

**The University of Hong Kong**

**Faculty of Law**

**The Common Law Lecture Series**

**VICARIOUS LIABILITY ON THE MOVE<sup>1</sup>**

**The Right Honourable The Lord Phillips of Worth Matravers**

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The common law is alive and well. In Britain Parliament is responsible for an ever-growing volume of legislation that seems to govern every aspect of our lives, but there is still plenty of room for the judges to exercise their common law powers to make new law, and this is true of the rest of the common law world. I refer to the judges, but the reality is, of course, that changes in the common law are usually initiated by the ingenuity of the lawyers who appear before the judges, seeking relief for their clients.

In this lecture I am going to look at some common law developments in the law of tort. Where a claimant has suffered damage as a result of a tortious act his concern is to obtain compensation. He will wish to seek relief from a party who has the resources to pay this. Often the

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<sup>1</sup> This speech can also be found at the Hong Kong Law Journal under the citation of “(2015) 45 HKLJ 29”.

individual man or woman whose wrongful act has caused the damage does not have the means to compensate the victim. In these circumstances the victim, with the aid of his lawyer, looks for someone to sue who will be good for the money.

I am going to look at two circumstances in which the courts have been prepared to impose liability on a defendant who has himself done nothing wrong for the tortious act of someone else. The first is where the defendant is vicariously liable for another's wrongdoing. The second is where the wrongdoing results in the breach of what has been described as a non-delegable duty owed by the defendant to the claimant. Our courts have recently expanded both the scope of vicarious liability and the scope of the non-delegable duty, so that there is now a considerable overlap between the two. They are, however, very different in principle.

Vicarious liability arises because of the relationship between the defendant and the wrongdoer. Classically, the wrongdoer is the defendant's employee, and the defendant is vicariously liable because the wrongdoer committed the wrong "in the course of his

employment”. There will normally be no prior relationship between the defendant and the claimant at all.

A non-delegable duty usually arises out of a pre-existing relationship between the claimant and the defendant. As a result of that relationship the defendant owes the claimant a duty to take reasonable care to see that he, or his property, is not harmed. That duty cannot be delegated. The *performance* of the duty may be delegated to another, but if he is negligent in performing the duty the defendant will remain personally liable for the negligence.

I am first going to show you how the law of vicarious liability has been on the move. The doctrine of vicarious liability predates the creation by the judges of the law of negligence. It dates back to the days when society was divided into two classes, properly described as “masters” and “servants”. Under the principle of vicarious liability a master was held liable for the torts of his servant if these were committed “in the course of his employment”. Precisely how and why the judges developed this principle is not clear. Professor Glanville Williams writing over half a century ago<sup>2</sup> commented:

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<sup>2</sup> ‘Vicarious Liability and the Master’s Indemnity’

“Vicarious liability is the creation of many judges who have had different ideas of its justification or social policy, or no idea at all”.

When I started at the Bar over fifty years ago the law of vicarious liability had been unchanged for many years. The requirements for vicarious liability were that:

- 1) the first defendant had been the employer of the second defendant;
- 2) the second defendant had committed a tort; and
- 3) that tort had been committed by the second defendant in the course of his employment by the first defendant.

There was seldom any problem in establishing the relationship of employer and employee. Usually when one person worked for another it was under a contract of employment, and this was conclusive of the relationship. This was not always the case, of course. One member of my chambers was a man of private means. He owned a Rolls Royce and he employed a chauffeur to drive him about in it. Had his chauffeur had an accident on the way in he would have

been vicariously liable, because the chauffeur was his employee and the accident would have occurred in the course of his employment.

If, however, he had taken a taxi and the taxi driver had had a collision, he would not have been liable. That is because the taxi driver would have been an independent contractor.

