties wishing to enter into legal relations with the principal. It follows, that the basis of strict liability for the wrongdoing of an agent is very similar to the basis for holding a solicitor strictly liable for the wrongdoing of an employee who has been vested with authority by the solicitor to effect legal relations on behalf of the solicitor’s clients. There is
no reason, therefore, why solicitor’s employees should not be seen as a valid exception to the general rule that an ‘agent’ is a person in whom a principal has vested authority to effect legal relations on the principal’s behalf so that the general principles governing strict liability for the wrongdoing of an agent can consequently be applied as if the solicitor’s employee was an agent.\footnote{An exception which might also extend to other professionals who confer authority on their employees to effect legal relations on behalf of clients, for example, a broker.} The need for the exception reflects the particular role played by members of the legal profession in arranging legal transactions on behalf of others.

\section*{VIII \hspace{1em} Contract or Tort?}

So far it has been argued that an ‘agent’ for the purposes of strict liability for the wrongdoing of an agent is restricted to an agent in the narrow, contractual sense of the term. If this is the case, it might be asked whether there is a valid role for tort law in regulating the liability of a principal for the wrongdoing of an agent. This is an appropriate question; however, to the extent that there are some circumstances in which liability can arise in tort but not in contract, it is submitted that there remains a valid role for tort law even though an ‘agent’ for the purposes of strict liability for the wrongdoing of an agent is so narrowly defined.

The boundaries between liability in contract and tort for the wrongdoing of an agent have never been particularly clear, but they are bound to intersect where an ‘agent’ is defined in the same narrow, contractual sense for the purposes of both forms of liability. For the purposes of contract law, where a disclosed agent validly enters into a contract on behalf of a principal, the parties to the contract are taken to be the principal and the contracting party rather than the agent and the contracting party.\footnote{Dal Pont, G E, \textit{Law of Agency} (2\textsuperscript{nd}, 2008) 478.} It follows that the acts of an agent in entering into a contract on a principal’s behalf are attributed to the principal for the purposes of contract law.\footnote{Ibid 595.} This includes any wrongdoing by the agent. For example, where an agent makes a fraudulent representation which becomes a term of the contract, the principal will be
held liable for that fraudulent misrepresentation in contract law as if the principally personally made the fraudulent misrepresentation. Liability in contract, however, is not the only type of liability which might arise in such circumstances. On the principles outlined in this chapter, strict liability for the wrongdoing of an agent might also arise, though any such liability is treated as strict liability for the wrongdoing of another and not personal liability.

If strict liability for the wrongdoing of an agent was restricted to circumstances in which liability also arose in contract, tort law would not be adding much and any liability imposed in such circumstances could be construed as contractual liability. There are, however, circumstances, in which strict liability for the wrongdoing of an agent can be imposed even though no liability in contract might arise. The clearest example is where no contract comes into existence. As has already been noted, there are agents who have authority to effect legal relations on behalf of a principal but who did not necessarily have authority to enter into legal relations on behalf of a principal. Take, for example, a real estate agent. A real estate agent is not generally vested with authority to enter into legal relations on behalf of a vendor, but will have authority to provide information about the property and to negotiate the terms of the sale. If the real estate agent makes a fraudulent misrepresentation which does not become a term of the contract, no liability in contract can arise. Liability can be imposed in tort law though, provided the fraudulent misrepresentation was made within the apparent scope of the real estate agent's authority. Similarly, a life insurance agent such as the one in CML does not have authority to enter into legal relations on behalf of a life insurance company, but can accept proposals for life insurance policies by customers, as well as premiums, on the life insurance company's behalf. Once again, as no contract arises until the life insurance company accepts the proposal, there can be no liability in contract, although liability might arise in tort. This can be important, for instance, in situations where the life insurance agent absconds with the premium before paying it to the life insurance company.

It follows that, although liability for the wrongdoing of an agent in contract and tort intersect, there are circumstances in which liability might arise in one
but not the other. Consequently, there is a valid role for tort law and a plaintiff should have the right to choose whether an action in tort or contract is more beneficial.\footnote{Henderson v Merrett Syndicates Ltd (No.1) [1995] 2 AC 145.}

IX CONCLUSION

Strict liability for the wrongdoing of an agent was previously imposed under the label ‘vicarious liability’. Such a label gave few clues as to the basis of the liability or its limits. By focussing on the one feature which the various relationships in which the courts impose strict liability for the wrongdoing of another in tort have in common, it can now be seen that strict liability for the wrongdoing of an agent responds to the potential for abuse of authority vested in an agent to effect legal relations on a principal’s behalf. Unlike previous explanations, the vesting of authority in an agent by a principal to effect legal relations on the principal’s behalf is both necessary and sufficient for strict liability for the wrongdoing of an agent to be imposed. It can now also be seen that strict liability for the wrongdoing of an agent is more closely aligned with strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another, than it ever was with strict liability for the wrongdoing of an employee.
Chapter 7
Distinguishing the Different Forms of Strict Liability for the Wrongdoing
of Another in Tort

This thesis has proposed a new expositive framework within which strict
liability for the wrongdoing of another in tort can be understood. The
framework is based on the one feature which the various relationships in
which the courts currently impose strict liability for the wrongdoing of another
in tort have in common – the feature of authority. It has been argued that
there are three different forms of strict liability for the wrongdoing of another
in tort, each of which respond to the potential for the authority found in the
relationships within which such liability is imposed to be abused.

Although it is possible to understand strict liability for the wrongdoing of
another in tort in terms of the authority present in each of the relationships in
which the strict liability is currently imposed, it does not necessarily mean
that it should. Compelling reasons for adopting the new expositive
framework put forward by this thesis need to be identified. This chapter sets
out the reasons why the new expositive framework for strict liability for the
wrongdoing of another in tort proposed by this thesis should be adopted.
After outlining a number of broad arguments in favour of the new expositive
framework, the chapter will focus on one in particular; its capacity to
distinguish between the different forms of strict liability for the wrongdoing of
another in tort and the circumstances in which those forms of strict liability
arise.

I Why Should the New Expositive Framework Be Adopted?

The principal strength of the new expositive framework put forward by this
thesis is that it provides a convincing basis for each form of strict liability for
the wrongdoing of another recognised by the law of torts which is both
necessary and sufficient for liability to be imposed. This thesis has shown
that whenever the courts impose strict liability for the wrongdoing of another
in tort, the defendant is either vested with authority over the person who
wrongfully harmed the plaintiff or has vested or conferred a form of authority
upon that person in respect of the plaintiff. This authority is significant because it has the potential to be abused. It is the potential for abuse of such authority which consequently puts the plaintiff at risk of harm.

*Strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another,* for instance, is found in both the employment and school relationships and responds to the potential for abuse of the power relationship created by an employer or school conferring their authority to direct the conduct of an employee or student upon another person. This potential for abuse of the power relationship exists because the power relationship enables the person upon whom authority has been conferred to direct the conduct of an employee or student and creates an expectation that the employee or student will obey.

In contrast, *strict liability for the wrongdoing of an employee* is limited to the employment relationship and responds to the potential for an employer, when exercising their authority to direct the conduct of an employee for their own benefit, to abuse that authority by creating a conflict between an employee’s duties under their employment contract and any other general law obligations or responsibilities the employee might owe. Where such a conflict exists, it can put pressure on an employee to follow their employer’s directions rather than complying with their obligations and responsibilities at general law, putting strangers to the employment relationship at risk of harm.

Finally, *strict liability for the wrongdoing of an agent* is limited to the agency relationship and responds to the potential for abuse of the authority vested in an agent by a principal. Such potential exists because the authority vested in an agent by a principal creates a relationship between the agent and the party wishing to effect legal relations with the principal (the ‘*transactional party’*) which enables the agent to effect legal relations between the principal and the transactional party in circumstances in which the transactional party is not expected to confirm with the principal the details of those legal relations.

A second reason why the new expositive framework put forward by this thesis should be adopted is that it accommodates the cases; especially some
of the more unusual distinctions drawn by the cases. It explains, for instance, why a school might be held strictly liable to a student sexually assaulted by a teacher, but not by a janitor. With respect to the teacher, a school confers authority upon the teacher to direct the conduct of a student and in so doing creates a power relationship between the teacher and the student which is subject to abuse. In contrast, no such authority is generally conferred upon a janitor so that the most that can be said when a janitor sexually assaults a student is that the school provided an opportunity for the assault to occur. The new expositive framework also explains why an employer is only held strictly liable for damage *wrongfully* caused by an employee, and not for all damage caused by an employee. Strict liability for the wrongdoing of an employee does not arise because an employee causes damage, but because an employer may potentially have pressured the employee into engaging in wrongdoing by abusing their authority to direct the conduct of the employee and creating a conflict between the employee’s duties under their employment contract and any other general law obligations or responsibilities the employee might owe.

A third reason why the new expositive framework put forward by this thesis should be adopted is that it provides judges with greater guidance when deciding future cases. In the past, judges have found it difficult to determine both the scope of the different forms of strict liability for the wrongdoing of another in tort and whether those different forms of strict liability for the wrongdoing of another in tort should be extended to new factual situations. This was because the bases of the different forms of strict liability for the wrongdoing of another in tort were unclear. This can be seen in the decision of the High Court of Australia in *Leichhardt Municipal Council v Montgomery*.\(^1\) The question in that case was whether the Council should be held strictly liable for the negligence of a road contractor who had failed to adequately cover a hole in a footpath into which the plaintiff had fallen. All of the judges agreed that the Council should not be held strictly liable but gave different reasons and relied on different cases.\(^2\) The judges were unable to

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\(^1\) (2007) 230 CLR 22.

\(^2\) All except Crennan J who agreed with the reasons of Gleeson CJ and Hayne JJ.
discern from the mass of often inconsistent and contradictory cases in both
nuisance and negligence why a person might be held strictly liable for the
wrongdoing of an independent contractor in some circumstances but not in
others. What little guidance they had was reduced to labels such as a
'special kind of duty' or a 'special kind of vicarious responsibility', which the
judges did not think were 'normatively predictive'. Should the judges have
had the benefit of the new expositive framework put forward by this thesis,
they would have seen that strict liability for the wrongdoing of another in tort
is generally only imposed on a defendant for the wrongdoing of an
independent contractor where that independent contractor has either been
conferred authority by the defendant to direct the conduct of the injured
plaintiff (strict liability for the wrongdoing of a person upon whom authority
has been conferred in relation to another) or vested with authority by the
defendant to effect legal relations on the defendant's behalf (strict liability for
the wrongdoing of an agent). As no such authority had been vested or
conferred by the Council upon the road contractor in *Leichhardt Municipal
Council v Montgomery*, there was no basis upon which strict liability could be
imposed.

The final reason why the new expositive framework put forward by this thesis
should be adopted, and the focus of this chapter, is its capacity to distinguish
between the different forms of strict liability for the wrongdoing of another in
tort and the circumstances in which those forms of strict liability arise. There
have been a number of cases in which different forms of strict liability for the
wrongdoing of another have appeared to arise in the same factual situation.
In the child sexual assault cases, for instance, strict liability for the
wrongdoing of another in tort might have been imposed by reason of either

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‘If the law were frankly to acknowledge that what is involved is not a breach by the defendant
of a special kind of duty, but an imposition upon a defendant of a special kind of vicarious
responsibility, a different problem would have to be faced. It would be necessary to identify
and justify the exceptions to the general rule that a defendant is not vicariously responsible
for the negligence of an independent contractor, and to provide a means by which other
exceptions may be identified when they arise. That, in turn, would require an explanation of
the general rule so as to account for the circumstances in which it yields to exceptions. It
may be difficult to justify those circumstances in terms of fixed categories. Within those
categories there may be individual cases some of which may be thought to merit making
them an exception and others of which may not.’

4 Ibid 74-75 (Hayne J).
the employment relationship or the school relationship.\(^5\) The potential for different forms of strict liability for the wrongdoing of another in tort to arise in the same factual situation has led some commentators to question whether different forms of strict liability for the wrongdoing of another actually exist.\(^6\) The new expositive framework put forward by this thesis, however, shows why different forms of strict liability for the wrongdoing of another in tort have developed.

II DETERMINING WHICH FORM OF STRICT LIABILITY SHOULD BE IMOPOSED

There are two points at which the three different forms of strict liability for the wrongdoing of another in tort identified by the new expositive framework put forward by this thesis potentially intersect. First, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another and strict liability for the wrongdoing of an employee may both arise in situations in which the person upon whom authority has been conferred by an employer or school to direct the conduct of an employee or student is also an employee. Secondly, strict liability for the wrongdoing of an employee and strict liability for the wrongdoing of an agent may both arise in situations in which the agent is an employee.

A Strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another – v – Strict liability for the wrongdoing of an employee

Strict liability for the wrongdoing of an employee is not the only form of strict liability for the wrongdoing of another in tort which might be imposed on an employer for the wrongdoing of an employee. In certain circumstances, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another might also be imposed. The question then is how best to determine which form of strict liability should be applied and in what circumstances.

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\(^6\) See John G Fleming, The Law of Torts (9th ed, 1998) 434, who suggested that strict liability for the wrongdoing of another in tort imposed under the label 'liability for breach of a non-delegable duty of care' was simply a disguised form of the strict liability for the wrongdoing of another in tort imposed under the label 'vicarious liability'.

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The new expositive framework put forward by this thesis shows that strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another and strict liability for the wrongdoing of an employee differ in a number of respects. One point of distinction has already been noted; the two forms of strict liability respond to the wrongdoing of different types of people. Strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another can respond to the wrongdoing of an independent contractor, an employee or a person who has been acting gratuitously. This is because it is not the status of the person who has engaged in the wrongful conduct which is important, but the fact that they have been conferred authority by an employer or school to direct the conduct of the injured employee or student. Strict liability for the wrongdoing of an employee, on the other hand, only responds to the wrongdoing of an employee.

