KEY POINTS

- The Supreme Court in *Mohamud v Morrison Supermarkets Plc* relaxed the "close connection test" identified by the House of Lords in *Lister* and drastically expanded the potential exposure of employers to vicarious liability. The Court of Appeal's commercially unattractive response (in *Morrison Supermarkets Plc v Various Claimants*), in acknowledgement, is simply "more insurance".
- The Supreme Court's unconstrained formulation "unbroken sequence of events" and "seamless episode" was applied by the Court of Appeal in *Morrison Supermarkets Plc v Various Claimants* to surprising effect – Morrisons was held vicariously liable for the wrongdoing of its aggrieved employee that was intended to harm it.

Feature

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English law of vicarious liability: off on a frolic of its own – or the flight from principle?

In this article Paul Marshall explains why the Supreme Court needs to provide clarity to the law on vicarious liability to address the serious uncertainty created by its earlier decision in *Mohamud v Morrison Supermarkets Plc*. The Supreme Court decision will be of importance to all financial institutions that control large amounts of personal data – with attendant risks.

> "The doctrine of vicarious liability has not grown from any very clear logical or legal principle but from social convenience and rough justice."
>
> Lord Pearce in *ICI v Shatwell* [1965] AC 656

INTRODUCTION

There is not a lawyer capable of providing an accurate, succinct and principled summary of the present English law on vicarious liability of the kind provided by Sir John Salmond in 1907, in his first edition of *On Torts*,[1] without recourse to vague generalities. The reason is that Lord Pearce's observation in *ICI v Shatwell* seems of late to have been treated by judges more as a mandate than a comment on legal history. That doing so should lead to confusion and uncertainty is no surprise. Remarkably, Lord Clyde, in *Lister and ors v Hesley Hall Ltd*[2] said that consideration of the history of vicarious liability was not useful in seeking guidance for its modern application. Disconcertingly, he said that there was not any reason of principle or policy that could guide resolution of its application in particular cases.[3] The present law rather vindicates his perception.

All employers should be concerned about the recent and sudden expansion of the English law on vicarious liability. To take just one area of potential exposure, the GDPR includes provisions for penalties for data breaches that extend to 4% of turnover.[4] Already data "leakage" is an area of serious corporate risk that demands the allocation of significant management and financial resources. The seemingly laconic and commercially unattractive[5] answer given by the Court of Appeal, in recognition that the law has recently massively expanded employer risk, is "more insurance":

> "…. there have been many instances reported in the media in recent years of data breaches on a massive scale caused by either corporate system failures or negligence by individuals acting in the course of their employment. These might … lead to a large number of claims against the relevant company for potentially ruinous amounts. The solution is to insure against such catastrophes; and employers can likewise insure against losses caused by dishonest or malicious employees."[6]

Whether such a redistributive economic function is properly for the courts, rather than the legislature, is perhaps moot – a theme of Jonathan Sumption's 2019 Reith Lectures 'Law's Expanding Empire'.[7] It is surprising that the present law, and the risks to which it gives rise, has received comparatively little attention or comment.

It is trite that vicarious liability is imposed upon a party, *as a matter of law*, without regard to their own default, and thus (relatedly) *strictly*, for the wrongdoing of another. Therefore it is important to keep in mind the different but related tort of the unfortunately-named breach of a "non-delegable duty of care" where liability is also imposed for the wrongdoing of another, but for which the liability is primary and not vicarious – because it extends to taking care for the performance of the acts of another (conventionally dangerous activities – swimming pool cases and the like). It is further important to bear in mind that while the language of vicarious liability and agency are frequently indifferently adopted without distinction (further below), in true agency cases, where the wrong of the agent is attributed to the principal, liability *is* the liability of the principal and is not vicarious, but primary. Thus the seminal decision of the House of Lords in *Lloyd (Pauper) v Grace, Smith & Co*[8] (that concerned the solicitor's clerk who defrauded the client of proceeds of two property sales) though often treated as an authority on vicarious liability is probably better explained in agency.[9] The irreducible and unusual feature of the law on vicarious liability, that a party upon whom liability is imposed is herself without fault, can scarcely be overstated in its importance. That remarkable circumstance is sometimes apt to be lost sight of where decided cases are concerned with the *nature of connections* that point to liability being imposed. The law is concerned, on the one hand, with the nature of the *relationship* between the defendant "employer"[10] and the wrongdoer and, on the

