(2017) 29 SAcLJ 500
(Published on e-First 17 August 2017)

Case Note

THE NON-DELEGABLE DUTY

Some Clarifications, Some Questions

Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd
[2016] 4 SLR 521

The non-delegable duty is a device used by courts to hold defendants accountable for acts of negligence of third parties in exceptional cases where the defendant has a special relationship with the plaintiff or has undertaken exceptionally hazardous activity. The rule is controversial as it imposes liability without personal fault on the defendant. The recent Singapore Court of Appeal decision of *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* provides welcome clarification of the general principles underpinning the non-delegable duty.

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I. Introduction

1 When should a defendant be held liable for harm caused by the negligence of a third party engaged to perform a particular task? The law generally distinguishes between an employee, an agent, and an independent contractor. The rules on vicarious liability and agency would determine whether the employer or principal may be held liable. Employers are generally not liable for harm caused by the tort of an independent contractor, but in exceptional cases, courts have held the employers to come under a personal duty to ensure that care is taken. This type of duty is commonly known as the non-delegable duty.

2 The basic norm underpinning the non-delegable duty is that the defendant, by virtue of the nature of the activity undertaken or a special relationship with the plaintiff, cannot absolve itself of liability by

* I am grateful to my colleagues, Margaret Fordham and Swati Jhaveri, of the National University of Singapore and Gary Chan of the Singapore Management University for their helpful comments on an earlier draft.

delegating the performance of the task to a third party. While the defendant may delegate the performance of a task to a carefully selected independent contractor, the defendant, nevertheless, remains under a duty to the plaintiff to ensure that reasonable care is taken; in short, the defendant is held liable for the independent contractor's negligence.[1]

3 There are several controversial aspects of the non-delegable duty. Firstly, it is perceived as imposing strict liability on the defendant, contrary to the fault-based regime of the tort of negligence. Secondly, it is criticised as a disguised form of vicarious liability circumventing the rule that an employer is not vicariously liable for the torts of its independent contractor. Thirdly, courts and academics have pointed out that it does not appear to rest on a firm theoretical foundation,[2] conflating primary and secondary duty.

4 In some respects, analysing vicarious liability and the non-delegable duty is a quixotic exercise as we enter the age of the Fourth Industrial Revolution,[3] where the binary distinction between employees and independent contractors is whimsical. New theoretical models building on theories of institutional liability, systemic liability, and enterprise risk will be required to meet the challenges brought on by

1 This is also the approach taken in the leading English and Australian textbooks on the law of torts, dealing with the non-delegable duty as an adjunct to vicarious liability. See, *eg*, *Winfield & Jolowicz on Tort* (Edwin Peel & James Goudkamp eds) (Sweet & Maxwell, 19th Ed, 2014); Simon Deakin, Angus Johnston & Basil Markesinis, *Markesinis and Deakin's Tort Law* (Clarendon Press, 7th Ed, 2013); David Howarth *et al*, *Hepple and Matthews' Tort Law: Cases and Materials* (Hart Publishing, 7th Ed, 2015); Christian Witting, *Street on Torts* (Oxford University Press, 14th Ed, 2015); Rosalie Balkin & Jim Davis, *Law of Torts* (LexisNexis Butterworth, 5th Ed, 2013). An exception is Nicholas J McBride & Roderick Bagshaw, *Tort Law* (Pearson Education Ltd, 5th Ed, 2015) where the authors deal with the non-delegable duty within the general discussion of the duty of care.

2 See John Murphy, "Juridical Foundations of Common Law Non-Delegable Duties" in *Emerging Issues in Tort Law* (Jason Neyers, Erika Chamberlain & Stephen Pitel eds) (Hart Publishing, 2007) fn 1.

3 The World Economic Forum describes the Fourth Industrial Revolution "as the advent of 'cyber-physical systems' involving entirely new capabilities for people and machines … [representing] entirely new ways in which technology becomes embedded within societies and even our human bodies. Examples include genome editing, new forms of machine intelligence, breakthrough materials and approaches to governance that rely on cryptographic methods such as the blockchain"; see Nicholas Davis, "What Is the Fourth Industrial Revolution?", *World Economic Forum* (19 January 2016) <https://www.weforum.org/agenda/2016/01/what-is-the-fourth-industrial-revolution/> (accessed 1 March 2017). This new age has consequences for legal liability, requiring a fundamental rethink of how we attribute blame and responsibility.

artificial intelligence,[4] global business[5] and the gig economy.[6] These issues, however, are beyond the scope of this paper, which focuses on the Court of Appeal's authoritative judgment on the non-delegable duty in Singapore, *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd*[7] ("*Tiong Aik*").