Another point of distinction is that the two forms of strict liability respond to different risks. Strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another responds to the risk of physical harm to an employee or student created by an employer or school conferring their authority to direct the conduct of the employee or student upon another person. In contrast, strict liability for the wrongdoing of an employee responds to the risk of harm to a stranger to the employment relationship which exists because an employer can exercise their authority to direct the conduct of an employee for their own benefit and, in so doing, may potentially abuse that authority by creating a conflict between an employee’s duties under their employment contract and any other general law obligations or responsibilities the employee might owe.

Finally, and for these purposes more importantly, the two forms of strict liability differ in scope. The scope of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another is not limited by the terms of the actual authority conferred by the employer or school upon another person to direct the conduct of an employee or student. Instead, it extends to circumstances in which the person upon whom authority has been conferred is acting within the terms of apparent authority.
conferred by the employer or school. This is because an employee or student will interact with the person upon whom authority has been conferred on the basis of the terms of the apparent authority that has been conferred upon that person by the employer or school. One reason a student will go with a teacher into a storeroom, for instance, is because the teacher has the apparent authority to direct the student to do so.\(^7\) It is the terms of the apparent authority that has been conferred by the employer or school, therefore, which shapes the power relationship between the person upon whom authority has been conferred and the employee or student and it is the potential for abuse of this power relationship which attracts the concern and intervention of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another.

In contrast, the scope of strict liability for the wrongdoing of an employee is limited by what it is an employer has *actually* directed (whether expressly or impliedly) the employee to do. Strict liability for the wrongdoing of an employee can be imposed on an employer whenever an employee wrongfully injures a stranger to the employment relationship whilst acting within the course of their employment. In accordance with the *Salmond* test, an employee’s wrongful conduct does not fall within the course of their employment unless the employee was acting in accordance with their employer’s actual directions (express or implied) immediately prior to the wrongdoing. This is because, where an employee is acting in accordance with their employer’s actual directions, there is the potential for the employer to abuse their authority to direct the conduct of an employee by creating a conflict between the employee’s duties under their employment contract and the other general law obligations or responsibilities the employee might owe. Where an employee is not acting in accordance with their employer’s actual directions (express or implied), the employee is no longer subject to their employer’s authority and the employee can comply with their general law obligations or responsibilities in the ordinary course. It is this potential for an employer to abuse their authority to direct the conduct of an employer by creating a conflict between the employee’s duties under their employment

\(^7\) As happened in *New South Wales v Lepore* (2003) 212 CLR 511.
contract and other general obligations or responsibilities the employee might owe which attracts the concern and intervention of strict liability for the wrongdoing of an employee.

As can be seen, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another and strict liability for the wrongdoing of an employee are two very different forms of strict liability for the wrongdoing of another in tort. The bases of the two forms of strict liability differ, as does their scope. Despite these differences, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another and strict liability for the wrongdoing of an employee intersect in circumstances in which the wrongdoer is an employee who has been conferred authority by their employer to direct the conduct of the plaintiff. It cannot be assumed, however, that just because the wrongdoer is an employee who has been conferred authority by their employer to direct the conduct of the plaintiff that both forms of strict liability will apply.

Consider the child sexual assault cases. The question in the child sexual assault cases was whether a school or closely analogous institution could be held strictly liable for the sexual assault of a child within their care by an employee. In accordance with the new expositive framework put forward by this thesis, strict liability for the wrongdoing of an employee can only be imposed on an employer where the employee was acting in accordance with their employer's actual directions (express or implied) immediately prior to the wrongdoing. In the child sexual assault cases, the employees who committed the assaults had not been directed by the schools or closely analogous institutions (either expressly or impliedly) to sexually assault a child or to engage in conduct with the purpose of sexually assaulting a child.\(^8\) It follows that, the schools or closely analogous institutions were not in a position to abuse their authority to direct the conduct of the employees by creating a conflict between the employee’s duties under their employment contract and other general law obligations or responsibilities the employee

\(^8\) It was acknowledged by the Supreme Court of New Zealand in Dollars & Sense Finance Ltd v Rerekohu Nathan [2008] 2 NZLR 557 (at 576) that acts knowingly done for the purpose of enabling wrongdoing to occur could not be considered to have been done within the actual authority of the wrongdoer.
might have owed. As the schools or closely analogous institutions had no reason to believe that the employees would be engaged in such conduct, it is unlikely that they would have been minded to exercise their authority to direct the conduct of the employees in such a way as to abuse that authority by creating a conflict. Without the potential for conflict in such cases, there was no basis upon which strict liability for the wrongdoing of an employee could be imposed.

Although it was not possible for strict liability for the wrongdoing of an employee to be imposed in the child sexual assault cases, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another could. This is because in the cases where schools or closely analogous institutions were held strictly liable for the sexual assaults, the wrongdoers were not just employees but employees who had been conferred authority to direct the conduct of the children in their care. In accordance with the new expositive framework put forward by this thesis, strict liability for the wrongdoing of a person upon whom authority has been conferred is not limited by the terms of the actual authority conferred by an employer or school upon another person to direct the conduct of an employee or student but extends to circumstances in which the person upon whom authority has been conferred is acting within the terms of the apparent authority conferred by the employer or school immediately prior to the wrongdoing occurring. It was not necessary in the child sexual assault cases therefore for a plaintiff to show that the employee was acting in accordance with the actual directions (express or implied) of the school or closely analogous institution immediately prior to the wrongdoing. It was sufficient for the plaintiff to show that the employee was acting within the terms of the apparent authority conferred by the school or closely analogous institution to direct the conduct of the plaintiff immediately prior to the wrongdoing. This was generally not difficult given that the employee typically had to use the apparent authority conferred by the employer to direct the plaintiff away from other children for the assault to occur. It follows that the assaults in the child sexual assault cases could be seen as an abuse of the power relationship created by the conferral of authority by the school or closely analogous
institution upon the employee to direct the conduct of the child so that strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another could be imposed.

Cases in which strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another could be imposed but strict liability for the wrongdoing of an employee could not, can also be found in the employment context. Consider cases in which one employee intentionally assaults another employee in the workplace.\(^9\) As a general rule, employers are not held strictly liable for such assaults since employees are not generally directed by their employers (either expressly or impliedly) to assault fellow employees or to engage in conduct with the purpose of assaulting a fellow employee.\(^10\) Such an assault typically takes place outside an employee’s course of employment so that employers are unlikely to have been minded in such circumstances to exercise their authority to direct the conduct of the employee in such a way as to abuse that authority by creating a conflict between the employee’s duties under their employment contract and other general law obligations or responsibilities the employee might have owed because the employer had no reason to suspect that the employee was engaging in such activities in the first place. Where the employee who commits the assault, however, has been conferred authority by the employer to direct the conduct of the other employee, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another can be imposed if the employee was acting within the terms of the apparent authority conferred by the employer immediately prior to the wrongdoing. This was the case in *MacMillan v Wimpey Offshore Engineers and Constructors Ltd*\(^11\) where the foreman smashed the head of the plaintiff against a metal skip whilst in the process of giving the plaintiff directions.\(^12\)

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\(^9\) See for example, *Gittani Stone Pty Ltd v Pavkovic* (2007) Aust Torts Reports 81-924 in which one employee shot a fellow employee sitting in his car outside his place of employment.

\(^10\) For example when a fight occurs between employees in staff lunch or for an employee prank. See further chapter 4.


\(^12\) See further chapter 4, part III.
As can be seen, although both strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another and strict liability for the wrongdoing of an employee can respond to the wrongdoing of an employee who has been conferred authority to direct the conduct of the plaintiff, it does not necessarily follow that both forms of strict liability will be imposed in such circumstances. This is particularly important in cases involving the intentional wrongdoing of an employee. It is relatively unusual for an employer to actually direct an employee to engage in wrongdoing. It is submitted, therefore, that it should also be relatively unusual for strict liability for the wrongdoing of an employee to be imposed on an employer in respect of the intentional wrongdoing of an employee. In contrast, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another can be imposed for the intentional wrongdoing of an employee provided that the employee engaged in the wrongdoing had been conferred authority by their employer to direct the conduct of the plaintiff, and the employee was purporting to exercise the conferred authority immediately prior to the wrongdoing occurring. It follows that there is more scope for strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another to be imposed on an employer where an employee has been engaged in intentional wrongdoing, than strict liability for the wrongdoing of an employee.

There are still some circumstances in which both strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another and strict liability for the wrongdoing of an employee might be imposed; namely, where an employee who has been conferred authority to direct the conduct of a plaintiff has wrongfully harmed the plaintiff whilst acting within the terms of the actual authority conferred by the employer. This is most likely where the wrongdoing of the employee is negligent, rather than intentional. In *Ramsay v Larsen*,\(^\text{13}\) for instance, either strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another or strict liability for the wrongdoing of an employee might have been imposed on the school in respect of the negligence of the teacher.

\(^{13}\)(1964) 111 CLR 16. See further chapter 2.
in directing a student to retrieve a set of keys from a tree in the school yard. This is because the teacher was acting within the terms of the actual authority conferred by the school immediately prior to the wrongdoing occurring by giving the child directions. In such situations, either strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another or strict liability for the wrongdoing of an employee could be imposed on the school. The plaintiff can choose which form of strict liability is more advantageous;\(^{14}\) although it is not immediately apparent at this stage that there are any advantages to be obtained in pursuing one form of strict liability for the wrongdoing of another in tort over another.

The new expositive framework put forward by this thesis makes clear, for the first time, the extent to which strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another and strict liability for the wrongdoing of an employee interact. That interaction can be diagrammatically represented as follows:

![Diagram showing the overlap of strict liability for the wrongdoing of a person conferred authority over another and strict liability for the wrongdoing of an employee]

As can be seen, the extent of overlap between the two forms of strict liability is limited. The only situation in which an employer might be subject to both strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another and strict liability for the wrongdoing of an employee is likely to be limited.

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\(^{14}\) *Henderson v Merrett Syndicates Ltd (No. 1) [1995] 2 AC 145*
employee is where the employer has conferred authority upon an employee to direct the conduct of the plaintiff and the employee wrongfully injures the plaintiff whilst acting within the terms of the actual authority conferred by the employer. This will generally exclude instances of intentional wrongdoing unless an employee has been directed by their employer to engage in such conduct.

Courts have long struggled to differentiate between the circumstances in which strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another and strict liability for the wrongdoing of an employee might be imposed. This was evident in the child sexual assault cases where judges could not decide whether to impose strict liability for the wrongdoing of an employee or strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another.\textsuperscript{15} Although most judges chose to impose strict liability for the wrongdoing of an employee, this preference appears to have been driven more by difficulties in identifying a rational basis for strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another than any firm view that imposing strict liability for the wrongdoing of an employee was more appropriate. For instance, some judges were concerned that to impose strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another for the sexual assaults would remove the liability 'from any connection with the law of negligence.'\textsuperscript{16} Alternatively, that to impose strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another for the sexual assaults would turn schools or closely analogous institutions into an 'insurer' of the children in their care.\textsuperscript{17} Finally, there were concerns that to impose strict liability for the wrongdoing of a person upon whom authority has been conferred in relation

\textsuperscript{15} For example, McHugh J in \textit{New South Wales v Lepore} (2003) 212 CLR 511 and Lord Hobhouse in \textit{Lister v Hesley Hall Ltd} [2002] 1 AC 215 used strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another (or as it was then called, strict liability imposed under the label of 'liability for breach of a non-delegable duty of care'), whilst McLachlin CJ in \textit{Bazley v Curry} (1999) 174 DLR (4th) 45 and Kirby J in \textit{New South Wales v Lepore} used strict liability for the wrongdoing of an employee (or as it was then called, strict liability imposed under the label of 'vicarious liability').

\textsuperscript{16} \textit{New South Wales v Lepore} (2003) 212 CLR 511, 601-602 (Gummow and Hayne JJ).

\textsuperscript{17} Ibid.
to another for the sexual assaults would remove 'room for any operation of orthodox doctrines of [strict liability for the wrongdoing of an employee]." 18

The new expositive framework put forward by this thesis not only distinguishes strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another from strict liability for the wrongdoing of an employee, but does so in a way which addresses such concerns. It can now be seen that strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another has no more to do with the law of negligence than strict liability for the wrongdoing of an employee. Both forms of strict liability are imposed regardless of wrongdoing by the defendant. Nor does imposing strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another turn a school or analogous institution into an 'insurer' of the children in their care. First, such liability only arises in respect of those employees upon whom authority has been conferred by the school or analogous institution to direct the conduct of the children. Secondly, the employee has to be acting within the terms of the actual or apparent authority that has been conferred by the school or closely analogous institution for the liability to be imposed. Consequently, it is unlikely that strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another would be imposed on a school or closely analogous institution in the event that a teacher sexually assaulted a student at the teacher's home on the weekend. 19 There is also room for both forms of strict liability for the wrongdoing of another to operate in the law of torts. As can now be seen, the bases of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another and strict liability for the wrongdoing of an employee is different and the extent to which the two forms of strict liability intersect is quite limited.

The new expositive framework put forward by this thesis also distinguishes strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another from strict liability for the wrongdoing of an

18 Ibid 602.
employee in a way which does not risk the unprincipled expansion of either form of strict liability. To impose strict liability for the wrongdoing of an employee on the schools and closely analogous institutions in the child sexual assault cases, judges had to hold that such a deliberate and self-serving act as sexually assaulting a child could occur within the 'course of employment'. To do this, they had to abandon the *Salmond* test and find that an employee's wrongdoing could be within the 'course of employment' whenever there was a 'sufficient connection' between 'the nature of the employment and the particular tort'. The risk with such an approach is that strict liability for the wrongdoing of an employee extends to cover the intentional wrongdoing of employees more generally. This risk is very real given that the sufficiency of the 'connection' necessary to impose strict liability for the wrongdoing of an employee remains an open question.

Consider the decision of the English Court of Appeal in *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church*. In that case, even though the plaintiff was not a member of the congregation and the church had not sought to engage with the plaintiff 'on any religious level', strict liability for the wrongdoing of an employee was imposed on the church in respect of the sexual assault of the plaintiff by the priest because:

...there was a sufficiently close connection between Father Clonan's employment as priest at the church and the abuse which he inflicted on the claimant to render it fair and just to impose vicarious liability for the abuse on his employer, the archdiocese.