other, with the connection between the wrong and the activities assigned to the wrongdoer under their employment. There is something vaguely theological about the imposition of liability upon a person herself without fault and, as sometimes with theological doctrines, it is easier to state a conclusion than to clearly identify the route and justification in arriving at it, indeed, that is the central problem with the present state of English law on vicarious liability. *That* liability may be imposed may be straightforward. *Why* the law should impose liability vicariously upon an innocent party, in particular circumstances, remains intractable. The law of England and Wales on this has recently become more uncertain, and, I suggest, has become de-anchored from discernible principle, being subordinated to the vagaries of subjective perception and activist judicial policy-making. *Morrison Supermarkets Plc v Various Claimants*[11] (below) illustrates the point.

In November 2019 the Supreme Court heard the appeal against the Court of Appeal's (unanimous) decision in *Morrison Supermarkets Plc v Various Claimants* and is confronted with the task of providing some much-needed clarity to the uncertainty created by its earlier decision in *Mohamud v Morrison Supermarkets Plc*,[12] a decision that reversed a similarly unanimous Court of Appeal to opposite effect. Whether it will do so, and if so how, remains to be seen.

THE REQUIREMENT FOR PRINCIPLE

Courts proceed upon the assumption that the law provides a body of doctrine that governs the decision in a given case. It is taken for granted that a decision will be correct according to how it conforms to ascertained legal principle, that is applied according to a standard of reasoning that is not idiosyncratic to the judges. It would be odd and subversive if there was not some external objective standard of legal correctness.

Writing about equity, the subject of Meagher, Gummow and Lehane's famous textbook,[13] in his foreword to the first edition, Sir Frank Kitto, formerly a Justice of the High Court of Australia, wrote:

> "Lord Simonds, resolute opponent as he was of rogue reformers who would lay impious hands on the ark of the Law, was not one to suggest that modern equity Judges may no longer contribute to substantive law and continue the development of the principles of their own special discipline; but he insisted that 'the range of its (Equity's) authority can only be determined by seeing what jurisdiction the great equity Judges of the past assumed and how they justified that assumption'. The last five words might well be written in letters of fire. *An understanding of the conceptual foundations of established principles, and that alone, provides a permissible foundation for further advance.*" (My emphasis.)

That was written of equity – a jurisdiction the subject of John Seldon's famous barb about the Chancellor's foot length, but the common law is not free from similar constraint. In similar vein, Justice Binnie,[14] formerly Justice of the Supreme Court of Canada, in *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia*[15] counselled that "overly frequent resort to general principles opens the door to subjective judicial evaluations that may promote uncertainty and litigation at the expense of predictability and settlement".

It is suggested that the recent expansion of vicarious liability by the courts, subject to further clarification and restriction, should this be provided by the Supreme Court in *Morrisons v Various Claimants*, is not based upon any discernible legal principle and, at a high level of abstraction, is of questionable legitimacy[16] – which is of course not to say that it is not the law.

AN EMPLOYER'S LIABILITY FOR WRONGDOING INTENDED TO HARM IT

In January 2014 an electronic data file containing personal details of 99,998 employees of Morrisons was posted on a file-sharing website. The data unlawfully had been downloaded at work by one Mr Skelton, an IT auditor of Morrisons, in November 2013. It was posted on the web on a Sunday from his home (80 miles from the place of his employment) using his own USB stick. The data consisted of the names, addresses, gender, dates of birth, phone numbers, national insurance numbers, bank details and salary of the employee in question. In March 2014, a CD containing a copy of the data was received by several newspapers. Skelton had sent the CD anonymously, purporting to be concerned that payroll data relating to Morrisons' employees was available on the web. Morrisons' senior management took urgent diligent steps to have the data taken down. Mr Skelton was identified as having had access to the data at the relevant time, was charged with criminal offences under the Computer Misuse Act 1990 and convicted. An important feature of the circumstances was that the *sole and limited purpose* of his having access, in his employment, to the data of Morrisons' employees was for him to securely transmit it to KPMG, Morrisons' auditors, and to respond to any questions they might have had.

5,518 employees of Morrisons brought claims for compensation against Morrisons. The claims included that Morrisons was vicariously liable for Skelton's acts, a claim that was upheld by the trial judge Mr Justice Langstaff.