II. Facts and background

5 The facts in *Tiong Aik* were that a condominium had been erected with defects in the common property, resulting in economic loss to the appellant, the management corporation, which sued four defendants: Mer Vue Developments Pte Ltd ("developer"); Tiong Aik Construction Pte Ltd ("Main Contractor"); RSP Architects Planners & Engineers (Pte) Ltd ("Architect"); and Squire Mech Private Limited. The actions against the developer included claims for breach of contract, breach of duty in the tort of negligence, and breach of statutory duty under the Building Maintenance and Strata Management Act[8] ("BMSMA"). The actions against the Main Contractor were for negligence and breach of contract; the claims against the remaining two defendants were in negligence only. All the allegations of negligence against the first three defendants were with respect to acts of their subcontractors and all three pleaded in defence that they were not liable for the torts of their independent contractors.

6 Not unusual in the building and construction industry, there were several subcontractors involved; significantly, the Main Contractor had a total of 21 subcontractors (nine nominated and 12 domestic). All the alleged acts of negligence contributing to the defects were committed by various subcontractors. The four defendants sought to have certain preliminary issues, including those pertaining to the

4 The flag bearer for the potential liability, both civil and criminal, for artificial intelligence-driven technology is the driverless car. Who should be liable for injuries caused by a driverless car?

5 An interesting example of such a global issue is the potential liability of a German company purchasing textiles from a Pakistani factory to employees of the Pakistani factory injured in a fire at the factory. See Thomas Thiede & Andrew J Bell, "Picking the Piper, the Payment, and Tune – The Liability of European Textile Retailers for the Tort of Suppliers Abroad" (2017) 33 *Journal of Professional Negligence* 25.

6 The gig economy is best exemplified in the transportation industry with the advent of Uber to replace conventional taxi services and Deliveroo to replace conventional delivery services. Courts around the world are being required to determine the employment status of the individuals in the gig economy – are they employee or independent contractors? The bigger question is whether there should be a different model to deal with rights and liabilities in this economy.

7 [2016] 4 SLR 521.

8 Cap 30C, 2008 Rev Ed.

liability of the first three defendants for the torts of their subcontractors, tried and determined prior to the main trial. The appeal arose from the High Court's decision on the preliminary questions.

7 The High Court decided that the Main Contractor and the Architect could not be held vicariously liable for the torts of their independent contractors,[9] and that they were not directly liable in negligence as they had exercised reasonable care in appointing the independent contractors.[10] Further, the High Court held that neither the Main Contractor nor the Architect owed a non-delegable common law duty to the appellant and that any non-delegable statutory duty owed under the Building Control Act[11] ("BCA") did not extend beyond compliance with safety regulations. The appellant brought an appeal against the High Court's decision, naming the Main Contractor and the Architect as respondents. The sole issue on appeal was whether the Main Contractor and the Architect owed a non-delegable duty to the appellant under the common law to build and design the condominium with reasonable care.[12]

III. Decision of the Court of Appeal

8 Chao Hick Tin JA, delivering the judgment of the court and dismissing the appeal, began by addressing the relationship between the non-delegable duty, vicarious liability, and the "independent contractor" defence. Chao JA reaffirmed that the doctrine of vicarious liability imposes liability on an employer for torts committed by its employee in the course of employment. An employer cannot be held vicariously liable for its independent contractors, but in exceptional cases, can be held personally liable if the court finds a non-delegable duty. The practical effect of the non-delegable duty is to render the defendant strictly liable for harm caused by the tort of its independent contractor,[13] thus running counter to the orthodox fault-based liability of negligence. Non-delegable duties are, thus, exceptional and require compelling legal and policy justification.[14]

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9 *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793 at [10] and [31]–[39].

10 *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793 at [93]–[98].

11 Cap 29, 1999 Rev Ed.

12 Although the appellant did not pursue the statutory non-delegable duty question during oral submissions, the Court of Appeal, nevertheless, addressed this issue for completeness.

13 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [24].

14 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [63].

9 Chao JA, noting that the recent UK Supreme Court decision in *Woodland v Swimming Teachers Association*[15] ("*Woodland*") had been applied in Singapore by the High Court,[16] endorsed Lord Sumption's reasoning in *Woodland* with the pithy observation that the categories of non-delegable duties had developed as the common law responded to particular situations to meet the "demand of justice".[17] *Woodland*, it will be recalled, involved a school which had outsourced its swimming lessons to an independent contractor whose employees negligently caused severe brain injury to one of the school's pupils. In finding the school authority liable by virtue of a non-delegable duty, Lord Sumption, noting two broad categories of cases in which non-delegable duties are recognised, set out some general principles to determine the existence and scope of non-delegable duties.