This reasoning is very similar to that used in the child sexual assault cases. Although the court found the facts of *Maga* to be similar to the facts of the child sexual assault cases more generally, the new expositive framework put forward by this thesis suggests that the decision was incorrect. First, as explained above, strict liability for the wrongdoing of an employee could not have been imposed on the church because the wrongdoing of the priest was intentional and the priest was not acting in accordance with the church's actual directions immediately prior to the assault. Secondly, although there

21 *Lister v Hesley Hall Ltd* [2002] 1 AC 215, 229 (Lord Steyn).
23 Ibid 1447.
24 Ibid 1455 (Lord Neuberger of Abbotsbury MR).
was scope to argue that the church may have conferred authority upon the
priest, such authority would have only extended to members of the
congregation and not to the plaintiff who was not a parishioner and who had
not sought to engage with the church on any religious level. Consequently,
the conferral of authority by the church upon the priest did not create a power
relationship between the priest and the plaintiff which the priest was in a
position to abuse. Unfortunately, the differences between the facts of Maga
and the child sexual assault cases went undetected, due to the breadth of
the ‘sufficient connection’ test adopted by the court.

Consider further the decision of the English Court of Appeal in Wallbank v
Wallbank Fox Designs Limited. The case involved an employee who
assaulted the Managing Director of the company at which he worked. The
assault occurred whilst the Managing Director was in the process of
explaining to the employee that he had made a mistake whilst carrying out
his duties. Once again, the court used the reasoning from the child sexual
assault cases to impose strict liability for the wrongdoing of an employee on
the employer.26

The tort was so closely connected with what was expected of Mr Brown, which was to
carry out lawfully given instructions, that it would be fair and just to hold his employer,
Wallbank Fox Designs Limited, vicariously liable for the tortious attack on Mr
Wallbank.

It is also difficult to see the decision of the court in Wallbank as correct in
light of the new expositive framework put forward by this thesis. First, strict
liability for the wrongdoing of an employee could not have been imposed on
the employer because the wrongdoing of the employee was intentional and
the employee was not acting in accordance with the employer’s actual
directions immediately prior to the assault. Secondly, the employer in this
case had not conferred any authority upon the employee in respect of the
Managing Director. Instead it was the Managing Director who had been
conferred authority by the employer to direct the conduct of the employee.
Consequently, although strict liability for the wrongdoing of a person upon
whom authority has been conferred in relation to another might have been

25 [2012] EWCA Civ 25 (‘Wallbank’).
26 Ibid [67] (Lord Justice Aikens).
imposed on the employer if the Managing Director had assaulted the employee in the circumstances, no such liability could be imposed on the actual facts of the case as the employer had not created a power relationship between the employee and the Managing Director which the employee himself was in a position to abuse. These differences between the facts of Wallbank and the child sexual assault cases were again obscured by the courts use of the 'sufficient connection' test.

B  Strict liability for the wrongdoing of an employee – v – Strict liability for the wrongdoing of an agent

Just as strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another intersects with strict liability for the wrongdoing of an employee, strict liability for the wrongdoing of an employee also intersects with strict liability for the wrongdoing of an agent. Once again, this is because both forms of strict liability can arise in respect of the wrongdoing of an employee. It is necessary, therefore, to consider how best to determine which form of strict liability should be applied and in what circumstances.

Strict liability for the wrongdoing of an employee and strict liability for the wrongdoing of an agent can be distinguished in much the same way as strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another and strict liability for the wrongdoing of an employee. First, the two forms of strict liability respond to the wrongdoing of different kinds of people. As mentioned earlier, strict liability for the wrongdoing of an employee only responds to the wrongdoing of an employee. In contrast, strict liability for the wrongdoing of an agent may respond to wrongdoing of an employee, an independent contractor or a person who has been acting gratuitously. As with strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another, it is not the status of the agent which is important, but the fact that the agent has been conferred authority by the principal to effect legal relations on the principal's behalf.
Another point of distinction is that the two forms of strict liability respond to different risks. Strict liability for the wrongdoing of an employee responds to the risk of harm to a stranger to the employment relationship which exists because an employer can exercise their authority to direct the conduct of an employee for their own benefit and, in so doing, may potentially abuse that authority by creating a conflict between an employee’s duties under their employment contract and any other general law obligations or responsibilities the employee might owe. In contrast, strict liability for the wrongdoing of an agent responds to the risk of harm to a party wishing to enter into legal relations with the principal (the ‘transactional party’) which exists because an agent is vested with authority to effect legal relations between the principal and the transactional party in circumstances in which the transactional party is not expected to confirm with the principal the details of those legal relations.

Finally, the two forms of strict liability differ in scope. As explained above, the scope of strict liability for the wrongdoing of an employee is limited by what it is an employer has actually directed (whether expressly or impliedly) the employee to do. This is because, where an employee is acting in accordance with their employer’s actual directions, there is the potential for the employer to abuse their authority to direct the conduct of an employee by creating a conflict between the employee’s duties under their employment contract and the other general law obligations or responsibilities the employee might owe. Where an employee is not acting in accordance with their employer’s actual directions (express or implied), the employee is no longer subject to their employer’s authority and the employee can comply with their general law obligations or responsibilities in the ordinary course. It is this potential for an employer to abuse their authority to direct the conduct of an employer by creating a conflict between the employee’s duties under their employment contract and other general obligations or responsibilities the employee might owe which attracts the concern and intervention of strict liability for the wrongdoing of an employee.

In contrast, strictly liability for the wrongdoing of an agent is not limited by the terms of the actual authority vested by in an agent by the principal. Instead,
it extends to circumstances in which an agent is acting within the terms of the apparent authority vested in the agent by the principal. This is because a transactional party will interact with an agent on the basis of the terms of the apparent authority vested in the agent by the principal. One reason a transactional party will hand over money to an agent, for instance, is because the agent has the apparent authority to collect that money on the principal’s behalf. The relationship between the agent and the transactional party is therefore shaped by the terms of the apparent authority vested in the agent by the principal and not by the terms of the actual authority that has been so vested. In this respect, strict liability for the wrongdoing of an agent is very similar to strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another.

As can be seen, strict liability for the wrongdoing of an employee and strict liability for the wrongdoing of an agent are two very different forms of strict liability for the wrongdoing of another in tort. The bases of the two forms of strict liability differ, as does their scope. Despite these differences, strict liability for the wrongdoing of an employee and strict liability for the wrongdoing of an agent intersect in circumstances in which the wrongdoer is both an employee and an agent. Once again, it cannot be assumed that just because the wrongdoing is both an employee and an agent that both forms of strict liability will apply.

Consider the fraud cases. 27 The question in the fraud cases was whether an employer could be held strictly liable for the fraud of an employee. In accordance with the new expository framework put forward by this thesis, strict liability for the wrongdoing of an employee can only be imposed on an employer where the employee was acting in accordance with their employer’s actual directions (express or implied) immediately prior to the wrongdoing. In the fraud cases, the employees who committed the frauds had not been directed by their employers (either expressly or impliedly) to commit fraud or engage in conduct with the purpose of committing fraud. 28 It

27 See, eg, Barwick v English Joint Stock Bank (1867) 11 LR Exch. 259.
28 It was acknowledged by the Supreme Court of New Zealand in Dollars & Sense Finance Ltd v Rerekohu Nathan [2008] 2 NZLR 557 (at 576) that acts knowingly done for the purpose
follows that, the employers were not in a position to abuse their authority to direct the conduct of the employees by creating a conflict between the employee’s duties under their employment contract and other general law obligations or responsibilities the employee might have owed. As the employers had no reason to believe that the employees would be engaged in such conduct, it is unlikely that they would have been minded to exercise their authority to direct the conduct of the employees in such a way as to abuse that authority by creating a conflict. Without the potential for conflict in such cases, there was no basis upon which strict liability for the wrongdoing of an employee could be imposed.

Although it was not possible for strict liability for the wrongdoing of an employee to be imposed in the fraud cases, strict liability for the wrongdoing of an agent could. This is because in the cases where employers were held strictly liable for fraud, the wrongdoers were not just employees but employees who had also been vested with authority by their employers to effect legal relations on behalf of their employer (that is, they were agents). The fraudulent bank manager in *Barwick v English Joint Stock Bank*, for instance, had been vested with authority to issue guarantees and enter into other contracts on behalf of the bank. In accordance with the new expositive framework put forward by this thesis, strict liability for the wrongdoing of an agent is not limited by the terms of the actual authority vested in an agent by a principal but extends to circumstances in which the agent is acting within the terms of the apparent authority vested in the agent by the principal immediately prior to the wrongdoing occurring. It was not necessary in the fraud cases therefore for a transactional party to show that the agent was acting in accordance with the actual directions (express or implied) of the principal immediately prior to the wrongdoing. It was sufficient for the transactional party to show that the agent was acting within the terms of the apparent authority vested in the agent by the principal immediately prior to the wrongdoing. Where this could be done, there was the potential for the

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29 (1867) II LR Exch. 259.
agent to abuse that authority and strict liability for the wrongdoing of an agent could be imposed in respect of the fraud.

As can be seen, although both strict liability for the wrongdoing of an employee and strict liability for the wrongdoing of an agent can respond to the wrongdoing of an employee who is also an agent, it does not necessarily follow that both forms of strict liability can be imposed in such circumstances. Once again, this is particularly important in cases involving the intentional wrongdoing of an employee. Where the wrongdoing is intentional and the employee is not acting in accordance with their employer's actual directions immediately prior to the wrongdoing, strict liability for the wrongdoing of an employee will generally not arise. Strict liability for the wrongdoing of an agent, however, can be imposed for the intentional wrongdoing of an employee provided the employee engaged in the wrongdoing had been vested with authority by their employer to effect legal relations on the employer's behalf, and the employee was acting within the terms of the apparent authority vested in them by their employer immediately prior to the wrongdoing occurring. Outside cases of intentional wrongdoing, either strict liability for the wrongdoing of an employee or strict liability for the wrongdoing of an agent may be imposed provided the employee was acting within the terms of the actual authority vested in the employee by the employer to effect legal relations on the employer's behalf or in accordance with their employer's actual directions (express or implied) immediately prior to the wrongdoing. This is most likely where the wrongdoing of the employee is negligent, rather than intentional. In such circumstances, the plaintiff will have a choice as to which form of strict liability to pursue.

The new expositive framework put forward by this thesis makes clear, for the first time, the extent to which strict liability for the wrongdoing of an employee and strict liability for the wrongdoing of an agent interact. That interaction can be diagrammatically represented as follows:
As can be seen, the only situation in which an employer might be subject to both strict liability for the wrongdoing of an employee and strict liability for the wrongdoing of an agent is where the employer has vested the employee with authority to effect legal relations on their behalf and the employee wrongfully injures the plaintiff whilst acting within the terms of the actual authority vested in the employee by the employer. This will generally exclude instances of intentional wrongdoing unless an employee has been directed by their employer to engage in such conduct.

The boundary between strict liability for the wrongdoing of an employee and strict liability for the wrongdoing of an agent has never really been clear. Judges have often resorted to the concept of ‘agency’ in order to hold an employer strictly liable for the wrongdoing of an employee, particularly in cases of intentional wrongdoing; but they have done so within the framework of strict liability for the wrongdoing of an employee. This has once again risked extending the scope of strict liability for the wrongdoing of an employee to cover the intentional wrongdoing of employees more generally. It has also put pressure on the definition of ‘agency’ to the point that it has been suggested that both a ‘bicycle courier’ and a ‘pilot’ can be considered an agent. Such problems have arguably arisen because the courts have failed to accurately distinguish between the two different forms of strict liability for the wrongdoing of another in tort. The new expositive framework put forward by this thesis has shown that strict liability for the

wrongdoing of an employee and strict liability for the wrongdoing of an agent are two separate forms of strict liability for the wrongdoing of another in tort. Although the two forms of strict liability intersect in respect of the wrongdoing of an employee who is also an agent, the bases of the two forms of strict liability differ as does their scope.

III Conclusion

The existing explanations of strict liability for the wrongdoing of another in tort are flawed.\textsuperscript{32} They neither explain when such liability arises or why. This thesis has sought to overcome such difficulties by proposing a new expository framework to explain strict liability for the wrongdoing of another in tort based on the one feature which the various relationships in which the courts currently impose such liability have in common – the feature of authority. This new expositive framework provides a convincing basis for the different forms of strict liability for the wrongdoing of another in tort, makes clear the boundaries between those different forms of strict liability for the wrongdoing of another in tort, accommodates more of the cases and has the capacity to provide judges with greater guidance when deciding future cases.

\textsuperscript{32} See generally chapter 1.
Chapter 8
Miscellaneous Categories of Strict Liability for the Wrongdoing of Another in Tort

This thesis has proposed a new expositive framework within which to understand strict liability for the wrongdoing of another in tort and set out the reasons why the new expositive framework should be adopted. The final step is to see how the new expositive framework can assist in explaining what at present appear to be miscellaneous categories of strict liability for the wrongdoing of another in tort.

This chapter will examine three such categories of strict liability: the strict liability imposed on partners for the wrongdoing of a fellow partner; the strict liability imposed on a bailee for the wrongdoing of a person upon whom authority has been conferred by the bailee to deal with the baior's goods; and the strict liability imposed on the owner of a motor vehicle for damage wrongfully caused by a person driving the vehicle for the owner's purposes. It will show that whilst two of these categories fit comfortably within the new expositive framework proposed by this thesis, one does not. The exception is the strict liability imposed on the owner of a motor vehicle for damage wrongfully caused by a person driving the vehicle for the owner's purposes. Current cases indicate, however, that the courts are not as willing to impose such liability as they once were.¹

1. STRICT LIABILITY FOR THE WRONGDOING OF A PARTNER

Partners have long been held strictly liable for the wrongdoing of a fellow partner in the course of carrying out the business of the partnership.² Although first recognised at common law, the strict liability was subsumed into legislation in the United Kingdom and each of the Australian states in the late 19th century.³ Section 10(1) Partnership Act 1892 (NSW) is typical:⁴

...where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm..., or with the authority of the partner's co-partners, loss or

¹ See Scott v Davis (2000) 204 CLR 333.
³ Ibid 7-8.
⁴ This section is based on s.10 Partnership Act 1890 (UK) c 39 and equivalent provisions exist in all the Australian states and territories (emphasis added).
injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor [sic] to the same extent as the partner so acting or committing to act.