There was no liability for a tort committed by an independent contractor who has performing a service for you, even if the service was identical in kind to one that might have been provided by your employee. The difference between a servant and an independent contractor was said to be whether the employer had the right to control the manner in which the service was performed. An employer had the right to dictate to his employee not merely what he should do, but how he should do it. He could not dictate to the independent contractor how he should perform the service that he had engaged him to provide. My wealthy member of chambers was entitled to tell his chauffeur not to drive so fast , but he was not entitled to give the same instructions to a taxi driver.

Perhaps this distinction was one of the reasons why an employer was liable for the torts of his employee but not those of an independent

contractor whose services he had engaged. The fact that he was entitled to direct his employee how to perform his duties meant that he had a greater responsibility for seeing that they were performed properly and carefully.

At all events the first thing that you had to prove to establish vicarious liability was that the person who had caused you the harm was the employee of the person you were seeking to hold liable.

The second thing that you had to prove was that the person who had caused you the harm was acting “in the course of his employment” when he did so. What does that mean? Salmond on Torts, a leading text book on the subject, gave the same definition of this in no less than 21 editions:

“A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorized by the master, or (2) a wrongful and unauthorized mode of doing some act authorized by the master”.

The chauffeur, or in the olden days the coachman, provides a good illustration. If the coachman is driving his master to the races and negligently runs over a pedestrian, he will have done so in the course of his employment, and the master will be liable. If, however, while the master is abroad on business, the coachman takes his carriage without permission in order to take his mistress off to the races, and negligently runs over a pedestrian, the luckless pedestrian will not be entitled to sue the master.

This is because the coachman was not acting in the course of his employment. He was on what has been called “a frolic of his own”.

I am going to show you how the judges have extended the scope of liability in two ways. First by holding that vicarious liability can arise out of a relationship that is not that of employer and employee. Secondly by holding that that vicarious liability can arise out of deliberate wrongful acts that are the very opposite of what the wrongdoer is employed to do.

For over 200 years the courts have recognized that the existence of a contract of employment is not always the touchstone of the relationship that can give rise to vicarious liability.

An exception can arise where an employer lends or hires out his employee to perform services for a third party. If that third party is entitled to control the manner in which this workman performs his services the workman will be treated as if he was the employee of the third party when performing those services. If the workman is negligent the third party will be vicariously liable. This situation classically occurred where a piece of equipment, typically a vehicle or a crane, was hired out to the third party together with its operator. Thus in *Donovan v Laing, Wharton and Down Construction Syndicate Ltd*<sup>3</sup>, back in 1893, the defendants hired out a crane and its operator to stevedores who were loading a ship at a wharf. The stevedores were giving the crane operator precise instructions as to the working of the crane – “up a bit, down a bit, left a bit” and so on. In the course of carrying out those instructions the crane operator negligently injured a workman. A powerful Court of Appeal held that the crane operator’s contractual employers were not vicariously liable for his

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<sup>3</sup> [1893] 1 QB 629

negligence. He was to be treated as employed not by them but by the stevedores. Bowen LJ put the matter in this way<sup>4</sup> :

“We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act. “

Some fifty years later exactly the same test was adopted by the House of Lords to a similar situation, although the test produced a different result.

In *Mersey Docks and Harbour Board v Coggins and Griffiths*<sup>5</sup>, the Harbour Board had hired out a crane together with its driver, to a firm of stevedores under a contract that specified that the crane driver was to be the employee of the stevedores, although the Harbour Board retained the power to dismiss him. The crane driver negligently injured the plaintiff.

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<sup>4</sup> pp 633-4

<sup>5</sup> 1947 [AC] 1

The House of Lords held that the Harbour Board, and not the stevedores, was vicariously liable for his negligence. This was because, in contrast to the situation in *Donovan v Laing*, the stevedores had no control over the manner in which the crane was operated. This was a matter for the driver himself.

I find the emphasis on “control” in a case decided in 1946 rather odd. By this time the test of whether or not the employer could control the manner in which the employee carried out his duties had become out of date as the touchstone of a contract of employment. That test was realistic when the majority of employees were agricultural labourers or domestic staff. But in a modern industrial society employees are often employed because they have skills that their employers lack.