10 The first category is based on the character of the act, involving cases where the defendant has employed an independent contractor to undertake an activity that is "either inherently hazardous or liable to become so in the course of [the] work".[18] The second is based on an antecedent relationship between the defendant and plaintiff that justifies "a positive or affirmative duty to protect [the plaintiff] against a particular class of risks".[19] *Woodland*'s characterisation of the second category draws heavily on Australian jurisprudence where the High Court of Australia, over a series of decisions, described the key features of non-delegable duty cases as involving the defendant's care, control, and custody of the plaintiff, and the plaintiff's reciprocal dependence and vulnerability.[20] The focus in *Tiong Aik* was on the second category, with Chao JA noting that the "extra-hazardous" activity category is *sui generis* based on the particular facts.[21] The crucial passage setting out the law in Singapore is as follows:[22]

15 [2014] AC 537.

16 *BNM v National University of Singapore* [2014] 2 SLR 258; *Hii Chi Kok v Ooi Peng Jin London Lucien* [2016] 2 SLR 544.

17 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at 60.

18 *Woodland v Swimming Teachers Association* [2014] AC 537 at [6].

19 *Woodland v Swimming Teachers Association* [2014] AC 537 at [7].

20 The leading cases include: *Commonwealth of Australia v Introvigne* (1982) 150 CLR 258; *Kondis v State Transport Authority* (1984) 154 CLR 672; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 and *State of New South Wales v Lepore* (2003) 212 CLR 511.

21 This category of non-delegable duties may have to be considered by the Court of Appeal in the appeal from the High Court's decision in *Ng Huat Seng v Munib Mohammad Madni* [2016] 4 SLR 373.

22 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [62].

> In our judgment, moving forward, to demonstrate that a non-delegable duty arises on a particular set of facts, a claimant must *minimally* be able to satisfy the court either that: (a) the facts fall within one of the established categories of non-delegable duties; *or* (b) the facts possess *all* the [five *Woodland*] features … However, we would hasten to add that (a) and (b) above merely lay down *threshold* requirements for satisfying the court that a non-delegable duty exists – the court will additionally have to take into account the fairness and reasonableness of imposing a non-delegable duty in the particular circumstance, as well as the relevant policy considerations in our local context. [emphasis in original]

11 The five features identified in *Woodland* are reproduced for convenience:[23]

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

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

A. Distinguishing the duty of care from the non-delegable duty

12 The established categories recognised in *Tiong Aik* include: the duty of an employer to its employee;[24] the duty of hospitals and health authorities to patients;[25] the duty of schools and school authorities to students;[26] and cases involving extra-hazardous operations.[27] It should be noted that there are two additional categories in which non-delegable duties have been recognised locally, namely, the duty of occupiers to entrants under certain conditions and the duty of adjoining landowners with respect to withdrawal of support.[28] The question for the Court of Appeal was whether a new category should be recognised, namely, a non-delegable duty for construction professionals.

13 Chao JA, considering this question within the purview of the second *Woodland* category (based on an antecedent relationship), answered it in the negative, noting the absence of the classic indicia of control and vulnerability. While affirming that a non-delegable duty could be found with respect to pure economic loss, Chao JA held that the appellant could have protected itself against such loss and that it had alternative potential causes of action for breach of contract to recover its loss. Hence, it was not vulnerable in the classic sense. Further, it was held that a non-delegable duty would be incompatible with the commercial arrangement whereby the developer had a contract with the Main Contractor accepting the allocation of risks with respect to work carried out by the subcontractors. Imposing liability on the Main Contractor by way of a non-delegable duty in tort would, thus, have the effect of undermining the contractual matrix.

14 The incompatibility argument raises an interesting question as to the overlap between the existence of a duty of care and the non-delegable nature of that duty. It is trite that a contractual matrix may delineate the existence and scope of a duty owed in tort.[29] However, relying on the contractual matrix to deny the non-delegable nature of a duty is a different matter. The *raison d'être* of non-delegable duties is to prevent a defendant from contracting out personal responsibility by

24 *Chandran a/l Subbiah v Dockers Marine Pte Ltd* [2010] 1 SLR 786; *Mohd bin Sapri v Soil-Build (Pte) Ltd* [1996] 2 SLR(R) 223.

25 *Cassidy v Ministry of Health* [1951] 2 KB 343; *Hii Chi Kok v Ooi Peng Jin London Lucien* [2016] 2 SLR 544.

26 *Woodland v Swimming Teachers Association* [2014] AC 537; *Commonwealth of Australia v Introvigne* (1982) 150 CLR 258.

27 *Honeywill & Stein Ltd v Larking Bros (London's Commercial Photographers) Ltd* [1934] 1 KB 191.

28 *Y v National Parks Board* [2003] SGMC 36; *Afro-Asia Shipping Co (Pte) Ltd v Da Zhong Investment Pte Ltd* [2004] 2 SLR 117.