Consequently, in *Polkinghorne v Holland*, the High Court of Australia held partners in a firm of solicitors strictly liable for a fellow partner who negligently failed to advise a client where she could obtain accurate information about a company in which she was proposing to invest. Similarly, in *Walker v European Electronics Pty Ltd (in liq)*, the New South Wales Court of Appeal held partners in a firm of accountants strictly liable for a fellow partner who misappropriated funds from a company to which the partner had been appointed as receiver.

A **Basis of the Strict Liability**

To determine the basis upon which partners are held strictly liable for the wrongdoing of a fellow partner (*strict liability for the wrongdoing of a partner*) it is necessary to examine why the partnership relationship exists and how it functions.

A ‘partnership is the relation which subsists between persons carrying on a business in common with a view to profit’. Partnerships are defined in such terms because, unlike a company, a partnership is not a separate legal entity. It is instead an association of individuals who pool resources and/or expertise to carry on a single business enterprise. The absence of a separate legal entity enables partners to avoid regulation under the company legislation. It does, however, mean that something else is required to legally bind the partners together. That something is authority. Each partner vests their fellow partners with authority to act as their agent. The vesting of such authority is evidenced by legislation. Turning once again to the *Partnership Act 1892* (NSW), s.5 provides:

*Every partner...is an agent of the firm and of the other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which the*

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5 (1934) 51 CLR 143.
6 Fletcher, above n 2, 187.
7 (1990) 23 NSWLR 1.
8 Fletcher, above n 2, 186.
9 See, eg, *Partnership Act 1892* (NSW) s 1.
10 Emphasis added.
partner is a member binds the firm and the other partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter and the person with whom the partner is dealing either knows that the partner has no authority or does not know or believe the partner to be a partner.

As can be seen, a partnership is essentially an agency relationship. Each partner is vested with authority to conduct the business of the partnership on behalf of their fellow partners as agent. The analogy is not precise in that a partner is not only an ‘agent’ but also a ‘principal’, each partner being entitled to a share of the proceeds of the partnership business. But the similarities are close enough that the ‘rights, powers, duties, and obligations’ of a partner ‘are in many respects governed by the same rules and principles as those of an agent’.11

Because a partner is an agent, the basis of strict liability for the wrongdoing of a partner is closely associated with the basis of strict liability for the wrongdoing of an agent. In much the same way, strict liability for the wrongdoing of a partner can be seen to respond to the potential for abuse of the authority vested by partners in one another to effect legal relations on the partners’ behalf. Such potential exists because the authority vested by the partners in one another creates a relationship between an individual partner and a party wishing to enter into legal relations with the partnership (a ‘transactional party’) which enables that partner to effect legal relations between the partnership and the transactional party in circumstances in which the transactional party is not expected to confirm with the remaining partners the details of those legal relations. A partner, for instance, can use the authority vested in them by their fellow partners to misrepresent the partnership’s assets to a transactional party. Partners consequently put a transactional party at risk of harm by vesting one another with authority to effect legal relations on each other’s behalf.

Additionally, a partner may have been vested with authority by their fellow partners to effect legal relations on behalf of the clients of the partnership. This is not uncommon as many professionals, such as solicitors, brokers and accountants, conduct their business through a partnership structure due to

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11 Joseph Story, Commentaries on Partnership (1859) 1.
historical restrictions on incorporation.\textsuperscript{12} In such circumstances, the partner is again an ‘agent’ but an ‘agent’ in the exceptional sense that the employee of a solicitor who has been vested with authority to effect legal relations on behalf of the solicitor’s clients was considered an ‘agent’ in chapter 6. When partners vest one another with authority to effect legal relations on behalf of clients of the partnership, they create a relationship between an individual partner and the partnership’s client or that partner and a third party wishing to enter into legal relations with the partnership’s client which enables the partner to effect legal relations on behalf of the partnership’s client in circumstances in which neither the partnership’s client nor the third party is expected to confirm with each other the details of those legal relations. It follows that the authority vested by partners in one another to effect legal relations on behalf of the partnership’s clients is also subject to abuse. Partners consequently put both their clients and third parties wishing to enter into legal relations with their clients at risk of harm when they vest one another with authority to effect legal relations on behalf of the partnership’s clients.

Partners not only vest one another with authority to effect legal relations on behalf of themselves or their clients, but they also vest authority in one another to conduct the business of the partnership more generally. Such authority is not something to which strict liability for the wrongdoing of an agent ordinarily responds. In \textit{Sweeney v Boylan Nominees Pty Limited},\textsuperscript{13} for instance, the owner of a fridge escaped strict liability for the wrongdoing of an independent refrigeration mechanic even though the refrigeration mechanic was repairing the fridge on the fridge owner’s behalf as part of the fridge owner’s business.\textsuperscript{14} Partnerships, however, are a special case. Partners not only conduct business on one another’s behalf but hold themselves out as conducting a \textit{single business enterprise}. Having associated for this purpose, it is contrary to the public interest to allow

\begin{footnotesize}
\begin{enumerate}
\item[12] Fletcher, above n 2, 5.
\item[14] See further chapter 6.
\end{enumerate}
\end{footnotesize}
partners to subsequently dissociate when it is in their interests to do so. As Joseph Story explained:15

...in ordinary partnerships, there is a universal mandate and a joint propositura, by which each partner is institor of the whole trade to an unlimited extent, each being liable in solido for the company debts.1

The peculiarities of the partnership relationship mean that strict liability for the wrongdoing of a partner extends somewhat beyond strict liability for the wrongdoing of an agent. Legislatures have confirmed that partners, having held themselves out as such, should not be able to associate and dissociate at will.16 Consequently, the legislation governing partnerships requires that partners are not only held strictly liable for the wrongdoing of a fellow partner which occurs in the course of effecting legal relations on behalf of the partners or the partnership’s clients, but are held strictly liable for the wrongdoing of a fellow partner which occurs in the course of conducting the business of the partnership more generally. Such liability is imposed by way of legislation as a matter of public policy and is peculiar to the partnership relationship.

Although the legislation governing partnerships means that the basis of strict liability for the wrongdoing of a partner extends somewhat beyond the basis of strict liability for the wrongdoing of an agent, at their core they are very similar. Strict liability for the wrongdoing of a partner can therefore be seen as an extended form of strict liability for the wrongdoing of an agent (having been extended by way of legislation). As with strict liability for the wrongdoing of an agent, strict liability for the wrongdoing of a partner is not an absolute form of liability; it is not imposed in the absence of wrongdoing.17 It still needs to be shown that a partner wrongfully harmed a person in the course of effecting legal relations on behalf of the partners or the partnership’s clients or in the course of conducting the business of the partnership more generally. The liability is, however, imposed regardless of wrongdoing by the remaining partners. This means that strict liability for the wrongdoing of a partner can be imposed even though the fellow partners

15 Story, above n 11.
16 See, eg, Partnership Act 1892 (NSW) s 10.
may be able to adduce evidence that the vesting of authority in the partner
who engaged in the wrongdoing did not wrongfully contribute to the damage
suffered by the plaintiff. The liability can also be imposed even though the
fellow partners may be able to adduce evidence that an abuse of the
authority vested in the partner who engaged in the wrongdoing did not
actually take place. This is because strict liability for the wrongdoing of a
partner responds to the potential rather than an actual abuse of the authority
vested in the partner by their fellow partners.

B In what circumstances does the liability arise?

Legislation provides that strict liability for the wrongdoing of a partner can be
imposed on partners whenever a fellow partner wrongfully injures another
person in the course of conducting the business of the partnership,\(^{18}\)
including whilst in the course of effecting legal relations on the behalf of the
partners or the partnership’s clients.

Three points can be made about the general circumstances in which strict
liability for the wrongdoing of a partner arises. First, because there are
different circumstances in which strict liability for the wrongdoing of a partner
can be imposed, the types of damage which may be recovered under strict
liability for the wrongdoing of a partner vary. For instance, in circumstances
in which a partner engages in wrongdoing in the course of effecting legal
relations on behalf of the partners or the partnership’s clients, strict liability
for the wrongdoing of a partner mirrors strict liability for the wrongdoing of an
agent and is generally limited to economic loss. The reason is that the
potential for abuse of the authority to effect legal relations on behalf of the
partners or the partnership’s clients is typically limited to harm to the
contractual expectancies of a transactional party or the partnership’s clients
and such harm generally materialises in the form of economic loss. Strict
liability for the wrongdoing of a partner may, however, also extend in such
circumstances to property loss, given that a transactional party or a client of
the partnership may hand over property to a partner in the course of effecting
those legal relations with which the partner may subsequently abscond.

\(^{18}\) Above n 4.
As noted in the previous section, a partner is not only vested with authority by their fellow partners to effect legal relations on behalf of the partners or the partnership’s clients, but is vested with authority to conduct the business of the partnership more generally. As mentioned above, in order to prevent partnerships associating and dissociating at will, legislation governing partnerships requires that partners are not only held strictly liable for the wrongdoing of a partner which occurs in the course of effecting legal relations on behalf of their fellow partners or the partnership’s clients, but are also held strictly liable for the wrongdoing of a partner which occurs in the course of conducting the business of the partnership more generally. To the extent that partners can be held strictly liable by way of legislation for the wrongdoing of a fellow partner in conducting the business of the partnership more generally, there is no real basis upon which to limit the types of damage for which strict liability for the wrongdoing of a partner may be imposed. This is because partnerships undertake a broad range of business activities which may harm persons dealing with the partnership in various ways. Partnerships have consequently been held strictly liable for different types of damage including physical damage suffered as a result of the negligent operation of a mine\textsuperscript{19} and economic loss suffered as a result of negligent advice.\textsuperscript{20}

A second, and closely associated point, is that there are few restrictions on who can seek to impose strict liability for the wrongdoing of a partner given the different circumstances in which the strict liability might arise. Where a partner engages in wrongdoing in the course of effecting legal relations on behalf of the partners or the partnership’s clients, strict liability for the wrongdoing of a partner once again mirrors strict liability for the wrongdoing of an agent so that strict liability for the wrongdoing of a partner is ordinarily restricted to transactional parties wishing to enter into legal relations with the partners or a client of the partnership. Because legislatures have extended strict liability for the wrongdoing of a partner to circumstances in which a partner engages in wrongdoing whilst conducting the business of the

\textsuperscript{19} Mellors v Shaw (1861) 1 B & S 437; 121 ER 778.

\textsuperscript{20} As occurred in Polkinghome v Holland (1934) 51 CLR 143.
partnership more generally, however, any person who has been wrongfully harmed by a partner in the course of that partner conducting the business of the partnership can potentially seek to impose strict liability for the wrongdoing of a partner on the partner’s fellow partners.\textsuperscript{21}

A final point that can be made about the general circumstances in which strict liability for the wrongdoing of a partner arises is that it only arises in respect of the wrongdoing of a partner. Whether a person is a partner is to be determined in accordance with the various Partnership Acts. The vagaries of determining the existence of a partnership are beyond the scope of this thesis.\textsuperscript{22}

C Scope of Liability

Before strict liability for the wrongdoing of a partner can be imposed, it needs to be shown that a partner either engaged in wrongdoing in the course of effecting legal relations on behalf of the partners or the partnership’s clients or engaged in wrongdoing in the course of conducting the business of the partnership more generally.\textsuperscript{23} In both of these circumstances, the approach taken by the courts to determining the scope of strict liability for the wrongdoing of a partner is similar.

In circumstances in which a partner engages in wrongdoing in the course of effecting legal relations on behalf of their fellow partners or a client of the partnership, strict liability for the wrongdoing of a partner mirrors strict liability for the wrongdoing of an agent and extends to circumstances in which the partner is acting within the terms of the apparent authority vested in the partner by their fellow partners. Provided the transactional party wishing to enter into legal relations with the partnership or the partnership’s clients reasonably believes that the partner is acting within the terms of the apparent authority vested in the partner immediately prior to the wrongdoing occurring, any wrongdoing by the partner will be taken to have occurred in the course of effecting legal relations on behalf of the partnership or the partnership’s clients. This is best demonstrated by cases involving fraud. There are

\textsuperscript{21} Subject to the scope of the liability (see below).
\textsuperscript{22} See generally Fletcher, above n 2, chapter 2.
\textsuperscript{23} Above n 4.
numerous cases in which partners have been held strictly liable for the fraud of a fellow partner which occurred whilst the partner was purporting to effect legal relations on behalf of their fellow partners or a client of the partnership. A customer had left securities with a banking partnership for safe keeping. When two of the partners sold those securities without the permission of the customer, all the partners were held strictly liable for the loss even though the remaining partners were innocent of any personal wrongdoing. A more recent example is the decision of the House of Lords in Dubai Aluminium Co Ltd v Salaam. In that case, a firm of solicitors was held strictly liable when the senior partner dishonestly assisted a client to perpetrate a fraud by drawing up sham legal documents, again in circumstances in which the remaining partners were innocent of any personal wrongdoing. No liability would have been imposed in either of those cases if strict liability for the wrongdoing of a partner was limited by the terms of the actual authority vested in the partner to effect legal relations on behalf of their fellow partners or a client of the partnership. This is because the partners involved in those cases had not been vested with any actual authority to commit fraud or engage in conduct with the purpose of committing a fraud. As with strict liability for the wrongdoing of an agent, however, it is submitted that strict liability was nonetheless imposed because the partners in those cases were acting within the terms of the apparent authority vested in the partner immediately prior to the frauds occurring.