Ship owners are vicariously liable for the negligence of the master they employ despite the fact that they cannot and do not instruct him in the art of navigation. So why, just because an employee is placed under the control of a third party, should that third party be treated as the employer *in place of* the contractual employer, letting the contractual employer off the hook?

In his great work on vicarious liability written over half a century ago<sup>6</sup> Atiyah commented :

“It is perhaps strange that the courts have never countenanced what might be thought the obvious solution to the problem, namely to hold both employers liable to the plaintiff”

And 30 years later Fleming in his work on the Law of Torts<sup>7</sup>commented:

“Since in most cases control is divided between lender and borrower [of the employee], the most obvious conclusion would perhaps have been to impose joint liability.”

This is precisely what the courts in the United States did where an employer lent an employee to a third party, but it seems that for many years no lawyer in England had the initiative to invite the Court to impose joint vicarious liability.

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<sup>6</sup> Atiyah, *Vicarious Liability* 1967, at p. 156

<sup>7</sup> 9<sup>th</sup> Edition 1998 at p. 45

Then, in 2005, came the case of *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and others*<sup>8</sup>. A fitter working on installing air-conditioning in a factory negligently managed to flood the factory. He was not employed by the contractors who were installing the air-conditioning. He was employed by sub-contractors who had been engaged by the head-contractors.

There was an issue as to whether the head contractors, or the sub-contractors were vicariously liable for his negligence. The Court of Appeal itself raised the question of whether it was possible in law to have dual vicarious liability and adjourned the appeal so that this question could be properly argued.

Then, after considering the authorities, the Court decided that, although for 180 years courts had proceeded on the basis that only one defendant could be vicariously liable for a tortious act, there was no case that bound the court so to find. Academic writers favoured the possibility of dual vicarious liability and, on the facts of the case, this was the principled solution.

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<sup>8</sup> [2005] EWCA Civ 1151

So both the second and the third defendants were held to be jointly vicariously liable. Giving the leading judgment May LJ held that the test of vicarious liability depended on who had the right to control how the fitter did his work. On the facts the head contractors and the sub-contractors shared control, so both should be treated as the employers of the negligent fitter's mate. The other Lord Justice, Rix LJ, took a different view.

He commented<sup>9</sup> that the basis of vicarious liability was, generally speaking, that those who set in motion and profit from the activities of employees should compensate those who are injured by such activities, even when performed negligently. Dealing with the test of control<sup>10</sup> he observed that the right to control the method of doing work had long been an important and sometimes critical test of the master/servant relationship.

The courts had, however, imperceptibly moved from using the test of control as determinative of the relationship of employer and employee to using it as the test of vicarious liability of a defendant.

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<sup>9</sup> para 55

<sup>10</sup> paras 59 and 64

He questioned<sup>11</sup> whether the doctrine of vicarious liability was to be equated with control. Vicarious liability was a doctrine designed for the sake of the claimant, imposing a liability incurred without fault because the employer was treated in law as picking up the burden of an organizational or business relationship which he had undertaken for his own benefit. Accordingly, what one was looking for was:

“a situation where the employee in question, at any rate for relevant purposes, is so much a part of the work, business or organization of both employers that it is just to make both employers liable for his negligence.”

Vicarious liability was certainly on the move in this case, first in the finding that there could be two defendants who were jointly vicariously liable for the negligence of an employee and secondly, in the case of Rix LJ, in formulating a test of vicarious liability that was not based on control, but on the wrongdoer playing an essential part in the employer’s business enterprise.

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<sup>11</sup> para 79

I was much influenced by Rix LJ's analysis when writing what was the last judgment that I delivered as President of the Supreme Court, a judgment with which all the other members of the Court agreed. The case has a long title <sup>12</sup> but I shall call it simply *the Christian Brothers Case*. The subject matter of this case was one that is unhappily very topical in Britain at the moment: child sex abuse.