In the Court of Appeal, Morrisons contended that the judge had been wrong to conclude that the wrongful acts of Skelton occurred during the course of his employment. The Court of Appeal rejected Morrisons' arguments holding[17] that the tortious acts of Skelton in sending the claimants' data to third parties "were … within the 'field of activities assigned to him by Morrisons'" – the formulation in the Supreme Court in *Mohamud v Morrison Supermarkets Plc*[18] (below). Similarly, Morrisons had contended that the publication by Skelton was disconnected by time, place and nature from his employment. Rejecting this, Langstaff J held there to have been an "unbroken thread that linked his work to the disclosure: what happened was a seamless and continuous sequence of events" – an evaluative judgment that the Court of Appeal, applying *Mohamud* (below), endorsed.[19]

Apart from attempting loyally to apply the Supreme Court's earlier decision in *Mohamud*, one important aspect of the Court of Appeal's decision in *Morrison v Various Claimants* is that it is the polar opposite from the position at common law until the decision of the House of Lords in *Lloyd v Grace, Smith & Co*[20] (1912) (the starting point for analysis of recent law). In *Morrison* the intention of Mr Skelton was *to deliberately inflict harm* on his former employer as a result of a grudge he bore. (His motive was held irrelevant.) The position at common law, until *Lloyd v Grace, Smith & Co.*, was that

for vicarious liability to be imposed on the employer, the wrongful act required to be *for the benefit* of the employer. That was the law as stated by Willes J in *Barwick v English Joint Stock Bank*[21] (1867) and the law for some 250 years previously.[22] The House of Lords' decision was a landmark in removing that requirement.

Morrisons had relied upon *Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Department*.[23] Lord Woolf MR had said:

> "[the] conduct for which the servant is responsible must constitute an actionable tort and to make the employer responsible for that tort the conduct necessary to establish the employee's liability must have occurred within the course of employment. … Before there can be vicarious liability, all the features of the wrong which are necessary to make the employee liable have to have occurred in the course of the employment. Otherwise there is no liability…".[24]

The Court of Appeal distinguished that requirement on the ground that "… the issue in the *Credit Lyonnais* case was not whether the acts complained of fell within the course of employment but rather … 'whether acts which were committed without the course of employment, which were not in themselves tortious, could be aggregated with acts of another party so as to render the employee a joint tortfeasor with that party, for whose joint acts the employer would be held vicariously liable'". It is noteworthy that Lord Woolf's proposition had been *applied* by the Court of Appeal to precisely opposite effect in its earlier decision *Frederick v Positive Solutions (Financial Services) Ltd*[25] (below) in concluding that the fraudulent actions alleged by the claimants *had not occurred under the agency*.

MOHAMUD v MORRISON SUPERMARKET PLC

The facts in *Mohamud v Morrison Supermarket Plc*[26] are striking. On 15 March 2008 Mr Mohamud visited Morrisons' petrol filling station. There was a kiosk and small convenience store that served the petrol station. Mr Mohamud entered the kiosk and asked Morrisons' employee, Mr Khan, if it was possible to print-off some documents. Mr Khan responded with verbal abuse. Mr Mohamud left the kiosk and walked to his vehicle followed by Khan, who shouted at Mr Mohamud and subjected him to a serious attack as he lay on the forecourt.

In the Court of Appeal[27] Treacy LJ said:

> "[m]y conclusion in relation to this appeal is that, on the basis of the facts found by the judge … there was no element … which could bring this Appellant's case within the *close connection test*[28] so as properly to enable a finding of vicarious liability."[29]

Similarly, Christopher Clarke LJ said that:

> "[i]f the question was simply whether it would be fair and just for Morrisons to be required to compensate Mr Mohamud for the injuries that he suffered, there would be strong grounds for saying that they should … That is not however, the test. *The question is whether the connection between the assault and the employment was sufficiently close to make it fair and just to hold the employer vicariously liable*. The fact that Mr Khan's job included interaction with the public does not, by itself, provide that connection. I was at one time attracted by the proposition that the assault could be looked at as a perverse execution by Mr Khan of his duty to engage with customers such that what he did could be regarded as falling within the scope of his work. However, such an approach parts company with reality … *If Morrisons were liable it would mean that in practically every case where an employee was required to engage with the public, his employer would be liable for any assault which followed on from such an engagement*…."[30] (Emphasis mine.)

Arden LJ concurred with both judgments.