The reason strict liability for the wrongdoing of a partner is not limited by the actual terms of the authority vested in a partner by their fellow partners in circumstances in which a partner is purporting to effect legal relations on behalf of the partnership or a client of the partnership is that a transactional party wishing to enter into legal relations with the partnership or a client of

25 Devaynes v Noble (1816) 1 Mer. 572.
26 Case described by Pollock, above n 24, 53-54. Today the case would be handled under a specific section of the Partnership Acts which deals with the misapplication of money or property left in the custody of a partnership. See, eg, Partnership Act 1892 (NSW) s 11.
28 At least, it was assumed that the partner had engaged in dishonest assistance, the point not being contested at trial. Ibid, 390-391 (Millet J).
the partnership will interact with that partner on the basis of the terms of the apparent authority vested in the partner by their fellow partners. One reason the partners in *Clayton’s Case* were able to sell the securities, for instance, is because they had been vested with apparent authority by their fellow partners to dispose of assets on behalf of the partnership’s clients. The relationship between a partner and a transactional party or a partner and a client of the partnership is therefore shaped by the terms of the apparent authority vested in the partner and not by the terms of the actual authority vested in the partner. It is the potential for this authority to be abused which puts transactional parties and clients of the partnership at risk of harm.

In circumstances in which a partner engages in wrongdoing in the course of conducting the business of the partnership more generally, the partnership legislation again stipulates that the scope of the strict liability is to be determined by reference to the terms of the apparent rather than the actual authority vested in the partner.29 Once again, this approach appears to have been taken on the basis of the policy concern that partnerships should not be allowed to associate and dissociate at will. It follows that, even where a partner is not effecting legal relations on behalf of their fellow partners or the partnership’s clients, the courts will use the terms of the apparent authority vested in the partner by their fellow partners to determine whether the partner was acting within the ordinary course of the business of the partnership immediately prior to the wrongdoing occurring.

Consider *Hamlyn v John Houston & Co.*30 In that case, the English Court of Appeal held the defendant partners strictly liable when a fellow partner offered the employee of a competitor a bribe to find out information about the competitor’s business. Although the partner had not been vested with any actual authority by his fellow partners to pay bribes, the partner was conducting legitimate business on behalf of the partnership with the competitor immediately prior to paying the bribe and in so doing was acting within the terms of the apparent authority vested in the partner by his fellow partners.

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29 See *Partnership Act 1892 (NSW)*, s.5 above.
30 [1903] 1 KB 81.
partners. Similarly, in *Proceedings Commissioner v Ali Hatem* the New Zealand Court of Appeal held a firm of partners who conducted a motor vehicle garage strictly liable when a fellow partner sexually harassed a woman applying for a job at the garage. Once again, although the partner had not been vested with actual authority by his fellow partners to engage in sexual harassment, the partner’s wrongdoing was considered to be in the scope of the strict liability because the partner was conducting a job interview on behalf of the partnership immediately prior to the harassment and was so acting within the terms of the apparent authority vested in the partner by his fellow partners. Admittedly, the approach of the courts in cases such as these can be difficult to reconcile with the new expositive framework put forward by this thesis since the partners in the cases were not acting in their capacity as agent for their fellow partners or a client of the partnership immediately prior to the wrongdoing occurring. Unlike the other relationships examined in this thesis, however, the partnership relationship is governed by legislation and subject to the broader public policy concern that partners should not be allowed to associate and disassociate at will.

Using the terms of the apparent authority vested in a partner by their fellow partners to determine the scope of strict liability for the wrongdoing of a partner does not mean that a partnership will be held strictly liable for all harm wrongfully caused by a partner. It still has to be shown that a partner was acting within the terms of the apparent authority vested in the partner by their fellow partners immediately prior to the wrongdoing occurring. Where this cannot be done, strict liability will not be imposed. Consequently, strict liability for the wrongdoing of a partner was not imposed on a firm of solicitors in *Flynn v Robin Thompson & Partners* when a partner at a firm of solicitors physically assaulted the husband of a plaintiff who had brought legal proceedings against the firm for negligence. Although the partner had been defending the claim brought against the partnership prior to the assault

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31 [1999] 1 NZLR 305.
32 Alternatively, liability in such cases could be seen as an example of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another as in *Petrov v Hatzigeorgio* (1991) Aust Torts Reports ¶81-071. See further chapter 4.
33 See previous section.
and the assault took place outside the judge’s chambers after proceedings for the day had finished, the partner had run into the plaintiff’s husband quite by chance and was not purporting to further the legal proceedings immediately prior to the assault occurring. A different decision might have been reached if the partner was in a meeting with the plaintiff and her husband and was trying to settle the legal proceedings immediately prior to the assault. Similarly, the firm of solicitors in *Harman v Johnson*\(^{35}\) escaped strict liability for the wrongdoing of a partner when a client gave one of the partners a sum of money to invest at the partner’s discretion and the partner later absconded with it. Although firms of solicitors vest their partners with authority to make specific investments on behalf of clients, they do not generally vest partners with authority to accept funds in order to undertake such investment activities since solicitors are not financial advisers or brokers. As no such authority had been vested in the partner in this case, the partner was found not to have engaged in wrongdoing in the course of effecting legal relations on behalf of a client of the partnership and strict liability for the wrongdoing of a partner was not imposed.

As can be seen, the new expositive framework for understanding strict liability for the wrongdoing of another in tort put forward by this thesis can assist in explaining the strict liability imposed on a partnership in respect of the wrongdoing of a partner. The strict liability can be described as an extended form of strict liability for agents, such liability having been extended by legislatures as a matter of public policy, on the basis that partners confer authority upon one another as agents to conduct the business of the partnership.

II  **Strict Liability For the Wrongdoing of a Person upon Whom Authority has been Conferred to Deal with a Bailor's Goods**

A less well-known example of strict liability for the wrongdoing of another in tort is the strict liability imposed on a bailee for damage wrongfully caused by

\(^{35}\) (1853) 2 E&B 61 cited by Pollock, above n 24, 54.
a person upon whom authority has been conferred by the bailee to deal with a bailor’s goods.

A bailment arises when one person (the ‘bailee’) ‘voluntarily takes’ the goods of another person (the ‘bailor’) into their possession and holds or deals with those goods on the bailor’s behalf. As a bailor no longer has possession of their goods, stringent obligations are placed on a bailee to protect the bailor’s interests. A bailee, for instance, is obliged to keep the bailor’s goods safe. They are also obliged to deal with those goods in a manner consistent with the bailor’s rights of ownership. To this extent, a bailee owes a positive duty to protect a bailor’s goods from theft. Furthermore, a bailee bears the onus of proving that they took reasonable care of the bailor’s goods or that any failure by the bailee to take reasonable care of the bailor’s goods was not a cause of their damage.

Although a bailee owes a duty to keep a bailor’s goods safe, a bailee may confer their authority to deal with the bailor’s goods upon another person. For instance, a bailee may create a sub-bailment by transferring possession of the goods to another person (the ‘sub-bailee’) without relinquishing the role of bailee. Where a sub-bailment is created, the sub-bailee will owe the same duties in respect of the bailor’s goods as the bailee. A bailee may also give custody or temporary control of the bailor’s goods to an employee. In such circumstances, it is unusual for an employee to become a sub-bailee and the employee will consequently not owe the same duties in respect of the bailor’s goods as the bailee. There are also circumstances in which an independent contractor can be given custody or temporary control of a bailor’s goods by a bailee without the independent contractor becoming a sub-bailee. A security guard given access to a bailee’s premises for the purposes of conducting random security checks, for instance, is not usually given sufficient possession of the goods stored in the premises to be

38 Ibid.
40 Ibid 52-55.
41 Ibid 1240.
construed as a sub-bailee of those goods.43 Once again, as the independent contractor does not become a sub-bailee, they will not owe the same duties in respect of the bailor’s goods as the bailee.

When a bailee confers authority upon another person to deal with the bailor’s goods, the courts have found that the bailee may be held strictly liable for damage wrongfully caused to the bailor’s goods by that person. The most well-known example is the decision of the English Court of Appeal in Morris v C W Martin & Sons Ltd.44 In that case a furrier forwarded a mink stole to a cleaner on behalf of his customer.45 The cleaner was subsequently held strictly liable for the theft of the stole by an employee who had been given the stole for cleaning purposes. The English Court of Appeal also suggested in British Road Services Ltd v Arthur V. Crutchley & Co Ltd46 that the owner of a warehouse could be held strictly liable for the negligence of a security firm hired to patrol the warehouse when 200 cases of whisky were stolen.47 The whisky was being held by the warehouse owners for a road carriage company and was awaiting shipping at the time of the theft.

Although the basis of the strict liability imposed on a bailee for the wrongdoing of another person has yet to be formally identified,48 the courts have made it clear that a bailee will not be held strictly liable whenever the bailor’s goods are harmed by another person, but only for damage wrongfully caused by a person upon whom authority has been conferred by the bailee to deal with the bailor’s goods.49 As Salmon LJ explained in Morris v C W Martin & Sons Ltd.50

A bailee for reward is not answerable for a theft by any of his servants but only for a theft by such of them as are deputed by him to discharge some part of his duty of taking reasonable care. A theft by any servant who is not employed to do anything in relation to the goods bailed is entirely outside the scope of his employment and

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43 For example, there was no suggestion in British Road Services Ltd v Arthur V. Crutchley & Co Ltd [1968] 1 Lloyd’s Rep 271 that the security guard appointed to provide security services in respect of the bailee’s warehouse was a sub-bailee.


45 No case was brought against the furrier in respect of the stolen fur.


47 As the owner of the warehouse had also been negligent, however, it was not necessary to impose liability for the wrongdoing of the security firm.

48 Palmer, above n 39, 816-821.

49 Or indeed by a sub-bailee.

50 Morris v C W Martins & Sons Ltd [1966] 1 QB 716, 740-741 (Salmon LJ).
cannot make the master liable. So in this case, if someone employed by the defendants in another depot had broken in and stolen the fur, the defendants would not have been liable. Similarly in my view if a clerk employed in the same depot had seized the opportunity of entering the room where the fur was kept and had stolen it, the defendants would not have been liable. The mere fact that the master, by employing a rogue, gives him the opportunity to steal or defraud does not make the master liable for his depredations.

The distinction is borne out by numerous cases in which bailees have escaped strict liability because the person who wrongfully harmed the bailor’s goods had not been conferred sufficient authority to deal with the bailor’s goods by the bailee.\(^{51}\) The decision of the Queen’s Bench Division in *Swiss Bank Corporation v Brink’s-MAT Ltd*\(^ {52}\) provides a good example. Brink’s-MAT had been charged with transporting a significant sum of Bank of England notes from three banks in England to the Swiss Bank Corporation in Zurich. An employee at Brink’s-MAT with criminal connections provided information with respect to the movement of the notes enabling them to be stolen. Although the employee worked at the Brinks-MAT vaults where the notes were at the time they were stolen, the employee had not been ‘entrusted with the care and custody of these notes’ and had not been involved with the handling of the shipment.\(^ {53}\) As a result, Brinks-MAT avoided strict liability for the theft.

### A Basis of the Strict Liability

When a bailee confers authority upon another person to deal with a bailor’s goods, the bailee puts the person upon whom authority has been conferred in a position of power with respect to the bailor’s goods which did not previously exist. This is because the conferral of authority by the bailee not only gives the person upon whom authority has been conferred custody or possession of the bailor’s goods, but enables the person upon whom authority has been conferred to deal with those goods without being questioned. For instance, if a bailee confers authority upon a courier to deal with the bailor’s goods, the courier will be able to drive away with those goods without being questioned. As the person upon whom authority has been conferred is not necessarily subject to the same stringent duties in

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\(^{51}\) Palmer, above n 39, 834-835. See more recently *Brink’s Global Services In v igrox Limited* [2010] EWCA Civ 1207.

\(^{52}\) [1986] 2 Lloyd’s Rep 79.

\(^{53}\) Ibid 87.
respect to those goods as the bailee,\textsuperscript{54} there is significant potential for this position of power to be abused. A bailee consequently puts the bailor's goods at risk of loss or physical damage whenever they confer authority upon another person to deal with those goods.

The authority conferred by a bailee upon another person to deal with a bailor's goods is very similar in nature to the authority conferred by an employer or school upon another person to direct the conduct of an employee or student, there being no relevant distinction for these purposes between circumstances in which a defendant confers authority in relation to another person or another person's goods. It is submitted, therefore, that the strict liability imposed on a bailee for the wrongdoing of a person upon whom authority has been conferred by the bailee to deal with the bailor's goods ('strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor's goods') is a form of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another. The liability responds to the potential for abuse of the position of power created by the conferral of authority by a bailee upon another person to deal with the bailor's goods by holding the bailee liable regardless of fault for any harm wrongfully caused to a bailor's goods by the person upon whom the bailee conferred authority to deal with those goods.

Strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor's goods is not an absolute form of liability; it is not imposed in the absence of wrongdoing.\textsuperscript{55} It still needs to be shown that the person upon whom the bailee has conferred authority to deal with the bailor's goods engaged in wrongdoing which caused the bailor harm. The liability is, however, imposed regardless of wrongdoing by the bailee. This means that strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor's goods can be imposed even though a bailee may be able to adduce evidence that the conferral of authority by the bailee did not wrongfully contribute to the damage suffered

\textsuperscript{54} Particularly in respect of an employee or independent contractor who receives custody or temporary control of the bailor's goods, but does not become a sub-bailee. See above.

by the bailor. The liability can also be imposed even though a bailee may be able to adduce evidence that an abuse of the authority conferred by the bailee upon the person who wrongfully damaged the bailor’s goods did not actually take place. This is because strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor’s goods responds to the potential rather than an actual abuse of the authority conferred by the bailee.

B  *In what circumstances does the liability arise?*

Strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor’s goods can be imposed on a bailee whenever a bailee confers authority upon another person to deal with a bailor’s goods and that person wrongfully loses or damages those goods in the course of exercising the conferred authority.