29 *Cf Man B&W Diesel SE Asia Pte Ltd v PT Bumi International Tankers* [2004] 2 SLR 300.

engaging independent contractors. Further, the existence of a contractual matrix is not an element of the *Woodland* factors, which focus on the relationship between the defendant and the plaintiff, not the defendant and the third party.

15 Keeping the existence of a duty distinct from the non-delegable nature of that duty is critical to avoiding confusion as to the nature and scope of the duty. *Chandran a/l Subbiah v Dockers Marine Pte Ltd*[30] ("*Chandran*") serves as a valuable illustration. The facts were that the appellant, an employee of the respondent stevedore, was injured when he fell down the hatch of a cargo vessel on which he was deployed to work. He was supervised by another employee of the respondent. The trial judge distinguished the duty to provide a safe system of work from the duty to provide a safe place of work. With respect to the former, the trial judge held that the respondent had not been negligent based on industry standards. With respect to the latter, the trial judge held that the respondent was not under a duty to inspect a workplace belonging to a third party over which it had no control.

16 The Court of Appeal disagreed, holding that the employer's duty was a composite one that was personal and non-delegable; it was a duty "to take reasonable care for the safety of their employees".[31] On the facts, V K Rajah JA, delivering the judgment of the court, held that the respondent had breached its duty by failing to inspect the place of work (the entry hatch with the defective ladder) and for failing to provide safety equipment (safety belts and harnesses) to protect employees from the risk of falling from heights. Ultimately, Rajah JA simply made a finding on the facts that the respondent had acted negligently.[32] *Chandran* did not involve any allegation of negligence on the part of any third party; it was based on direct negligence by the employer. The non-delegable nature of the duty was simply not engaged.

17 The extended discussion on the non-delegable duty of the employer was strictly not necessary and had the unfortunate consequence of blurring the distinction between the employer's failure to take care and the employer's failure to ensure care was taken. For example, relying on *Cook v Square D Ltd*[33] ("*Cook*"), Rajah JA held that an employer will not be in breach of the non-delegable duty to inspect a workplace for safety if it is unreasonable to expect the employer to do so.

30 [2010] 1 SLR 786.

31 *Chandran a/l Subbiah v Dockers Marine Pte Ltd* [2010] 1 SLR 786 at [15].

32 *Chandran a/l Subbiah v Dockers Marine Pte Ltd* [2010] 1 SLR 786 at [26]–[32]. The respondent could also have been found vicariously liable for the negligence of its supervisor who was at the site but had failed to carry out the inspection or provide the safety equipment.

33 [1992] ICR 262.

In *Cook*, the employer, based in the UK, had sent his employee to work in Saudi Arabia. The employee slipped and fell at the workplace and sued the employer. The court held that the employer had no duty to inspect the workplace and was not liable as long as he had not been negligent in selecting the site operator. *Cook* actually illustrates the proposition that an employer's duty is not always non-delegable.

18 This is also illustrated by *A (A Child) v Ministry of Defence*,[34] ("*A v MOD*") in which the court held that while the Ministry of Defence owed a duty to its employees and their dependents stationed in Germany, it could, nonetheless, delegate some services to a third party for which it would not be held liable. It should be noted that Lord Phillips of Worth Matravers' explanation of the non-delegable duty supports the *dicta* in *Chandran*; Lord Phillips noted that a non-delegable duty has "only been found in a situation where the claimant suffers an injury while in an environment over which the defendant has control".[35] Lord Sumption in *Woodland* expressly rejected this view, holding that a non-delegable duty can be found in the absence of the defendant's control over the environment of risk.[36] The question is not whether the defendant could have avoided the risk, but whether the defendant should be held liable for the independent contractor's negligence.[37]

19 A case where the non-delegable nature of the employer's duty was engaged is *The Lotus M (No 2)*,[38] regrettably not cited in *Chandran*, but considered in *Tiong Aik*. This is a classic illustration of when an employer will be held liable under the non-delegable duty for the negligence of an independent third party. The facts were that employees of Sunray Marine were injured in an explosion while working on board the vessel, the Lotus M. The fault was solely that of the owner of the Lotus M. Nevertheless, one of the employees sued Sunray Marine in its capacity as employer. Sunray Marine sought to be indemnified by the owner of the Lotus M. The Court of Appeal held that Sunway Marine was a joint tortfeasor on the basis of a non-delegable duty, stating, "it is no defence for Sunray Marine to show that it delegated its performance to the shipowner whom Sunray Marine believed to be competent to