In a remarkable judgment, unanimously reversing the judgment of the Court of Appeal, Lord Toulson (Lady Hale, and Lords Neuberger, Dyson and Reed agreeing) said[31] that under the present law (as then stated by the Supreme Court) there are two questions to be considered:

> "The first question is what functions or *'field of activities'*[32] have been entrusted by the employer to the employee …, this question must be addressed broadly … .[33] Secondly, the court must decide whether there was *sufficient connection* between the position in which he was employed and his wrongful conduct *to make it right for the employer to be held liable under the principle of social justice* …." (Emphasis mine).

A similar consideration was identified by the Supreme Court decision in *Various Claimants v Catholic Child Welfare Society*.[34] Lord Philips said:

> "[34] … in the majority of modern cases the defendant is not an individual but a corporate entity. … The policy objective underlying vicarious liability is to ensure, insofar as it is *fair, just and reasonable*, that liability for tortious wrong is borne by a defendant with the means to compensate the victim."

The formulation "fair, just and reasonable" is open to several objections: that it reveals no legal principle, that it is borrowed from the law of negligent misstatement (where its over-free use has been criticised, including recently by the Supreme Court itself,[35] for giving rise to instability), that it has no obvious application to the imposition of *strict* vicarious, as distinct from fault-based, liability, that it necessarily encourages unpredictable judicial subjectivity and that, consequently, the formulation promotes uncertainty. As the High Court of Australia delicately put it in *Prince Alfred College Inc. v ADC*:[36]

> "if a general principle provides that liability is to depend upon a primary judge's assessment of what is fair and just, the determination of liability may be rendered easier, even predictable. But principles of that kind depend upon policy choices and the allocation of risk, which are matters upon which minds may differ."

Seldon's barb about equity springs to mind. Who can challenge a finding that "it is fair just and reasonable" to impose liability? Whatever it is, while superficially attractive, it is not legal principle.

On the facts in *Mohamud*, Lord Toulson held[37] that:

> "Mr Khan's … conduct in answering the claimant's request in a foul-mouthed way … was inexcusable but within the 'field of activities' assigned to him. *What happened thereafter was an unbroken sequence of events. … I do not consider that it is right to regard him as having metaphorically taken off his uniform* the moment he stepped from behind the counter. He was following up on what he had said to the claimant. *It was a seamless episode. …* when Mr Khan followed the claimant back to his car and opened the front passenger door, *he again told the claimant in threatening words that he was never to come back to the petrol station. This was not something personal between them; it was an order to keep away from his employer's premises, which he reinforced by violence. In giving such an order he was purporting to act about his employer's business*. It was a gross abuse of his position, but it was in connection with the business in which he was employed to serve customers. His employers entrusted him with that position and it is just that as between them and the claimant, they should be held responsible for their employee's abuse of it … ."

There is an air of artificiality about this analysis. Importantly, no explanation is offered as to why it should be "just" that Morrisons be held responsible – a point made by the High Court in *Prince Alfred College Inc v ADC* (below). It is nevertheless striking that Lord Toulson sought to establish the "sufficient connection" (however artificially) by holding that Khan's act "was an order to keep away from his employer's premises, which he reinforced by violence. In giving such an order he was purporting to act about his employer's business". There can be no question of Mr Skelton's actions, in downloading the data, and four months later, at home on a Sunday, uploading the data to the web, being in any meaningful sense connected with what he was entrusted to do with the data in his employment. It cannot sensibly be suggested that Skelton at the time was "purporting to act about his employer's business". Further, it is difficult, to borrow the analogy adopted by Lord Toulson, not to say that at home, months after the downloading, when he uploaded the data to the web, Skelton *had taken off* his metaphorical uniform (so that his capacity was changed).[38]

The emphasis by the court on an "unbroken sequence of events" and "seamless episode" represents an important development of the law and an expansion of liability central to the later reasoning of the Court of Appeal in *Morrison v Various Claimants*; otherwise the posting of the data by Skelton, four months after in breach of confidence it had been wrongfully downloaded by him for the purposes of his criminal plan, hitherto would have weighed against liability being imposed – for the obvious reason that the requisite "close connection" (*Lister*) between the act and the employment would not have been established.