Two points can be made about the general circumstances in which strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor’s goods can be imposed on a bailee. First, as with strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor’s goods is restricted to loss of or physical damage to the bailor’s goods.\(^{56}\) The reason is that the authority conferred by a bailee is an authority to physically deal with the bailor’s goods. The risk created by a bailee when conferring authority upon another person to deal with the bailor’s goods is therefore a risk of loss or physical damage only. It follows that the only person who can seek to impose strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor’s goods upon a bailee is the bailor.

Secondly, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor’s goods can be imposed on a bailee in respect of the wrongdoing of either an employee, an independent contractor or a person who has been acting gratuitously. This is because it

\(^{56}\) Including damage consequential upon such physical damage.
is not the status of the person who has engaged in the wrongful conduct which is important, but the fact that they have been conferred authority by a bailee to deal with a bailor’s goods.

On this point, there is an outstanding question as to whether a bailee can be held strictly liable for the wrongdoing of a person upon whom authority has been conferred authority to deal with the bailor’s goods in circumstances in which the person upon whom authority has been conferred becomes a sub-bailee of the bailor’s goods. There are as yet no cases in which strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor’s goods has been imposed on a bailee in respect of the wrongdoing of a sub-bailee.\textsuperscript{57} In principle, there is no obvious reason why the liability should not extend to the wrongdoing of a sub-bailee. A sub-bailee, by definition, is conferred authority by the bailee to deal with the bailor’s goods; but the point is yet to be considered by the courts.

One reason for the absence of cases is that a bailor is entitled to proceed directly against the sub-bailee.\textsuperscript{58} This is what occurred in \textit{Lotus Cars Ltd v Southampton Cargo Handling plc.}\textsuperscript{59} In that case, Lotus had delivered a number of new cars to stevedores at the Southampton docks in order for the cars to be shipped to Canada. The stevedores placed the cars in a secure compound kept by the port authority from which one of the cars was stolen when thieves cut through the wire fence. Lotus brought proceedings against the stevedore as bailee and the port authority as sub-bailee. Both were found directly liable to Lotus on the basis that they had both failed to use reasonable care in the storage of the vehicle.

A second and related reason for the absence of cases is that the duties imposed on a sub-bailee in respect of the bailor’s goods are broader than those imposed on a person who has been conferred authority by the bailee to deal with the bailor’s goods who does not become a sub-bailee. This means that there is a greater degree of protection available to a bailor where the bailee confers authority upon a sub-bailee to deal with the bailor’s goods

\textsuperscript{57} Palmer, above n 39, 1240.
\textsuperscript{58} Ibid.
\textsuperscript{59} ‘The Rigoletto’ [2000] 2 All ER 705.
as opposed to a person who does not become a sub-bailee. In such circumstances, the courts may question whether it is appropriate to impose strict liability on a bailee for the wrongdoing of a sub-bailee conferred authority to deal with the bailor’s goods if the sub-bailee is under the same duties in respect of the bailor’s goods as the bailee. This assumes, however, that there may not be any advantage to a bailor in proceeding against the bailee, as opposed to the sub-bailee.

One case in which such an advantage presented itself was the decision of the Privy Council in *The Pioneer Container*. The principal issue in *The Pioneer Container* was whether a sub-bailee could invoke the contractual terms of a sub-bailment against a bailor even though the bailor was not privy to such terms. The sub-bailee in that case was a ship owner who sought to rely on an exclusive jurisdiction clause in a sub-bailment contract whilst defending claims brought by cargo owners after the ship had sunk. It was in the sub-bailee’s interests to be able to rely on such a term, because if they were unable to do so, they would have had to defend claims in respect of the sinking in a number of different jurisdictions. The Privy Council found that the ship owner could rely on the exclusive jurisdiction clause because the cargo owners had allowed the bailee to sub-bail the goods ‘on any terms’. As a result, the cargo owners were reluctantly subjected to terms of a sub-bailment to which they were not party. If a bailee can be held strictly liable for damage wrongfully caused to a bailor’s goods by a sub-bailee, as the reasoning in this thesis suggests, the cargo owners might have avoided this position by suing the bailees rather than the sub-baillees. The cargo owners’ claim against the bailees would then have been governed by the contractual terms of the bailment and the bailees could then sue the sub-bailees to recover their loss in accordance with the contractual terms of the sub-bailee. If, however, the duties imposed on a sub-bailee in respect of their dealings with the bailor’s goods are deemed sufficient to protect the interests of a bailor when a bailee confers authority upon the sub-bailee to deal with

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60 [1994] 2 AC 324.
61 Ibid 333.
62 This is ultimately the result reached in cases like *Simaan General Contracting Co v Pilkington Class Ltd (No.2)* [1988] QB 758 where courts have denied claims for economic loss in tort and required parties to sue down a chain of contracts.
the bailor's goods, the decision reached in *The Pioneer Container* can be considered correct. It will take an appropriate case to find out which view is correct.

C **Scope of liability**

Strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor's goods is generally limited to circumstances in which the person upon whom authority has been conferred by the bailee wrongfully damages the bailor's goods in the *course of exercising the conferred authority*. This is because the strict liability responds to the potential for abuse of the position of power created when a bailee confers authority upon another person to deal with the bailor's goods and such potential only exists where the person upon whom authority has been conferred is purporting to exercise the conferred authority immediately prior to the wrongdoing occurring.

Importantly, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor's goods is not limited by the terms of the actual authority conferred by the bailee upon that person. As with strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another, the scope of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor's goods extends to circumstances in which the person upon whom authority has been conferred is acting within the terms of the *apparent* authority conferred by the bailee. Provided third parties reasonably believe that the person upon whom authority has been conferred is acting within the terms of the apparent authority conferred by the bailee immediately prior to the wrongdoing occurring, any wrongdoing by the person upon whom authority has been conferred will be taken to have occurred in the course of exercising the conferred authority. This is best demonstrated by cases involving theft. There are numerous cases in which a bailee has been held strictly liable for the theft of a bailor's goods by a person upon whom authority has been conferred by the bailee to deal with those goods. *Morris v*
C W Martin & Sons Ltd is the most well-known example, but there are many others. In such cases, no liability would have been imposed if strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor’s goods was limited by the terms of the actual authority conferred by the bailee. This is because in each of those cases the person upon whom authority has been conferred to deal with the bailor’s goods had not been conferred any actual authority to steal the bailor’s goods or engage in other conduct which enabled the bailor’s goods to be stolen. It is not, however, the terms of the actual authority conferred by the bailee which is important for determining the scope of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor’s goods, but the terms of the apparent authority conferred by the bailee. A person upon whom authority has been conferred by a bailee to deal with a bailor’s goods is able to deal with those goods without being questioned because of the terms of the apparent authority that has been conferred on that person by the bailee. To return to the example of the courier, one reason a courier can drive away with goods without anyone raising the alarm because the courier has apparent conferred authority to do so. It is the terms of the apparent authority conferred by the bailee, therefore, which shapes how the person upon whom authority has been conferred by the bailee can deal with the bailor’s goods and it is the capacity to deal with the bailor’s goods which presents the risk of loss or physical damage to which strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor’s goods responds. Provided that the person upon whom authority has been conferred by the bailee to deal with the bailor’s goods was acting within the apparent terms of the conferred authority immediately prior to the wrongdoing, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor’s goods can be imposed.

As with strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another more generally, using the terms of

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63 [1966] 1 QB 716.
64 Palmer, above n 39, 833-835.
the apparent authority conferred by the bailee upon another person to deal with a bailor's goods to determine the scope of the liability that can be imposed on a bailee does not mean that a bailee will be held strictly liable for all damage wrongfully caused to a bailor's goods by a person upon whom authority has been conferred to deal with the bailor's goods by the bailee. It still has to be shown that the person was acting within the terms of their apparent authority so that the there was the potential for there to be an abuse of the position of power created by the bailee's conferral of authority. The most common situation in which a person upon whom authority has been conferred to deal with a bailor's goods have been found to be acting outside the terms of the apparent authority conferred by the bailee is where the person upon whom authority has been conferred is an employee and has returned to their place of employment after business hours to deal with the bailor's goods. Consequently, the bailee in *Sanderson v Collins* 65 escaped strict liability when an employee coachman returned to work after garaging the coach for the night and took it for a joyride. 66 Similarly, in *Darling Ladies Wear Ltd v Hickey* 67 the bailee escaped strict liability when an employee returned to work after hours to steal a car upon which he had been working. As the terms of the apparent authority conferred by the bailee upon the employee to deal with the bailor's goods ceased at the end of the working day, so too did the bailee's strict liability.

Strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor's goods is another apparently miscellaneous form of liability which sits comfortably within the new expositive framework for understanding strict liability for the wrongdoing of another in tort proposed by this thesis. To the extent that it is imposed when a bailor confers authority upon another person to deal with a bailor's goods, the liability can be seen as a form of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another.

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65 [1904] 1 KB 628.
66 Ibid 631.
67 [1950] 1 DLR 720.
III  STRICT LIABILITY FOR THE WRONGDOING OF A DRIVER?

The final category of strict liability for the wrongdoing of another in tort to be examined by this thesis is the strict liability imposed on the owner of a motor vehicle for damage wrongfully caused by a person driving the vehicle for the owner’s purposes. In the days of the horse and carriage, carriage owners were held strictly liable for accidents wrongfully caused by their drivers.\(^{68}\) Initially, such liability was limited to circumstances in which the carriage owner was in the carriage at the time of the accident,\(^{69}\) but was later extended to circumstances in which the driver was using the carriage for the owner’s purposes even though the owner was absent.\(^{70}\) With the arrival of the motor vehicle, the principle was extended yet again. For instance, in *Ormrod v Crosville Motor Services Ltd*\(^{71}\) the English Court of Appeal found the owner of a racing car strictly liable for the negligence of a friend who was driving the car from England to Monte Carlo so that it could be used in the famous race. Similarly, in *Sobulusky v Egan*,\(^{72}\) the High Court of Australia found the owner\(^{73}\) of a car strictly liable for the negligence of a friend whom he had asked to drive to a meeting they were both attending because the owner ‘had a stiff neck and he preferred not to drive long distances’.\(^{74}\)

Traditionally, the courts have explained the strict liability imposed on the owner of a motor vehicle for damage wrongfully caused by a driver of the motor vehicle on the basis that the driver was acting as the owner’s ‘agent’ at the time the wrongdoing occurred, hence the requirement for the vehicle to be being used for the owner’s purposes. As Denning LJ noted in *Ormrod v Crosville Motor Services Ltd*:\(^{75}\)

> It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. But that is not correct. The owner is also liable if the driver is his agent, that is to say, if

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\(^{68}\) A brief history of the liability can be found in *Sobulusky v Egan* (1959-60) 103 CLR 215, 229-231 (Dixon CJ, Kitto and Windeyer JJ).

\(^{69}\) See *Chandler v Broughton* (1832) 1 C&M 29, 149 ER 301.

\(^{70}\) See *Booth v Mister* (1835) 7 Car & P 66, 173 ER 30.

\(^{71}\) [1953] 1 WLR 1120.

\(^{72}\) (1959-60) 103 CLR 215.

\(^{73}\) This case was complicated by the fact that the transfer of registration on sale had not been completed, leaving the defendant technically a bailee.

\(^{74}\) *Sobulusky v Egan* (1959-60) 103 CLR 215, 225.

\(^{75}\) [1953] 1 WLR 1120, 1122.
the driver is, with the owner's consent, driving the car on the owner's business or the
owner's purposes.

Throughout this thesis, the term 'agent' has been used in its narrow
contractual sense of a person upon whom authority has been conferred by a
principal to effect legal relations on the principal's behalf. This definition was
adopted because, outside the motor vehicle cases, strict liability for the
wrongdoing of an agent is generally restricted to situations in which the
wrongdoer has been conferred such authority. 76 In contrast, Denning LJ is
using the term 'agent' in the above statement as meaning one person doing
anything on behalf of another person. This broader sense of the term 'agent'
appears to have been adopted in an effort to sidestep the general rule that
strict liability cannot be imposed for the wrongdoing of an independent
contractor or any other person who is not an employee. This was
acknowledged by Lord Wilberforce in Launchbury v Morgans: 77

I accept entirely that 'agency' in context such as these is merely a concept, the
meaning and purpose of which is to say 'is vicariously liable', and that either
expression reflects a judgment of value - respondeat superior is the law saying that
the owner ought to pay.

It is not possible in such circumstances to see the strict liability imposed on
the owner of a motor vehicle for damage wrongfully caused by a person
driving the vehicle for the owner's purposes as a form of strict liability for the
wrongdoing of an agent in accordance with the new expositive framework put
forward by this thesis.

If the strict liability imposed on the owner of a motor vehicle for damage
wrongfully caused by a person driving the vehicle for the owner's purposes is
not a form of strict liability for the wrongdoing of an agent, is there any other
basis upon which such liability can be imposed? To answer this question it is
necessary to consider the particular features of the relationship between the
motor vehicle owner, the driver and an injured third party to see how else the
strict liability might be explained.

76 See generally chapter 6.
One feature of the relationship is that when strict liability is imposed, the defendant is either the owner or bailee\(^7\) of the motor vehicle. It is difficult, however, to attribute any significance to the ownership of the motor vehicle since the owners of other chattels, such as a firearm or a bicycle,\(^7\) are not held strictly liable for the wrongful use of those chattels by another person with their consent.\(^8\) It is also not clear why ownership of the motor vehicle might itself be a source of liability. One explanation could be the retention of some type of control over the vehicle even though it was being used by someone else.\(^9\) It is difficult, however, to assess what type of actual control the owner of a motor vehicle might be able to exert over its use when the owner is not present,\(^10\) other than calling for the return of the vehicle. Such difficulties with the concept of 'control' are now well recognised and control has been abandoned as a basis for other forms of strict liability for the wrongdoing of another in tort.\(^11\) Alternatively, it might have something to do with the role of the owner in maintaining the vehicle or the limited opportunity of the driver to check the soundness of the vehicle before driving. This is unlikely, however, as the owner of the vehicle is held strictly liable even where the injury to the third party has nothing to do with the condition of the vehicle.