34 [2005] QB 183.
35 *A (A Child) v Ministry of Defence* [2005] QB 183 at [47].
36 *Woodland v Swimming Teachers Association* [2014] AC 537 at [24], *per* Lord Sumption: "[t]he essential element in my view is not control of the environment in which the claimant is injured, but control over the claimant for the purpose of performing a function for which the defendant has assumed responsibility".
37 *Woodland v Swimming Teachers Association* [2014] AC 537 at [24].
38 [1998] 1 SLR(R) 409.

perform it. The liability of Sunray Marine is personal and not vicarious for the shipowner".[39]

(1) Two clarifications on the non-delegable duty

20 The non-delegable duty regime raises two related dilemmas. First, does it modify the content of the duty of care by replacing the ordinary standard of care with a higher standard of care – bordering on strict liability, thus making it incompatible with negligence? Second, arising from attempts to distinguish it from vicarious liability, does it impose primary or secondary liability on the defendant? The first question really needs to be broken into two distinct questions: (a) is the content of the duty modified; and (b) does the non-delegable duty regime impose strict liability on the defendant? The answers, respectively, are no and yes. Chao JA was explicit: "[i]t should be clarified that the concept of non-delegable duties does not *per se* import a higher or absolute standard of care".[40] It is useful to reproduce fully the quote from Kirby J, relied on by Chao JA:[41]

> However, the non-delegable nature of the duty was not designed, as I read the cases, to expand the *content* of the duty imposed upon the superior party to the relationship, so as to enlarge that duty into one of strict liability or insurance. It was simply a device to bring home liability in instances that would otherwise have fallen outside the recognised categories of vicarious liability … [emphasis in original]

21 As a matter of practice, because the non-delegable duty tends to arise in situations of extreme hazard or to involve especially vulnerable claimants, the standard of care expected may be higher, as rightly highlighted in *Chandran*. However, this is a function of the orthodox rule in the tort of negligence that the standard of care and breach thereof are dependent on the particular facts. The non-delegable duty should not be treated as a substantive rule of negligence creating a "higher" duty of care; rather, it should be seen as a procedural rule designed to attribute liability to the defendant in exceptional cases. The non-delegable duty simply holds the defendant accountable for the independent contractor's negligence, just as vicarious liability holds the

39 *The Lotus M (No 2)* [1998] 1 SLR(R) 409 at [37].

40 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [23].

41 *New South Wales v Lepore* [2003] 212 CLR 511 at [291].

employer accountable for the employee's negligence.[42] In this sense, liability is strict, but the operative negligence of the employee or the independent contractor remains to be determined according to the ordinary principles of negligence.

22 The second question, whether the non-delegable duty gives rise to primary or secondary liability, featured prominently in *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd*[43] ("*Mer Vue*"), from which the *Tiong Aik* appeal arose. Chan Seng Onn J, in rejecting the conventional view expressed in *Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd*[44] ("*Seasons Park*") that the non-delegable duty operates as an exception to the independent contractor defence,[45] distinguished between vicarious liability and the non-delegable duty as follows:[46]

> These are not true exceptions as they are premised on a primary and *personal* non-delegable duty owed by the employer to the claimant, as opposed to a 'disguised form of vicarious liability' where secondary liability is still imposed on the employer for its independent contractor's tortious acts in certain situations … [emphasis in original]

23 Chan J relied on an academic article by Robert Stevens in which Stevens, constructing a theory of the relationship between the non-delegable duty and vicarious liability, was challenging conventional academic view and the prevailing judicial approach.[47] In Stevens' view, no duty can be delegated and, therefore, the label "non-delegable duty" itself is incongruous. True, but this misses the point that the label is just a label: it simply captures situations where the performance of the task is delegated and the defendant will remain liable if care is not taken by the delegate. The danger with the primary liability theory is that it can be a red herring, misleading courts and academics into thinking that the

42 It is accepted that vicarious liability imposes strict liability, but it is vital to note that vicarious liability is not a tort. It is simply a mechanism to attribute liability. To hold an employer vicariously liable for the negligence of its employee does not undermine the fault basis of the tort of negligence. The same goes for the non-delegable duty. It bears noting that an employer, in theory, may be liable under the non-delegable duty doctrine for the tort of its employee, although this will largely be superfluous as vicarious liability will cover the field.

43 [2016] 2 SLR 793.

44 [2005] 2 SLR(R) 613.

45 *Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd* [2005] 2 SLR(R) 613 at [37]–[38].

46 *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793 at [16].