It has become apparent that there have been many cases in the past where people given access to children, in a variety of different situations, have taken advantage of their position to abuse the children. And there has recently been a considerable body of litigation in which children who have been abused have, perhaps many years later, brought proceedings alleging that various bodies are vicariously liable for this abuse. Such claims can raise two issues. The first is whether the defendants can properly be treated as the employers of those responsible for the abuse. The second is how abusing a child can ever be treated as something that has been done in the course of employment. At this stage I am only going to deal with the first issue.

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<sup>12</sup> *The Catholic Child Welfare Society and others v Various Claimants and the Brothers of the Christian Schools and others* [2012] UKSC 56

The abuse in the *Christian Brothers* case had been carried out by members of a Roman Catholic Institute called 'the Brothers of the Christian Schools'. They were lay brothers of the Catholic Church. The mission of the Institute and of each of the lay brothers who belonged to it was that:

“they should make it their chief care to teach children, especially poor children, those things which pertain to a good and Christian life”

In order to carry out this mission, the Institute encouraged the brothers to obtain employment as teachers in schools. The abuse in *the Christian Brothers* case was committed by brothers who obtained employment in a Roman Catholic school for delinquent boys called *St Williams*. They did so under contracts of employment with the managers of St Williams. The victims of the abuse sued both the Institute and the managers of the school, alleging that they were both vicariously liable for the abuse committed by the brothers.

At first instance and before the Court of Appeal their claim against the managers of the school succeeded, but their claim against the

Institute failed on the ground that the Institute was not the employer of the brothers.

The managers appealed to the Supreme Court. They no longer disputed their own vicarious liability as the employers of the brothers. But they alleged that the Institute was jointly liable with them on the basis that the Institute shared responsibility for the conduct of its brothers, although it did not actually employ them. The Institute argued that only the managers were vicariously liable, because they were responsible for the running of the school and were the employers of the brothers.

We held that the Institute was jointly vicariously liable with the managers of the school. It was true that the Institute of which the brothers were members did not employ them. Indeed the brothers entered into deeds under which they undertook to transfer all their earnings to the Institute, leaving the Institute to cater for their material needs. But we held that this meant that their relationship with the Institute was even closer than that of employer and employee. We identified the following factors which rendered the

relationship of the brothers to the Institute akin to that of employment.

- 1) The Institute conducted its activities as if it were a corporate body;
- 2) The teaching activity of the brothers was undertaken because the senior members of the Institute directed the brothers to undertake it.
- 3) The teaching activity undertaken by the brothers was in furtherance of the mission of the Institute. They were carrying on the Institute's business.
- 4) The manner in which the brothers were required to conduct themselves as teachers was dictated by the Institute's rules.
- 5) While the brothers were not bound to the Institute by contracts they were bound by the vows of obedience that they had taken.

Let me pause to summarise the position thus far. So far as the first part of the test for vicarious liability is concerned, the common law is definitely on the move. It is no longer necessary for there to be a contract of employment to give rise to vicarious liability if a relationship exists which is akin to a contract of employment.

Furthermore, when considering that question, control of the wrongdoer no longer has the significance that it had in the past. More significant is the question of whether the wrongdoer was playing an integral part in the business activities of the employer when the tort was committed.

I am now going to turn to the second element that has to be proved in order to establish vicarious liability – that the person who actually committed the wrongful act did so “in the course of his employment” by the defendant. I have already referred to Salmond’s definition of this as either an act authorized by the master or a wrongful and unauthorized mode of doing some act authorized by the master. In his text-book<sup>13</sup> Salmond qualified this definition by saying

“a master...is liable even for acts which he has not authorized, provided that they are so connected with the acts that he has authorized that they may rightly be regarded as modes – although improper modes – of doing them.”