The "unbroken sequence of events" approach is an important and inadequately explained development and expansion of what traditionally had been the "scope of employment" consideration that goes back, so far as the modern law is concerned, to *Lloyd v Grace Smith & Co* and Sir John Salmond's famous formulation that had already been extended under the decision of the House of Lords in *Lister and ors v Hesley Hall Ltd*.[39] *Lister* was the most important development in English law on vicarious liability between *Lloyd v Grace Smith & Co* and *Mohamud*. Victims of child abuse by a warden of a school sued the school, including for vicarious liability for the acts of the warden. In an important development, Lord Steyn conceded that the law of vicarious liability did not "cope ideally" with cases of intentional wrongdoing. He said that the question was not whether the sexual abuse which occurred was an unauthorised mode of doing an act authorised by the master, (ie the traditional Salmond formulation) but, rather, *whether there was a "close connection" between the wrongdoing and the employment*. The House of Lords thereby adopted a test adopted by the Supreme Court of Canada[40] – an approach expressly informed by loss-distribution social theory. He concluded that there was, because the sexual abuse by the warden was committed *in the time and on the premises of the employers while the warden was also busy caring for the children*. He said that the abuse was "inextricably interwoven" with the carrying out of the warden's duties so that the school authority was vicariously liable for what he did. Lords Clyde, Hobhouse and Millett all favoured the "close connection" test of Lord Steyn.

Thus the "unbroken sequence of events" and "seamless episode" approach adopted by Lord Toulson represents a weakening of the "close connection" test only recently formulated in *Lister* (though explicitly not a rejection of it[41]). It is an approach based upon mere *causal* connection rather than the *closeness* of it (in *Lister* "inextricable"). Further, the transition to an "unbroken sequence of events", linking the relevant act with the "field of activities" assigned, might appear to require some kind of constraint/backstop of the kind otherwise well-established in tort law, say, in connection with foreseeability of harm. Otherwise when can an unbroken sequence of events be said to end?

A trenchant, though characteristically courteous, criticism of the Supreme Court's approach in *Mohamud* is provided by the High Court of Australia (the Australian equivalent to the Supreme Court) in *Prince Alfred College Inc. v ADC*.[42] The court (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ), referred to the difficulty in identifying principles of general application in a survey of the law in other common law jurisdictions. The court said of the Supreme Court's decision in *Mohamud*:

> "In *Mohamud* it was considered that the employee's conduct, in the manner of answering the customer's request, was inexcusable, but within the field of activities assigned to him. This would appear to be uncontroversial. The employee was clearly authorised to respond to enquiries. *But this would not explain why the employer should be liable for the conduct of the employee which followed*.
>
> The explanation given for the employer being held liable in *Mohamud* was that, because the employer had entrusted the employee with the position of serving customers, it was just that the employer should be held responsible for the employee's abuse of it. The requirement was made out because there was an 'unbroken sequence of events' and a 'seamless episode', which involved the employee 'following up on what he had said to the [customer]'. This might show, in a temporal and causal sense, that there was a connection, but it would not

give the answer to why it was fair and just to impose liability for the assaults. *It does not explain how the actions could or should be said to be in the course or scope of the employment.*" (My emphasis.)

The Australian courts have adopted a more conservative, principled, approach.

A NARROW APPROACH IN AGENCY: *FREDERICK v POSITIVE SOLUTIONS (FINANCIAL SERVICES) LTD*

Seven months before *Various Claimants v Morrison*, the Court of Appeal (Flaux, Rafferty and Asplin LJJ) had given judgment in *Frederick and ors v Positive Solutions (Financial Services) Ltd*.[43] The appellants (Frederick and family) were all members of the same family. In early 2008, they were approached by a Mr Qureshi. He persuaded them to make short-term loans in a property development scheme that Mr Warren, his business partner, was intending to carry out. Qureshi explained that the monies needed for the investment could be raised by way of re-mortgage of the properties of Frederick and family which could be arranged by Warren. Positive Solutions was a company providing independent financial advice to the public, was an "authorised person" regulated by the FCA and operated through agents. Warren was an appointed agent of Positive Solutions.

The re-mortgages were duly arranged by Warren. He submitted the applications for loans on behalf of the Frederick family through an online portal operated by Abbey National plc, to which he only had access because he was an agent of Positive Solutions. The applications were based upon false information, dishonestly submitted by Warren for him to (fraudulently) justify the borrowing which would not otherwise have been advanced to Frederick and family.

The applications for the loans were accepted and mortgage offers from Abbey National were made, which stated: "Positive Solutions … recommended that you take out this mortgage". The balance of the loan monies was advanced by Frederick and family to Warren or a company of which he and Qureshi were directors. Those monies were misappropriated and lost in the development scheme. Commission was paid to Positive Solutions by Abbey National. Warren created a false paper trail in order to access the commissions. Frederick and family's properties became subject to mortgages that they were unable to discharge.