47 Robert Stevens, "Non-Delegable Duties and Vicarious Liability" in *Emerging Issues in Tort Law* (Jason Neyers, Erika Chamberlain & Stephen Pitel eds) (Hart Publishing, 2007) ch 13, at p 331.

defendant must personally be at fault to be liable under the non-delegable duty. Stevens recognised that this is not the case, expressly stating that "the defendant cannot escape liability by establishing that he or she personally is not at fault".[48]

B. A new category of non-delegable duties for construction professionals?

24 Counsel for the appellant in *Tiong Aik* offered several policy arguments in pressing for the recognition of a non-delegable duty for construction professionals. The first argument, that "industry practice and expectations were that the builder and/or architect would take responsibility for all building defects," was dismissed by Chao JA for lack of supporting evidence. Further, Chao JA held that even if there were such expectations, they should be accommodated within the contractual framework rather than by way of a non-delegable duty. This raises the chicken and egg question identified above – if the non-delegable duty was intended to restrict the independent contractor defence, can the contractual matrix be used to defeat the non-delegable duty?

25 The second argument, that plaintiffs would be disadvantaged in litigation due to difficulties in identifying the legally responsible and solvent defendant among the myriad subcontractors, was dismissed as an unavoidable aspect of commercial litigation. The third argument that the plaintiffs might not be able to sue the subcontractors in tort for lack of proximity due to the contractual matrix was summarily dismissed as "unfounded".[49] There is a slight irony in this, as one of the reasons the court gave for rejecting the duty was that the contractual matrix negated the required proximity.[50]

26 The court appears not to have engaged the most significant policy argument that large contractors are increasingly outsourcing work to "poorer and under-insured subcontractors".[51] This is a critical consideration that would have provided the basis for the court to

48 Robert Stevens, "Non-Delegable Duties and Vicarious Liability" in *Emerging Issues in Tort Law* (Jason Neyers, Erika Chamberlain & Stephen Pitel eds) (Hart Publishing, 2007) ch 13, at p 332.

49 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [89].

50 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [81].

51 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [83].

explore a third category of non-delegable duties, in addition to the two *Woodland* categories, as foreshadowed in the High Court:[52]

> However, non-delegable duties premised on professional responsibility, though similarly justified based on an assumption of responsibility, probably belong to *a separate third category* from those expressed in *Woodland* where situations involved are inherently hazardous and risky or where the responsibility of the defendant for protective custody over a vulnerable claimant features strongly. [emphasis added]

27 There may be something to be said for a new category of non-delegable duties for professionals. By virtue of their expertise and special qualifications, professionals are in a position to exercise control and authority over others who are generally dependent on the professionals and are in a position of vulnerability. The healthcare industry is a classic example, as is the construction industry: both are increasingly structured on a network of independent contractors or involve complex systems to deliver services. This diffuse structure does not conduce to higher standards of safety for two reasons: the inherent risks in complex systems and the dangers of outsourcing. The more complex the system, the greater the threat from systemic risks due to gaps in communication and management. The healthcare industry is a prime example calling for a systemic approach, as noted in an influential report published in 1999:[53]

> One of the report's main conclusions is that the majority of medical errors do not result from individual recklessness or the actions of a particular group – this is not a 'bad apple' problem. More commonly, errors are caused by faulty systems, processes, and conditions that lead people to make mistakes or fail to prevent them …

In the absence of a comprehensive systemic liability approach, the non-delegable duty is increasingly relied on in medical malpractice litigation to provide a mechanism to sheet liability home to the institutional actor.[54]

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52 *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793 at [25].

53 *To Err is Human: Building a Safer Health System* (Linda T Kohn, Janet M Corrigan & Molla S Donaldson eds) (National Academies Press, 1999).

54 For Singapore, see *Hii Chi Kok v Ooi Peng Jin London Lucien* [2016] 2 SLR 544. The Malaysian Federal Court has granted leave to determine the scope of the non-delegable duty of healthcare institutions and their potential liability for torts committed by medical professionals engaged by the institutions; see: *Sunway Medical Centre Sdn Bhd v Soo Cheng Lin* Federal Court Civil Application No 08(f)-358-06/2016; *Zulhasnimar binti Hasan Basri v Dr Kuppu Velumani P* Federal Court Civil Application No 08(f)-287-06/2014(W).

28 Outsourcing to independent contractors risks a race to the bottom in terms of pricing, as tenders are generally awarded to the lowest bid.[55] This has a flow-on effect in terms of quality and safety standards as contractors cut costs. Perversely, the "independent contractor defence" serves as an incentive to outsource work, pushing responsibility for quality and safety down the chain of contractors to the smaller companies that may be inadequately insured or under-capitalised, leading to an inability to satisfy claims successfully brought against them.[56] So, not only is it difficult for claimants to identify the correct defendant in the milieu of independent contractors, they still face the risk of a pyrrhic victory should the contractor be insolvent. This "race to the bottom" ought to be a valid policy consideration to support a non-delegable duty or, at least, to recognise that part of the duty to take care in appointing an independent contractor includes a duty not to appoint a financially irresponsible subcontractor.