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<sup>13</sup> 1<sup>st</sup> Ed pp 83-4

This is a grey area. What is the nature of the connection that must exist between the unauthorized wrongful act and the act that the employer has authorized? In answering this question the common law has again been on the move. It has long been established that if the wrongful act takes place as an incident of the performance of the authorized act it will be treated as in the course of employment, even if specifically forbidden by the employer. A milkman was forbidden by his employers from taking anyone to help him on his milk-round. In breach of this prohibition he took a young boy on his milk-cart in order to assist him and then injured him by negligent driving. The Court of Appeal held that the milkman had been acting in the course of his employment<sup>14</sup>. And the driver of a petrol lorry who blew it up by lighting a cigarette and throwing away the match when fuel was being transferred from the lorry was held to have been acting in the course of his employment when doing so, even though smoking was forbidden<sup>15</sup>. It is easy to understand these cases. The wrongful acts actually occurred in the course of carrying out, and as an incident of, the authorized activities.

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<sup>14</sup> *Rose v Plenty* [1976] 1 WLR 141

<sup>15</sup> *Century Insurance v Northern Ireland Road Transport Board* [1942] AC 509

In the *Christian Brothers* case the claim was in respect of sexual abuse. As I have said, there has recently been quite a number of claims against institutions alleging vicarious liability for sexual abuse committed by their employees. Initially the courts had understandable difficulty with the proposition that sexual abuse could be something done “in the course of employment”.

In 1999 in the case of *Trotman* the Court of Appeal had to consider a claim that the Yorkshire County Council was vicariously liable for sexual assaults carried out on a child by their employee who was the deputy headmaster of a special school for handicapped children. The Court rejected the claim. It applied the Salmon test. Could the teacher’s conduct be described as “an unauthorized mode of carrying out the teacher’s duties.” Butler-Sloss LJ and her colleagues held that it could not. She said of the sexual abuse<sup>16</sup>:

“Rather it is the negation of the duty of the council to look after the children for whom it was responsible...In the field of sexual misconduct I find it difficult to visualize circumstances in which

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<sup>16</sup> *Trotman v North Yorkshire County Council* [1999] LGR 584

an act of the teacher can be an unauthorized mode of carrying out an authorized act...”

But *Trotman* was held by the House of Lords to have been wrongly decided in *Lister v Hemsley Hall Ltd*<sup>17</sup>. The defendants were the managers of a school for children with emotional and behavioural difficulties.

They employed a warden to run a boarding house of that school. He systematically sexually abused the children in his care, a number of whom, many years later, brought an action against them alleging that they were vicariously liable for the abuse. They lost at first instance and in the Court of Appeal, but won in the House of Lords. Their Lordship’s departed from Salmond’s test of whether the wrongful conduct constituted an unauthorized mode of carrying out an authorized act. In its place some of them at least substituted the test of whether the wrongful acts were “so closely connected with [the warden’s] employment that it would be fair and just to hold the employers vicariously liable”<sup>18</sup>. Lord Steyn said:

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<sup>17</sup> [2001] UKHL 22

<sup>18</sup> Lord Steyn at para 28, Lord Clyde at paras 37 and 50, Lord Hutton at para 52.

“...the sexual abuse took place while the employee was engaged in duties at the very time and place demanded by his employment”

Lord Clyde reasoned as follows:

“...the care and safekeeping of the boys had been entrusted to the [County Council] and they in turn had entrusted their care and safekeeping, so far as the running of the boarding house was concerned, to the warden.

That gave him access to the premises, but the opportunity to be at the premises would not itself constitute a sufficient connection between his wrongful actions and his employment. In addition to the opportunity which access gave him, his position as warden and the close contact with the boys which that work involved created a sufficient connection between the acts of abuse which he committed and the work that he had been employed to do.”

In the *Christian Brothers case* we applied the reasoning in *Lister* and in some Canadian authorities, which had been relied on in *Lister*. I summarized the principles as follows<sup>19</sup>

“Vicarious liability is imposed where a defendant, whose relationship with the abuser puts it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.”