The primary basis for the appeal was that, because of the relationship between Positive Solutions and Warren, Positive Solutions was vicariously liable for Warren's wrongdoing. The principal propositions of law given by the Court of Appeal in dismissing the contention that it was arguable that Positive Solutions was vicariously liable were straightforward. Flaux LJ (with whom Asplin and Rafferty LJJ agreed) said:[44]

"[73] … Warren did not have actual or ostensible authority to act on behalf of the respondent when he engaged in this wrongdoing."

"[74] … this is one of those cases, like *Credit Lyonnais*, where … not all the acts and omissions which would be necessary to make Warren personally liable in tort took place within the alleged course of his employment or agency, from which it must follow that the respondent is not vicariously liable for his wrongdoing: … Lord Woolf MR in *Credit Lyonnais* ...".

"[75] …Whatever tortious wrongdoing Warren had committed, until the appellants handed over the re-mortgage monies to him, they had not suffered a loss and therefore, his conduct in receiving and misappropriating the monies is a necessary feature or ingredient of the tort, without which he could not be personally liable. *That feature, or ingredient did not, on any view, occur in the course of his agency for the respondent.*" (My emphasis.)

"[76] ... at most, [Positive Solutions] provided the opportunity for Warren to commit the fraud or wrongdoing by giving him access to the portal. It is well-established that merely providing the opportunity for wrongdoing is not sufficient *without more* to give rise to vicarious liability… ." (My emphasis.)

The first point about that analysis is that, taken as a whole, it is strikingly different from Lord Toulson's broad approach in *Mohamud*. Flaux LJ's first reason, while conventional as a matter of strict agency law, is open to the objection that it is an unwarrantedly narrow interpretation of ostensible authority in the context of vicarious liability. In the parallel context of a person's "scope of employment", as its analogue, the concept has repeatedly been held (from *Lloyd v Grace Smith & Co*) to be required to be given a broad interpretation. In the House of Lords in *Armagas Ltd v Mundogas SA*[45] Lord Keith said that "scope of employment" and "ostensible authority" had no valid distinction, relying on Lord Macnaughten's speech in *Lloyd v Grace, Smith & Co* Lord Nicholls, in the House of Lords in *Dubai Aluminium v Salaam*[46] had gone further and had said that "liability for agents should not be strictly confined to acts done with the employer's authority". He had asked, rhetorically "[i]f, then, authority is not the touchstone what is?". His answer was that "… the best general answer is that the wrongful conduct must be so closely connected with the act the partner or employee was authorised to do that for the purpose of the liability of the firm or the employer to third parties the wrongful act may fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business or the employee's employment.".[47] (Underlining Lord Nicholls' own.)

Second, Flaux LJ's point that not *all the acts and omissions which would be necessary to make Warren personally liable in tort took place within the alleged course of his employment or agency*, from which it must follow that the respondent is not vicariously liable for Warren's wrongdoing, is to adopt a much more restrictive approach than Lord Toulson's formulation in *Mohamud* which emphasises, not the course of employment or agency, but rather the "*field of activities*" (a formulation followed by the Court of Appeal in *Morrison v Various Claimants*). Yet further, as noted above, subsequently, in *Morrison v Various Claimants*, the Court of Appeal *distinguished* Lord Woolf MR's requirement in *Credit Lyonnais*[48] that was *applied* by Flaux LJ in *Frederick* to opposite effect. There is no principled basis for applying it in one instance and distinguishing it in the other. Objection to "mere opportunity" as

a restriction upon liability "without more" depends upon there being nothing to satisfy the "without more" element. The "more" in question is a somewhat uncertain concept. Further, if one returns to the "close connection" test identified by Lord Steyn in *Lister*, it might in any event be said that the frauds *were closely connected with* the business and activities of the agency.

The Supreme Court gave permission to appeal the decision in *Frederick*. The appeal was due to be heard in February 2019 but settled on terms – giving rise to continuing unsatisfactory uncertainty in the law.

THE FLIGHT FROM PRINCIPLE

It is plain that an unconstrained application of the Supreme Court's decision in *Mohamud* can give rise to startling (potentially catastrophic) outcomes, as in the Court of Appeal's decision in *Morrison v Various Claimants*. Further, the broad approach to liability adopted by the Court of Appeal in that decision is not possible to reconcile with the contrastingly narrow approach to liability adopted in *Frederick v Positive Solutions* – it is very possible that one or other – or indeed both – are wrongly decided. Further, the "unbroken sequence of events" and "seamless episode" formulation adopted by the Supreme Court in *Mohamud*, as applied in *Morrison v Various Claimants*, represents an inadequately explained relaxation of the "close connection" test formulated by the House of Lords in *Lister*. Furthermore, in any event that test seems to be unconstrained by any limiting principle analogous to constraints on foreseeability in other areas of tort. Would Morrisons still have been liable if Skelton had bided his time and waited a year or two before uploading the data and merely kept the flash drive in a drawer? If not, why not? The pace of change is so remarkable as to be almost dizzying.