29 There is some precedent for this approach in the US jurisprudence where a defendant may be held liable for the torts of an independent contractor in one of three situations, where the defendant: (a) retained control over the activity carried out by the independent contractors; (b) had delegated to the independent contractor an activity that was inherently dangerous; and (c) had engaged an incompetent independent contractor. Drawing on *obiter* remarks from an earlier decision,[57] the New Jersey Supreme Court in *Becker v Interstate*

55 This point was made recently by the National Trade Union Council in the context of productivity; see Ramesh Subbaraman, "Outsourced Services: Establishing a Fair Exchange" (5 January 2017) <https://www.ntuc.org.sg/wps/portal/up2/home/news/article/articledetails?WCM_GLOBAL_CONTEXT=/Content_Library/ntuc/home/working%20for%20u/7f14163b-881b-481e-8ba1-91bbce34c249> (accessed 13 February 2017): "NTUC explained that outsourced sectors have long been plagued by low productivity and stagnating wages due to irresponsible outsourcing by businesses. A common practice is cheap sourcing, which has resulted in the industry being caught in a vicious cycle with service providers quoting the lowest bid and finding it challenging to embark on productivity efforts."

56 This was recognised in an Australian inquiry into insolvency in the construction industry. In her submission to the commission of inquiry, the New South Wales small business commissioner made this observation: "[t]he trend towards pushing down obligations is part of an approach by the sector to cascade risk. Ironically however, by pushing these obligations down the chain the prime and tier 1 subcontractors are in fact increasing the risk of failure of low tier subcontractors who do not have the sophistication or business skills to comprehend or manage the liabilities they are asked to take on"; see Yasmin King, "Inquiry into Construction Industry Insolvency in NSW" (17 October 2012) <https://www.smallbusiness.nsw.gov.au/__data/assets/pdf_file/0003/42294/OSBC-Summary-Document-Inquiry-into-Construction-Industry-Insolvency_Asset25642.pdf> (accessed 13 March 2017).

57 *Majestic Realty Associate Inc v Toti Contracting Co Inc* 30 NJ 425, 153 A 2d 321 (1959).

Properties[58] ("*Becker*"), by a 3:2 majority, held that engaging an independent contractor that is "financially irresponsible" is the equivalent of engaging an incompetent independent contractor. In such cases, it will be fair to hold the employer personally liable to the injured party.

30 The majority view in *Becker* was, subsequently, rejected in *Robinson v Jiffy Executive Limousine Co*[59] ("*Robinson*"), with the court holding that the *Becker* majority was overly influenced by distributive justice concerns as well as the desire to find a solvent defendant to ensure that the plaintiff received compensation. The *Robinson* court noted, amongst other things, that such a rule will place an unduly onerous burden on employers, requiring them "to make a diligent and continuing inquiry into the financial qualifications of the contractor"[60] before engaging it. Further, it can discriminate against smaller companies that cannot compete with larger, well-insured entities. Finally, it could be unfair on individuals who have no choice but to engage independent contractors to carry out demolition or renovation works.

31 It should be emphasised that a duty not to engage a financially irresponsible independent contractor is not the same as imposing a non-delegable duty on the defendant. The former requires proof of negligence on the part of the defendant whereas the latter directly attributes liability to the defendant for the negligence of the independent contractor.[61] In practice, the non-delegable duty will be relevant only when the independent contractor is insolvent. If recognising a non-delegable duty for construction professionals is too big a step to take, it may be worth considering the *Becker* approach for commercial construction projects. Such a duty would serve to raise safety and quality standards as it would encourage responsible outsourcing, promote greater monitoring of activities, and ensure accountability for harm emanating from the enterprise. The legitimate concerns expressed in *Robinson* may be addressed on a case-by-case basis, in the best tradition of the common law.

32 One point should be highlighted. *Becker* was a case that involved a construction worker who suffered personal injury. There is a more compelling policy argument to invoke the non-delegable in cases where workers suffer personal injury than cases where commercial entities suffer economic loss. On this alone, *Becker* may be

58 569 F 2d 1203 (3rd Cir, 1977).
59 4 F 3d 237 (3rd Cir, 1993).
60 *Robinson v Jiffy Executive Limousine Co* 4 F 3d 237 at 242 (3rd Cir, 1993).
61 See discussion at paras 15–18 above.

distinguished. However, it should be noted that the Court of Appeal has repeatedly stated that the general principles of negligence apply universally, and even in *Tiong Aik*, Chao JA reaffirmed that the non-delegable duty can be invoked in cases of pure economic loss. Recent jurisprudence has also reaffirmed that vulnerability in tort law is not limited to impecunious individuals but can include wealthy individuals and well-resourced corporations if they are dependent on the defendant and are not in a position to protect themselves.[62]