These cases of sexual abuse have, I believe, significantly extended the concept of “course of employment” in the test of vicarious liability. They have done so in the exercise of common law powers and, as it has appeared to the courts, in the interests of justice. But I am now going to turn to the other topic of this lecture – the concept of the non-delegable duty, and it may be that this alternative route to

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<sup>19</sup> Para 86

imposing liability for the wrongdoing of another, will strike you as more satisfactory.

Just as in the case of vicarious liability, the doctrine of the non-delegable duty has been around a long time. It is a common law doctrine invented by the judges. It has its origin in the law of nuisance and on the duty that a land-owner owed to his neighbour. The non-delegable duty in the case of *Rylands v Fletcher*<sup>20</sup>, not to permit the escape of water accumulated in a reservoir, was an absolute duty. In *Hughes v Percival*<sup>21</sup> that great law maker, Lord Blackburn, formulated a non-delegable duty to exercise reasonable care in respect of the duty owed by a house-owner to his neighbour in respect of their party wall. He said<sup>22</sup>:

“I do not think that duty went so far as to require him absolutely to provide that no damage should come to the plaintiff’s wall from the use he made of it, but I think that the duty went so far as to require him to see that reasonable skill and care were exercised in those operations which involved the use of the party wall, exposing it to this risk. If such duty was

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<sup>20</sup> (1866) LR 1 Ex 265

<sup>21</sup> (1883) 8 App Cas 443

<sup>22</sup> p 445

cast on the defendant he could not get rid of the responsibility by delegating the performance to a third person. He was at liberty to employ such third person to fulfill the duty which the law cast on himself...but the defendant still remained subject to that duty and liable for the consequences if it was not fulfilled.”

Finding that a negligent act by a third person breached a defendant’s non-delegable duty of care provided the judges with a convenient way of getting round any difficulties that arise under the doctrine of vicarious liability. The defendant could be held liable, even if the person committing the negligent act was not his employee. Some of the academics did not approve of the doctrine of non-delegable duty being used in this way.

Professor Glanville Williams described it as “a logical fraud”<sup>23</sup> and Fleming as “a disguised form of vicarious liability”. Before the Second World War the House of Lords had invoked the doctrine in respect of the duty of care that an employer owed to his workforce in order to

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<sup>23</sup> [1956] CLJ 180

get round the defence that then existed of common employment in *Wilsons & Clyde Coal v English*<sup>24</sup>. Lord Macmillan held of the duty<sup>25</sup>:

“It remains the [factory] owner’s obligation, and the agent whom the owner appoints to perform it performs it on the owners’ behalf. The owner remains vicariously responsible for the negligence of the person whom he has appointed to perform his obligation for him, and cannot escape liability merely by proving that he has appointed a competent agent.”

One of the areas where the judges were having difficulty in applying the doctrine of vicarious liability was hospital treatment. Some judges, applying the test of control, held that skilled professionals – surgeons, doctors, radiographers and even nurses could not be treated as employees of a hospital because the hospital did not control the manner in which they exercised their professional skills.

In *Gold v Essex*<sup>26</sup> the Court of Appeal held that the hospital authority was liable for the negligence of a radiographer that it employed. The majority of the court applied the ordinary principles of vicarious

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<sup>24</sup> [1938] AC 57

<sup>25</sup> p. 75

<sup>26</sup> [1942] 2 KB 293

liability, holding that the radiographer was the employee of the authority, acting in the course of his employment. The Master of the Rolls, Lord Greene, however, used the language of non-delegable duty<sup>27</sup>:

“...the first task is to discover the extent of the obligation assumed by the person it is sought to make liable. Once this is discovered, it follows of necessity that the person accused of the breach of the obligation cannot escape liability because he has employed another person, whether servant or agent, to discharge it on his behalf...”