Sometimes the Supreme Court, and before it the House of Lords, have had regard to decisions of other jurisdictions. Famously, in *Caparo Industries Plc v Dickman and ors.* [1990] 2 AC 605 Lord Bridge said of development of the law on the voluntary assumption of a duty of care for statements made:

> "We must now, I think, recognise the wisdom of the words of Brennan J. in the High Court of Australia in *Sutherland Shire Council v. Heyman* (1985) 60 A.L.R. 1, 43–44, where he said: *'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed" '.*"

This approach has not, however, been followed by English courts in the law of vicarious liability in their embarking, since *Lister*, on a course of energetic idiocyncratic innovation, greatly expanding the class of *otherwise innocent* potential defendants.

The last word may appropriately go to a judge of towering eminence. In one of the most famous lectures ever delivered on the subject, and not improved upon since, in 1955 Sir Owen Dixon gave an address at Yale University entitled *Concerning Judicial Method*.[49] By 1955 he had been a Justice of the High Court of Australia for 26 years and had been Chief Justice of the High Court for three years. He remarked that, in the nineteenth century:

> "… There was a steady if intuitive attempt to develop the law as a science. But this was not done by an abonnement of [departure from] the high techniques and strict logic of the common law. It was done by an apt and felicitous use of that very technique and, under the name of reasoning, of that strict logic which it seems fashionable now to expel from the system. The courts did not arrogate to themselves a freedom of choice … courts proceeded upon the basis that the conclusion of the judge should not be subjective or personal to him but should be the consequence of his best endeavour to apply an external standard. The standard is found in a body of positive knowledge which he regards himself as having acquired. … It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience … The objection is that the judge wrests the law to his own authority … No doubt he supposes that it is to do a great right and he may not acknowledge that for the purpose he may do more than a little wrong."

He added:

> "Indeed, there is a fundamental contradiction when such a course is taken. The purpose of the court which does it is to establish as law a better rule or doctrine. For this the court looks to the binding effect of its decisions as precedents. Treating itself as possessed of a paramount authority over the law in virtue of the doctrine of judicial precedent, it sets at nought every relevant judicial precedent of the past. It is for this reason that it has been said that the conscious judicial innovator is bound under the doctrine of precedents by no authority except the error he committed yesterday."

Whilst Lord Philips in *Various Claimants v Catholic Child Welfare Society* may have correctly observed that "[t]he law of vicarious liability is on the move",[50] there is much to be said for the courts, in this as in other areas of law, having regard to Brennan J's statement in *Sutherland Shire Council v Heyman* and heeding Dixon's stern warning. ■

1 In a formulation repeatedly cited with approval in decisions of common law courts until fairly recently, Salmond defined a wrongful act by a servant in the course of his employment as "either (a) a wrongful act authorised by the master or (b) a wrongful and unauthorised *mode* of doing some act authorised by the master", with the amplification that a master is liable for acts which he has not authorised if they are "so connected with acts which he has authorised, that they may rightly be regarded as *modes* –

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although improper modes – of doing them".

2 [2002] 1 AC 215, [2001] UKHL 22.

3 Ibid, paras [34] and [35].

4 Article 83

5 Perhaps highlighting the truth of an observation once made by Lord Bingham about judges being not necessarily well qualified to make commercial judgments (his remark was made in the context of the purported "commercial" construction of contractual terms).

6 *WM Morrison Supermarket Plc v Various Claimants* [2018] QB 772 at para [78].

7 Published as *Trials of the State*, Profile Books 2019.

8 [1912] AC 716.

9 A view that has some support from Lords Nicholls, Slynn and Hutton in *Dubai Alumninium Co Ltd v Salaam* [2003] 2 AC 366 who all considered that the claimant was acting in reliance on the ostensible authority of the clerk.

10 "Employer" because the relationship is no longer required to be of employment but may be "akin to employment": *Armes v Nottinghamshire County Council* [2017] UKSC 60.