\(^7\) As in Sobusky v Egan (1959-60) 103 CLR 215. Use of the term 'owner of a motor vehicle' in the remainder of this thesis should also be taken to include a reference to a 'bailee of a motor vehicle'.

\(^8\) Examples discussed by MacKinnon LJ in Hewitt v Bovin [1940] 1 KB 188, 192-193. He says at 193, referring to a question put by Bennett J in the course of argument: 'Suppose a son says to his father: "I have been invited to shoot next Saturday in the country; will you kindly lend me your gun, and will you lend me your car to get down there?" The father agrees to both requests. If at the shoot the son maladroitly peppers a beater, can his victim sue the father for damages? And if, coming home in the car, the son knocks down a pedestrian, can that second victim sue the father for damages? I can see no valid distinction between the two cases.'

\(^9\) Although there have been attempts to extend the vicarious liability of a car owner to the owners of other forms of motorised transport (see below).

\(^10\) In Samson v Aitchison [1912] AC 845, the Privy Council said (at 850) in a case on appeal from New Zealand: 'In the opinion of their Lordships this amounts to a finding of fact that the appellant had not abandoned the control which they think prima facie belonged to him... And if the control of the car was not abandoned, then it is a matter of indifference whether Collins, while driving the car, be styled the agent or the servant of the appellant in performing that particular act, since it is the retention of the control which the appellant would have in each case that makes him responsible for the negligence which caused the injury.'

\(^11\) Except where the driver is an employee.

\(^12\) For example, it is no longer used to support vicarious liability for employees. See further chapter 1.
Another feature of the relationship between a motor vehicle owner, the driver and an injured third party is that the driver is acting for the 'owner's purposes'.\textsuperscript{84} This is the feature which most judges have focused on to date. It seems to have been thought that because the driver is doing something for the purposes of the owner the owner should take responsibility for any damage wrongfully caused by the driver in performing the task. Elsewhere in the law, however, arranging for someone else to do something you yourself could do is generally not enough to invoke liability for the wrongdoing of another in tort.\textsuperscript{85} Such reasoning also leads to some potentially fine distinctions being made. Take, for example, the situation of a real estate agent selling a house for a vendor. If the real estate agent drove a prospective purchaser to the house whilst using the real estate agent's own car and negligently caused an accident injuring the prospective purchaser, the vendor would not be held strictly liable for the negligence of the real estate agent even though the real estate agent was acting for the purposes of the vendor at the time the accident occurred.\textsuperscript{86} If, however, instead of driving the real estate agent's own car, the real estate agent was driving the vendor's car, the vendor would be strictly liable for the negligence of the real estate agent. It is difficult to explain the different results in these two situations without resorting to ownership of or right to use the motor vehicle which, as shown, is also incapable of adequately explaining the outcomes of these cases.

Another feature of the relationship between a motor vehicle owner, the driver and the injured third party is that damage sustained by the third party typically involves personal injury. This suggests that what the law might be concerned with is the need to compensate people injured in road accidents. This was a policy championed by Lord Denning, as Lord Pearson explained in \textit{Launchbury v Morgans}:\textsuperscript{87}


\textsuperscript{84} Lord Wilberforce in \textit{Launchbury v Morgans} [1973] AC 127.

\textsuperscript{85} Hence the general rule against vicarious liability for independent contractors.

\textsuperscript{86} See further chapter 6 for limitations on the liability of a home owner for the wrongdoing of a real estate agent.

\textsuperscript{87} [1973] AC 127, 141.
of his car by other persons, because the car owner is the person who has or ought to have a motor insurance policy.

The limiting of strict liability for the wrongdoing of a driver to circumstances in which the driver is acting for the owner’s purposes, however, would seem to defeat this aim. Access to the owner’s insurance may be needed to compensate the injured plaintiff irrespective of whether the vehicle was being used for the owner’s purposes, the purposes of the driver, or even if the vehicle was being driven by a thief at the time of the accident. For this reason, legislation has now been introduced in all Australian states and territories extending compulsory motor vehicle insurance schemes to indemnify not only the owner but also the driver of the motor vehicle in cases of personal injury. A concern with compensating personal injury also does not explain why the strict liability imposed on a motor vehicle owner for damage wrongfully caused by a person driving the vehicle for the owner’s purposes can be relied upon to recover property damage as well as damages for personal injury.

The only other possible feature of the relationship between a motor vehicle owner, the driver and the injured plaintiff which might have some bearing on strict liability being imposed on the motor vehicle owner for damage wrongfully caused by the driver is the nature of the activity being engaged in by the driver; that is, the driving of a motor vehicle. Driving a motor vehicle is commonly regarded as a risky activity. As Lord Wilberforce commented in Launchbury v Morgans:

My Lords, I have no doubt that the multiplication of motor cars on our roads, their increasing speed, the severity of the injuries they may cause, the rise in accidents involving innocent persons, give rise to problems of increasing social difficulty with which the law finds it difficult to keep abreast.

It is possible, therefore, that by imposing strict liability on a motor vehicle owner for damage wrongfully caused by a person driving the vehicle for the owner’s purposes, the law has responded to the riskiness of the activity being undertaken or instigated by the owner of the vehicle and perhaps the

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89 See, eg, Jordan v Gosson Industries Pty Limited (1963) 82 WN (Pt 1) (NSW) 157 where a tow truck was driven into a shop.
limited opportunity to other road users to take measures to protect themselves from such risks.\textsuperscript{91} Similar concerns have been expressed elsewhere in the law. Chapter 2 explained, for instance, how land owners were held strictly liable at the end of the 19th century for damage wrongfully caused to an adjoining land owner by an independent contractor engaged to perform work threatening support or common walls because such work was thought to involve an inherent danger to an adjoining property. The strict liability of a carriage owner for damage wrongfully caused by a driver of the carriage was recognised around the same time. A concern with the risks associated with driving a carriage or a motor vehicle would explain both why ownership of or a right to use the vehicle was necessary for strict liability to be imposed, as well as the requirement for the driver to be pursuing the owner's purposes at the time the wrongdoing occurred.\textsuperscript{92}

More recently, however, there seems to have been a trend towards dismantling or limiting forms of strict liability for the wrongdoing of another in tort that have been based on the undertaking or instigating of risky activities. The courts appear to have realised that there are actually very few things which contain an inherent risk of danger which cannot be controlled by the person doing or managing the thing or the activity.\textsuperscript{93} As demonstrated in chapter 2, strict liability for the wrongdoing of another in tort no longer seems to be imposed on adjoining land owners for work done by an independent contractor even where such work might affect support or common walls. Similarly, the courts no longer seem as willing as they once were to hold the owner of a motor vehicle strictly liable for damage wrongfully caused by the driver of the vehicle. This is best demonstrated by the decision of the High

\textsuperscript{91} Ormrod v Crossville Motor Services Ltd [1953] 1 WLR 1120, 1123 (Denning L.J): 'The law puts an especial responsibility on the owner of a vehicle who allows it out on to the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else.'

\textsuperscript{92} Millward LJSC emphasised the importance of both these features in Pawlak v Doucette [1985] 2 WWR 588, [35]: 'Thus, an extension of the principle beyond automobiles to chattels, such as a motor boat, where the principal furnishes the chattel, meets the concern that the principle is not a general principle for vicarious liability of agents, yet retains liability where the causal connection establishes a relationship of the use of the principal's property for the principal's purpose.' [emphasis added]

\textsuperscript{93} See, eg, Read v J Lyons & Company [1947] AC 156, 181-182 (Lord Simonds): '...I would reject the idea that, if a man carries on a so-called ultra-hazardous activity on his premises, the line must be drawn so as to bring him within the limit of strict liability for its consequences to all men everywhere.' See further chapter 2.
Court of Australia in Scott v Davis\textsuperscript{94} which was discussed in chapter 6. In that case, the High Court not only refused to extend strict liability for the wrongdoing of a driver to other modes of transport, specifically aeroplanes, but challenged the very foundations of the strict liability. This can be seen quite clearly in the following statement by Gummow J:\textsuperscript{95}

A more fundamental reason for denying any extension of Sobelsky is that, for the reasons detailed earlier in this judgment, it rests upon insecure and unsatisfactory foundations in principle.

Even those judges who appeared to approve strict liability for the wrongdoing of a driver in its narrow sense as limited to motor vehicles\textsuperscript{96} can be seen to have had such concerns. As Giles J recently noted in the decision of the New South Wales Court of Appeal in Gutman v McFall,\textsuperscript{97} if the ‘principle were good law, Gleeson CJ [in Scott v Davis] would not have confined it to motor vehicles’.\textsuperscript{98} Similar concerns about the foundations of the strict liability imposed on the owner of a motor vehicle for damage wrongfully caused by a person driving the vehicle for the owner’s purposes were expressed by members of the House of Lords in Launchbury v Morgans.\textsuperscript{99}

There has been an occasional lower court decision in which strict liability has been imposed on the owner of a motor vehicle for damage wrongfully caused by a person driving the vehicle for the owner’s purposes. In Candler v Thomas (T/A London Leisure Lines),\textsuperscript{100} for instance, two judges of the English Court of Appeal applied Launchbury v Morgans,\textsuperscript{101} by which they were bound, to find the owner of a van strictly liable for the negligence of a friend who was driving the van to deliver a parcel on behalf of the owner. A single judge of the British Columbia Supreme Court was also prepared in Pawlak v Doucette\textsuperscript{102} to extend the strict liability of a motor vehicle owner for a driver to other forms of transport including motor boats.\textsuperscript{103} It is difficult to

\textsuperscript{94}(2000) 204 CLR 333.
\textsuperscript{95}Ibid 421.
\textsuperscript{96}Gleeson CJ and McHugh J.
\textsuperscript{97}(2004) 61 NSWLR 599.
\textsuperscript{98}Ibid 609.
\textsuperscript{99}[1973] AC 127, 135 (Lord Wiberforce) and 141-142 (Lord Pearson).
\textsuperscript{100}[1998] RTR 214.
\textsuperscript{101}[1973] AC 127, 135.
\textsuperscript{102}[1985] 2 WWR 588.
\textsuperscript{103}cf Gutman v McFall (2004) 61 NSWLR 599.
put much weight on such decisions, however, given the concerns expressed about the liability by judges of both the High Court of Australia and the House of Lords, the broader trend away from imposing strict liability for the wrongdoing of another in tort on the basis of risky activities and the absence of any other clear basis on which the owner or bailee of a motor vehicle might be held strictly liable for damage wrongfully caused by a driver. Unfortunately, there is unlikely to be another opportunity for either the High Court of Australia or what has since become the Supreme Court of the United Kingdom to formally resolve such concerns about the foundations of the liability as the advent of compulsory motor vehicle insurance has made the liability of limited practical significance. As it stands, there has not been an opportunity for a higher court in Australia or the United Kingdom to assess the continued validity of the liability now for over 30 years. In such circumstances, perhaps it is now finally time to recognise that the cases supporting the liability are little more than ‘historical oddities that have outlived their usefulness’.  

IV CONCLUSION

As can been seen, new expositive framework for understanding strict liability for the wrongdoing of another in tort put forward by this thesis can assist in explaining what presently appear to be miscellaneous categories of liability for the wrongdoing of another in tort. Strict liability for the wrongdoing of a partner, for instance, can be seen as an extended form of liability for agents. Similarly, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to a bailor’s goods can be seen as an example of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another. The only apparently miscellaneous example of strict liability for the wrongdoing of another in tort which does not seem to fit with the new expositive framework put forward by this thesis is the strict liability of the owner of a motor vehicle for damage wrongfully caused by a person driving the vehicle for the owner’s purposes. Current cases

indicate, however, that the courts are not as willing as they once were to impose such liability.
Chapter 9
Conclusion

This thesis has argued that strict liability for the wrongdoing of another in tort can be reconceptualised as a response to the potential for abuse of the authority found in each of the three main types of relationships in which the courts currently impose such liability. On this basis, a new expositive framework has been devised within which three main forms of strict liability for the wrongdoing of another in tort have been identified: strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another; strict liability for the wrongdoing of an employee; and strict liability for the wrongdoing of an agent. Each form of strict liability has been shown to reflect differences in the nature of the authority present in each of the relationships which give rise to strict liability for the wrongdoing of another in tort.

I THE IMPORTANCE OF THE THESIS

By focussing on what the relationships in which strict liability for the wrongdoing of another in tort is currently imposed have in common, this thesis has been able to reveal, for the first time, the internal consistency of strict liability for the wrongdoing of another in tort. The thesis has shown not only why there are different forms of strict liability for the wrongdoing of another in tort, but how they interrelate.