I think that it is no coincidence that counsel for the plaintiff in that case was Tom Denning KC. The headnote records that he argued:

“It is the duty of the hospital authorities to take reasonable care in the treatment of a patient. The hospital authorities are responsible for the failure of their servants to perform their duties properly”

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<sup>27</sup> p. 301

In the subsequent case of *Cassidy v Ministry of Health*<sup>28</sup> the issue was whether the Ministry was liable for the negligence of a doctor and a house surgeon in their employment at a hospital. Denning LJ (as he had become) found himself the most junior member of the Court of Appeal. The other two members of the court found in favour of the plaintiff by the application of the doctrine of vicarious liability. It was critical to their analysis that the doctor and surgeon were employees of the defendant. In differing from them Lord Denning said at p. 586:

“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.”

I have already referred to the case of *Lister v Helsey Hall* to illustrate the increase in the scope of vicarious liability. There the warden in charge of the school was held to have acted “in the course of his employment” when sexually abusing boys in the school.

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<sup>28</sup> [1951] 1 All ER 574

That case might have been decided instead applying the doctrine of the non-delegable duty.

Indeed the speech of Lord Hobhouse went a long way in that direction. After referring to *Trotman* and to some of the Canadian cases on sexual abuse, he said<sup>29</sup>:

“What these cases and *Trotman’s case* illustrate is a situation where the employer has assumed a relationship to the plaintiff which imposes specific duties in tort upon the employer and the role of the employee (or servant) is that he is the person to whom the employer has entrusted the performance of those duties. These cases are examples of that class where the employer, by reason of assuming a relationship to the plaintiff, owes to the plaintiff duties which are more extensive than those owed by the public at large ...

The classes of persons or institutions that are in this type of special relationship to another human being include schools, prisons, hospitals and even, in relation to visitors, occupiers of

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<sup>29</sup> paras 54 and 55

land. They are liable if they themselves fail to perform the duty which they consequently owe. If they entrust the performance of that duty to an employee and that employee fails to perform the duty they re still liable”

Lord Hobhouse went on to treat the case as one of vicarious liability for the tort of an employee, for the warden in that case was an employee. His reasoning would, however, have been equally applicable if the warden had been not an employee, but an independent contractor. However, at this point in time there had been no decision of a majority of the Court of Appeal, let alone of the House of Lords, that recognized that the doctrine of non-delegable duty applied in the case of hospitals, let alone schools. That is no longer the case.

On 23 October last the Supreme Court gave judgment in *Woodland v Essex County Council*<sup>30</sup>. Lord Sumption gave the only judgment, with which the other members of the Court agreed. The appellant, a young school-girl, had gone with her class for the weekly swimming lesson that her school provided in accordance with the national

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<sup>30</sup> [2013] UKSC 66

curriculum. There she got into difficulties and was not rescued in time to avoid serious brain damage. This was alleged to be due to the negligence of the lifeguard.

The Council was responsible for the school, but was not vicariously liable because the lifeguard was not their employee. She had provided her services as an independent contractor. So the claimant alleged that the school had been in breach of a non-delegable duty of care. The Supreme Court upheld the claim. Lord Sumption held<sup>31</sup> that the time had come to recognize that the minority reasoning of Lord Greene in *Gold* and Denning LJ in *Cassidy* had correctly identified the underlying principle. The factors giving rise to a non-delegable duty were as follows:

- (1) 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.

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<sup>31</sup> para 23

- (2) 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.
- (3) 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 school children.
- (4) The claimant has no control over how the defendant chooses to perform those obligations, ie whether personally, or through employees or through third parties.
- (5) 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.

- (6) 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.

In laying down these criteria Lord Sumption was attempting keep within reasonable limits the scope of the non-delegable duty of care.

But it seems to me that I have demonstrated in this lecture a significant expansion of the circumstances in which liability will be imposed on a defendant for the wrongful conduct of a third party.

The common law has been on the move in this area and I doubt whether it has yet come to a stop.