11 [2018] QB 772, [2018] EWCA Civ 2339.

12 [2016] AC 677, [2016] UKSC 11.

13 *Equity Doctrines and Remedies* now 5th Ed. 2015, LexisNexis Butterworths.

14 A Justice of the Supreme Court of Canada from 1998 to 2011.

15 [2005] 3 SCR 45 at 70 [41] cited by French CJ in the Australian High Court decision *Prince Alfred College Incorporated v ADC* [2016] HCA 37 (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).

16 Lord Millett in *Lister* said that vicarious liability was best explained as a loss distribution device and concluded that "an employer would be liable for risks inherent in the nature of the business". In doing so he was impliedly endorsing the "enterprise risk" theory of vicarious liability. In *Dubai Aluminium (loc cit.)* Lord Nicholls said that: "[t]he underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on. When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged". Whether the law should undergo sudden shifts to accommodate such perceptions and judicial economic analysis is, to borrow from Sumption, questionable.

17 *Morrison v Various Claimants* note 11 above, para [72].

18 [2016] AC 677, [2016] UKSC 11.

19 Paragraph [74].

20 [1912] AC 716.

21 (1867) 2 LR Exch 259.

22 The House of Lords, rejecting that requirement, appears to have disregarded the fact that the requirement was established at common law, and treated the requirement as though it was of Willes J's own devising rather than his formulation of established legal principle. For an illuminating exposition of this point, see Professor Anthony Gray, *Vicarious Liability Critique and Reform*, Hart Publishing, 2018.

23 [2000] AC 486.

24 Page 495.

25 [2018] EWCA Civ 431.

26 *Loc. cit.*

27 [2014] EWCA Civ 116.

28 See in more detail the text to note 40 below and Lord Steyn in *Lister loc. cit.* at para [15] and Lord Millett at para [70].

29 Paragraph [48]. This is in effect the same approach as adopted by the High Court of Australia in *Deatons Pty v Flew* (1949) 79 CLR 370 where a bar attendant threw a glass of beer, and the glass, at a customer causing loss of the sight of an eye – a result from orthodox reasoning that Lord Toulson in *Mohamud* considered to be unjust: para [30] – raising the distinction between justice and fairness.

30 Paragraphs [51]-[53].

31 Paragraphs [47], [48].

32 An expression derived from Lord Cullen's judgment in *Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co* 1925 SC 796, 802.

33 *s.q.* – The law was previously concerned with "scope of employment", that is not the same thing as "field of activities" – acknowledged by Lord Toulson in *Mohamud* at para [36].

34 [2013] 2 AC 1.

35 *Robinson v Chief Constable of West Constable of West Yorkshire* [2018] UKSC 4.

36 [2016] HCA 37 para [45].

37 Paragraph [47].

38 For the discussion of the point see Lord Toulson at para [47] and *Warren v Henlys* [1948] 2 All ER 935. In *Warren* a petrol station attendant assaulted a customer after they had been affronted by the attendant's behaviour and returned with a policeman. The customer had said he would report the attendant to his employer and was punched to the ground. It was held that by the time of the assault the business connection had ended and that when the customer returned with the police it was for a personal purpose. To use Lord Toulson's formula, the attendant by that time had "taken-off his uniform" and was not engaged in his employer's business. Some might think that an implausibly subtle distinction from *Mohamud*.

39 Note 2.

40 *Bazley v Curry*, 174 DLR(4th) 45 and *Jacobi v Griffiths*, 174 DLR(4th) 71 (a formulation said to be derived from Sir John Salmond).

41 Paragraph [46], Lord Toulson.

42 [2016] HCA 37.

43 [2018] EWCA Civ 431.

44 Paragraphs [73]-[76].

45 [1986] 1 AC 717.

46 [2003] 2 AC 366, [2002] UKHL 48 para 22.

47 Paragraph [23].

48 Note 23 above.

49 Collected in papers in *Jesting Pilate* The Law Book Company (1965) at pp 157-158.

50 *Loc. cit.* para [19].

This article is a revision of the substance of a lecture given to the Professional Negligence Lawyers Association at the Law Society on 9 October 2019.

Further Reading:

- Financial institutions beware: Cybersecurity lessons from the WM Morrisons Supermarket case (2018) 11 JIBFL 693.
- The legal implications of cybersecurity breaches for financial institutions (2017) 11 JIBFL 676.
- LexisPSL: Financial Services: Information and cyber security for financial services firms – overview.