33 A distinction can be drawn between cases such as *Tiong Aik*, where a commercial actor engages a network of independent contractors as part of a business model, and cases such as *Ng Huat Seng v Munib Mohammad Madni*[63] ("*Ng Huat Seng*"), where a non-commercial actor engages an independent contractor out of necessity. *Ng Huat Seng* involved a homeowner who engaged an independent contractor to demolish and rebuild a house, in the process of which the independent contractor negligently damaged the neighbour's house. The High Court upheld the trial court's judgment, holding that the respondent was not vicariously liable, had not been negligent in selecting the independent contractor and did not owe a non-delegable duty.[64]

34 In *Tiong Aik*, a commercial entity spawned an entire network of independent contractors, some of whom were nominated subcontractors and some of whom were domestic subcontractors, creating further confusion in lines of control and safety management. This team of independent contractors suggested a "system" at work, a holistic enterprise for which there should be a central authority that should be held accountable.[65] Part of the problem, particularly in the construction industry, is the prominence given to the notion of the "independent

62 See, *eg*, *Anwar Patrick Adrian v Ng Ching & Hue* [2014] 3 SLR 761; *Brookfield Multplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185.

63 [2016] 4 SLR 373.

64 A recent Court of Appeal decision from England hints at the possibility of liability in an analogous situation. In *Courts v Van Dijk* [2016] EWCA Civ 483 ("*Courts*"), the claimants owned a property adjoining the defendant, who undertook renovation work to improve the drainage at her property. She appointed an independent contractor to carry out the work. Subsequently, the claimants experienced flooding as the flow of water from their premises was affected. They brought an action in nuisance. The recorder found in favour of the claimant, dismissing the independent contractor defence on the ground that the "works were by their very nature likely to cause damage to the [claimants]": see *Courts* at [34]. The Court of Appeal allowed the appeal on the ground that the alleged nuisance had not been proved. The court did not address the independent contractor defence, but noted that it raised "difficult points": see *Courts* at [54].

65 See Hugh Collins, "Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration" (1990) 53 MLR 731.

contractor defence",[66] a phrase of relatively recent vintage in the judicial lexicon.[67] It should be noted that while there is no formal "independent contractor defence", the repeated use of the phrase risks elevating the independent contractor's appointment to a formal defence, encouraging a culture of "hide-behind-the-independent-contractor" rather than encouraging a culture of responsible management of risk.[68]

IV. Conclusion

35 *Tiong Aik* has set out clearly Singapore's law on the non-delegable duty. It has affirmed that Singapore follows the UK Supreme Court's framework in *Woodland*, tempered by locally relevant considerations of fairness and public policy. Significantly, it has affirmed that the non-delegable duty simply attributes liability to the defendant; it does not affect the content of the duty owed to the plaintiff. The duty remains one to take reasonable care. The real challenge is in dealing with the rise of the independent contractor defence in certain industries. How should tort law respond to this development – should it demand greater accountability or should it yield to the contractual allocation of risks? There are commercial realities that legitimately restrict the reach of tort law, and this note does not suggest that *Tiong Aik* should have been decided differently. However, there seems to be a missed opportunity to explore whether the contemporary professional services landscape, characterised by layers of service providers and independent contractors, creates an artificial buffer between service provider and service receiver.

36 It is worth recalling that *Donoghue v Stevenson*,[69] responding to the altered landscape following the age of industrialisation, engaged the law of torts to redress an imbalance between producers and consumers of products by recognising a general duty owed by manufacturers to consumers, regardless of privity of contract: a development viewed as heresy by some at the time. Similarly, the Fourth Industrial Revolution has radically transformed the relationship between providers and

66 The high watermark for this defence must be the case of *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793, where the High Court used the phrase 24 times in its judgment.

67 A search on LawNet for this phrase revealed seven hits, with the first in 2004 in *Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd (No 2)* [2004] SGHC 160. A similar search on Bailii revealed only four hits, with the first appearance in 2011 in *Tinseltime Ltd v Eryl Roberts* [2011] BLR 515.

68 The cache of this "defence" is seen in recent client updates and in-house news by local law firms, highlighting the "independent contractor defence".

69 [1932] AC 562.

consumers of services in the global marketplace.[70] Pro-business governments are reluctant to impose higher costs on private enterprise which is seen as critical to job creation. The question then is whether tort law should have a heightened regulatory function in the new economy to cut through the web of seemingly independent individuals to ensure that those who introduce unreasonable risks into the system are ultimately held accountable.

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70 As alluded to in the Introduction, the role of tort law in responding to the Fourth Industrial Revolution is a significant question which cannot be dealt with in a case, but which will be the subject of a more detailed exploration by the author in another paper.