The differences between the various forms of strict liability for the wrongdoing of another in tort can be summarised as follows:
<table>
<thead>
<tr>
<th>To whom is strict liability owed?</th>
<th>Persons over whom authority to direct conduct of that person has been conferred (typically employees and students)</th>
<th>Strangers to employment relationship</th>
<th>Transactional party effecting legal relations with principal through agent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who can be held strictly liable?</td>
<td>Person conferring authority (typically employers and schools)</td>
<td>Employers</td>
<td>Principals</td>
</tr>
<tr>
<td>For whose wrongdoing does liability arise?</td>
<td>Employee, independent contractor or person acting gratuitously</td>
<td>Employee</td>
<td>Employee, independent contractor or person acting gratuitously</td>
</tr>
<tr>
<td>Type of damage</td>
<td>Physical damage</td>
<td>Unrestricted</td>
<td>Economic or property loss resulting from damage to contractual expectancies</td>
</tr>
<tr>
<td>Scope of liability</td>
<td>Extends to conduct within terms of apparent authority (may include intentional misconduct)</td>
<td>Limited by what employee actually directed to do (express or implied)</td>
<td>Extends to conduct within terms of apparent authority (may include intentional misconduct)</td>
</tr>
</tbody>
</table>

Understanding these differences between the various forms of strict liability for the wrongdoing of another in tort can assist judges to overcome some of the difficulties previously experienced in imposing strict liability for the wrongdoing of another in tort. For instance, it can now be seen that there was no need in the child sexual assault cases to find that the deliberate and self-serving act of sexually assaulting a child could occur within the 'course of employment'. The strict liability imposed in those cases did not arise by reason of the employment relationship, but by reason of the relationship between the school or closely analogous institution and the child in their care. This is because strict liability for the wrongdoing of an employee is limited by what it is an employee is actually directed by their employer to do and does not extend to intentional misconduct. In contrast, strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another arises in circumstances in which the person upon whom authority has been conferred by an employer or school is acting within the terms of the apparent authority conferred upon that person immediately prior to the wrongdoing occurring and does extend to intentional misconduct. It follows that although the employees in the child sexual assault cases had not
been conferred any actual authority to sexually assault a child in their care or to engage in conduct with the purpose of sexually assaulting a child, the employees were acting within the terms of the apparent authority conferred by the schools or closely analogous institutions immediately prior to the sexual assaults occurring so that strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another could be imposed.

Understanding the differences between the various forms of strict liability for the wrongdoing of another in tort can also resolve the historical difficulties in determining who is an 'agent' for the purposes of strict liability for the wrongdoing of another in tort. Traditionally, strict liability for the wrongdoing of an agent has been associated with strict liability for the wrongdoing of an employee; they were described using the same label and were thought to be justified on similar grounds. This association was difficult, however, as it enabled strict liability for the wrongdoing of an agent to be used to sidestep the general rule that an employer cannot be held strictly liable for the wrongdoing of an independent contractor. It can now be seen that strict liability for the wrongdoing of an agent is much more closely associated with strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another than strict liability for the wrongdoing of an employee. As a result, the definition of who is an agent is much more confined, as is the scope of the strict liability, leaving the general rule of no strict liability for the wrongdoing of an independent contractor largely intact.

II  Authority

The new expositive framework put forward by this thesis for understanding strict liability for the wrongdoing of another in tort is based upon the feature of authority.

The feature of authority is a familiar concept to strict liability for the wrongdoing of another in tort. It has often been used to determine the
incidence of different forms of the liability.\textsuperscript{1} It has not, however, been used to explain the basis of strict liability for the wrongdoing of another in tort. ‘Control’ has been used in this sense, particularly to explain the basis of strict liability for the wrongdoing of an employee;\textsuperscript{2} but ‘authority’ is not the same as ‘control’. ‘Authority’ refers to the capacity to direct the behaviour of another person or location of a thing,\textsuperscript{3} whereas ‘control’ refers to the actual exercise of that capacity.\textsuperscript{4} ‘Control’ failed as the basis of strict liability for the wrongdoing of an employee because it was not always present; consequently, it was neither necessary nor sufficient for strict liability for the wrongdoing of an employee to be imposed. ‘Authority’, by contrast, is always present. It is not that an abuse of the authority will always occur, but there is always an inherent risk that the authority present in each of the relationships which give rise to strict liability for the wrongdoing of another in tort will be abused. This risk appears sufficient for strict liability for the wrongdoing of another in tort to be imposed.

Admittedly, ‘authority’ is not an unambiguous concept. There is no one settled meaning which applies in all circumstances. Authority does, however, generally connote some type of power held by one person over another person or thing. The question then is the extent of the power required before one person might be held strictly liable for the wrongdoing of another. This is something for which an understanding can be developed over time from the facts of the cases. At present the cases indicate that the standard required is quite high. For instance, in cases of strict liability for the wrongdoing of a person upon whom authority has been conferred in relation to another or strict liability for the wrongdoing of an employee, the authority consists not only of a power to direct the conduct of another person, but also the right to discipline that person in the event of non-compliance. In cases of strict liability for the wrongdoing of an agent, the authority consists of a power to effect legal relations on behalf of another person. The question in subsequent cases will be whether the type of authority present is sufficiently

\begin{itemize}
\item[\textsuperscript{1}] See further chapter 3.
\item[\textsuperscript{2}] See further chapter 1.
\item[\textsuperscript{3}] James Augustus Henry Murray, The Oxford English Dictionary (1923) v 1, 572.
\item[\textsuperscript{4}] Ibid v 2, 927.
\end{itemize}
analogous to justify imposing strict liability for the wrongdoing of another in tort. This will be a particularly important question in cases involving the potential liability of a church for a sexual assault committed by a priest or other church official.\footnote{See generally chapter 4.}

III Justifying Strict Liability for the Wrongdoing of Another in Tort

The new expository framework put forward by this thesis has explained both the basis of the various forms of strict liability for the wrongdoing of another in tort and the circumstances in which those various forms of liability arise. What it has not explained is why strict liability for the wrongdoing of another in tort is imposed. Although an important question, there has been insufficient space within the scope of the thesis to fully explore the normative justification of the liability.

There is space, however, to briefly speculate as to what that justification might be. The thesis has shown that what attracts the concern and intervention of the law in cases of strict liability for the wrongdoing of another in tort is the potential for abuse of the authority present in each of the relationships in which such liability is imposed. Such a concern with an abuse of authority or power can be seen elsewhere in the law of obligations. For example, the doctrine of undue influence in contract law enables contracts to be set aside where a person in a position of influence over another person takes advantage of that influence whilst contracting. Similarly, the doctrine of unconscionability enables contracts to be set aside where a contract has been procured with a person who was at a special disadvantage. Both these doctrines respond to the potential for a position of power between contracting parties to be abused, although they can be distinguished from strict liability for the wrongdoing of another in tort on the basis that evidence of personal wrongdoing needs to be shown for both doctrines before liability can be imposed.
A form of liability which is closer in nature to strict liability for the wrongdoing of another in tort is the strict liability imposed in equity for breach of a fiduciary duty. A fiduciary is in a position of power with respect to the beneficiary of the duty and is entrusted to act not in their own interests, but in the interests of the beneficiary. Where a fiduciary puts themself in a position of conflict or potential conflict with the interests of the beneficiary or puts the interests of the beneficiary in conflict or potential conflict with the interests of another person and the beneficiary suffers damage as a result, the fiduciary can be held strictly liable to the beneficiary for any damage the beneficiary suffers as a result. It does not matter for this purpose whether the fiduciary was ‘well-intentioned’ or ‘acting in good faith’; the existence of the conflict or potential conflict is sufficient for strict liability to be imposed. A fiduciary is also generally required to exercise their duties as a fiduciary personally. This means that in certain circumstances where a fiduciary delegates the exercise of any such duties to another person, the fiduciary can be held strictly liable for any wrongdoing by that person which causes the beneficiary of the fiduciary duty harm.

As can be seen, strict liability for breach of fiduciary duty shares a number of features with strict liability for the wrongdoing of another in tort; both forms of strict liability respond to the potential for abuse of authority within a relationship and both forms of liability can be imposed, in certain circumstances, regardless of personal wrongdoing. It is possible therefore that the justification for strict liability for the wrongdoing of another in tort might also be similar to the justification for strict liability for breach of a fiduciary duty. Justice Mason of the High Court of Australia outlined the justification for the fiduciary duty in Hospital Products Ltd v United States Surgical Corporation:

The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical

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7 Ibid 92.
8 Ibid 95.
10 (1984) 156 CLR 41, 96-97
sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of', and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibility.

The authority to which strict liability for the wrongdoing of another in tort responds is not exactly the same as a fiduciary duty. The biggest difference is that the authority to which strict liability for the wrongdoing of another in tort responds may sometimes be exercised by a party in their own interests (as with an employer), whereas a fiduciary is always required to act in the interests of the beneficiary. Notwithstanding this difference, however, there are enough similarities that the two forms of liability might be justified in similar terms. Strict liability for the wrongdoing of another in tort might therefore be justified in terms of the authority entrusted to and accepted by a defendant and the vulnerability of a plaintiff to a potential abuse of such authority.

Identifying an appropriate justification for strict liability for the wrongdoing of another in tort will be a considerable project. This thesis has, however, assisted in this task by developing a clearer understanding of the basis of strict liability for the wrongdoing of another in tort and the circumstances in which such liability is imposed.

IV WHERE TO FROM HERE?

The object of this thesis was to try and explain strict liability for the wrongdoing of another in tort. Personal liability, however, can also arise in the various relationships which were examined by this thesis. It is possible, therefore, that the authority present in the relationships examined by this thesis may have an impact not only on strict liability for the wrongdoing of another in tort but also personal liability.

Consider the employment relationship. It is well established that an employer owes an employee a duty of care, so that an employer must take reasonable steps to prevent an employee coming to any reasonably foreseeable harm. Historically, this duty has been expressed as a number of
specifically enumerated duties, such as a duty to provide a safe place of work, safe tools and equipment with which to work and a safe system of work to operate under. Outside the employment relationship, however, it is unusual in modern tort law for specific duties to be enunciated in this way. When describing the liability of car drivers, for instance, a car driver is said to owe a duty to use reasonable care. It has not been suggested that a car driver owes a specific duty to select an appropriate vehicle, ensure the vehicle is adequately maintained or to keep their driving skills up-to-date.

The reason modern tort law does not generally enunciate a specific duty of care is because the formulation of the duty in this way suggests a certain conclusion on liability. When a specific duty is enunciated, breach of that duty is more easily determined because delineation of the duty specifically dictates what should have been done, directing attention away from the issue of whether the holder of the duty behaved reasonably or not. Specifically enumerated duties of care also enable courts to side-step or divert attention away from many of the concerns generally focused upon when assessing liability in tort. In particular, such duties allow liability for omissions to be established more easily because the unreasonable conduct of a defendant can be described as a positive act, rather than an omission. For example a failure by an employer to install a safety guard on a piece of dangerous equipment, a clear omission, can be described as the installation of unsafe equipment, a positive act. This feature of specifically enumerated duties was particularly significant at the time the duties of an employer were devised because such liability was being steadfastly denied in other categories of case.

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12For example, Russell LJ said of the defendant employers in Calder v H. Kitson Vickers & Sons (Engineers) Ltd [1988] ICR 232, 239: ‘They provided the plaintiff with unsafe equipment whilst condoning what was plainly an unsafe system of working.’ (emphasis added) See also more generally on the potential to blur the line between misfeasance and non-feasance: Peter Cane, Aliyah’s Accidents, Compensation and the Law (5th ed, 1993) 63-67.

13See, eg, Meux v Great Eastern Railway Company [1895] 2 QB 387, 392 (Kay LJ): ‘The law as to such a state of things has been summed up in Taylor v Manchester, Sheffield and Lincolnshire Ry. Co. [1895] 1 QB 134. That was an action for personal injuries to the plaintiff,
The question then is why tort law has persisted in enumerating these specific employers’ duties. The historical difficulties faced by an employee in suing their employer, such as contributory negligence being a complete defence, are of limited explanatory force because many of these difficulties have since been removed.14 A concern with the safety of employees also does not offer much assistance. There are many occasions where safety is in issue but tort law does not resort to the enumeration of specific duties, for instance, when determining the liability of road users. Nor can it be a concern simply with risks being created by the employer for the employee, there being very few instances of human conduct that do not result in the creation of some type of risk. Perhaps then it can be explained in terms of the authority vested in an employer to direct the conduct of an employee. An employer not only has the potential to abuse their authority to direct the conduct of an employee for their own benefit by creating a conflict between an employee’s duties under their employment contract and other general law obligations or responsibilities the employee might owe which puts strangers to the employment relationship at risk, but has the potential to abuse that authority by creating a conflict which can put employees themselves at risk. Authority, therefore, may not only explain strict liability for the wrongdoing of another in tort, but the enhanced personal liability which is often found in the same relationships.

14-The apportionment of contributory negligence was introduced by the Law Reform (Contributory Negligence) Act 1945 (UK) c 28. The House of Lords also held in Smith v Baker [1891] AC 325 that an employee could no longer be taken to have voluntarily assumed the risks of employment.
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Voli v Inglewood Shire Council (1963) 110 CLR 74

Walker v European Electronics Pty Ltd (in liq) (1990) 23 NSWLR 1

Weddall v Barchester Healthcare Limited; Wallbank v Wallbank Fox Designs Limited [2012] EWCA Civ 25

Wheatley v Patrick (1837) 6 LJ Ex 193

Wilkinson v Rea [1941] 1 KB 688

Williams v Eady (1893) 10 TLR 41

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X (Minors) v Bedfordshire County Council [1995] 2 AC 633

Yepremian v Scarborough General Hospital (1980) 110 DLR (3d) 513

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3. Legislation

Commonwealth of Australia

*Insurance Contracts Act 1984*

New South Wales

*Children and Young Persons (Care and Protection) Act 1998*

*Conveyancing Act 1919*

*Education Act 1990*

*Employees Liability Act 1991*

*Motor Accidents Compensation Act 1999*

*Partnership Act 1892*

Tasmania

*Building Act 2000*

Victoria

*Building Act 1993*

Western Australia

*Occupiers Liability Act 1985*

United Kingdom

*Children Act 1975 c 72*

*Coal Mines Act 1911 c 50*
Consumer Protection Act 1987 c 43

Education Act 1996 c 56

Education and Inspections Act 2006 c 40

Employers' Liability Act 1880 c 1036

Employer's Liability (Defective Equipment) Act 1969 c 37

Law Reform (Contributory Negligence) Act 1945 c 28

Mineral Workings (Offshore Installations) Act 1971 c 61

Occupiers' Liability Act 1957 c 31

Offshore Installations (Operational Safety, Health and Welfare) Regulations 1976 No 1672

Partnership Act 1890 c 39

Party Wall etc Act 1996 c 40

Police Act 1996 c 16

Shipbuilding Regulations 1931 (St R & O, No 133)

The National Health Service Act 1977 c 49

Workmen's Compensation Act 1897 c 37

British Columbia (Canada)

Protection of Children Act 1960, c 303W