IN THE HOUSE OF LORDS No. [2001] UKHL 22

Thursday 3rd May, 2001

B e f o r e:

LORD STEYN

LORD CLYDE

LORD HUTTON

LORD HOBHOUSE OF WOODBOROUGH

LORD MILLETT

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT
IN THE CAUSE

- - - - - - -

L AND OTHERS (AP)

Appellants

- v -

HESLEY HALL LIMITED

Respondents

- - - - - - - - -

J U D G M E N T

LORD STEYN

My Lords,

I. The question

1. The central question before the House is whether as a matter of legal principle the employers of the warden of a school boarding house, who sexually abused boys in his care, may depending on the particular circumstances be vicariously liable for the torts of their employee.

II. The sexual abuse

2. In 1979 A House, a boarding annex of W Hall School, [Address} was opened. Between 1979 and 1982 the appellants were resident at A House. At that time the appellants were aged between 12 and 15 years. The school and boarding annex were owned and managed by Hesley Hall Ltd as a commercial enterprise. In the main children with emotional and behavioural difficulties were sent to the school by local authorities. A House is situated about two miles from the school.

3. The aim was that A House would provide care to enable the boys to adjust to normal living. It usually accommodated about 18 boys. The company employed Mr and Mrs Grain as warden and housekeeper to take care of the boys. The employers accept that at the material time they were aware of the opportunities of sexual abuse which may present themselves in a boarding school environment.

4. The warden was responsible for the day to day running of A House and for maintaining discipline. He lived there with his wife, who was disabled. On most days he and his wife were the only members of staff on the premises. He supervised the boys when they were not at school. His duties included making sure the boys went to bed at night, got up in the morning and got to and from school. He administered pocket money, organised weekend leave, evening activities, and supervised other staff. A House was intended to be a home for the boys and not an extension of the school environment.

5. The employers accept that, unbeknown to them, the warden systematically sexually abused the appellants in A House. The sexual abuse took the form of mutual masturbation, oral sex and sometimes buggery. The sexual abuse was preceded by "grooming" being conduct on the part of the warden to establish control over the appellants. It involved unwarranted gifts, trips alone with the boys, undeserved leniency, allowing the watching of violent and X-rated videos, and so forth. What may initially have been regarded as signs of a relaxed approach to discipline gradually developed into blatant sexual abuse. Neither of the appellants made any complaint at the time. In 1982 the warden and his wife left the employ of the respondents. In the early 1990s a police investigation led to criminal charges in the Crown Court. Grain was sentenced to seven years' imprisonment for multiple offences involving sexual abuse.

6. In 1997 the appellants brought claims for personal injury against the employers.

III. The decision at first instance

7. The trial took place in January 1999. It is necessary to describe the shape of the case. There were then three claimants. Their claims were advanced on two separate grounds. First, it was alleged that the employers were negligent in their care, selection and control of the warden. Secondly, the plaintiffs alleged that the employers were vicariously liable for the torts committed by the warden. The case was heard before Judge Walker in the Dewsbury County Court. The evidence was adduced by witness statements and oral evidence. The judge was asked to give judgment on liability only.

8. On 25 February 1999 the judge gave judgment. He dismissed the claim in negligence against the employers. That left the claim based on vicarious liability to be considered. This claim appeared to be ruled out by the *Salmond* test (*Salmond, Law of Torts,* 9th ed (1936), p 95; *Salmond and Heuston, Law of Torts,* 21st ed (1996), p 443) as interpreted and applied by the Court of Appeal in *T v North Yorkshire County Council* [1999] LGR 584. The following passage in the judgment of Butler-Sloss LJ, at p 591, reveals the perceived difficulty:

"18. Having looked at some of the relevant decisions on each side of the line, it is useful to

stand back and ask: applying general principles, in which category in the *Salmond* test would one expect these facts to fall? A deputy headmaster of a special school, charged with the responsibility of caring for a handicapped teenager on a foreign holiday, sexually assaults him. Is that in principle an improper mode of carrying out an authorised act on behalf of his employer, the council, or an independent act outside the course of his employment? His position of caring for the plaintiff by sharing a bedroom with him gave him the opportunity to carry out the sexual assaults. But availing himself of that opportunity seems to me to be far removed from an unauthorised mode of carrying out a teacher's duties on behalf of his employer. Rather it is a negation of the duty of the council to look after children for whom it was responsible. Acts of physical assault may not be so easy to categorise, since they may range, for instance, from a brutal and unprovoked assault by a teacher to forceful attempts to defend another pupil or the teacher himself. But in the field of serious sexual misconduct, I find it difficult to visualise circumstances in which an act of the teacher can be an unauthorised mode of carrying out an authorised act, although I would not wish to close the door on the possibility."

Thorpe LJ agreed with this judgment and Chadwick LJ expressed himself in materially similar terms. Not surprisingly, the judge felt compelled to conclude that the employers could not be held vicariously liable for the torts of the warden. On the other hand, the judge held that the employers were vicariously liable for the warden's failure to report to his employers his intentions (before the acts of sexual abuse) and the harmful consequences to the children (after acts of abuse). The judge explained his reasoning as follows:

"1. The defendant admits it had a duty of care towards the plaintiffs.

2. That duty of care was to take all reasonable steps to safeguard the plaintiffs (and other pupils) in its physical, moral and educational development whilst at the school.

3. In carrying out that duty of care the defendant a limited company necessarily had to appoint a hierarchy of responsible agents . . .

4. Mr Grain in particular was responsible for the boys while at A House . . .

5. He had a duty to report to the defendant . . . any harm which he perceived had come or might come to any of the boys in his care with a view to the defendant carrying out further its duty of care in taking remedial or preventative steps.

6. Failure by Mr Grain to report harm to the boys would unquestionably be a failure to carry out a duty which he owed generally and specifically to each boy in his care.

7. The consequences of a report of abuse upon a boy would (I find) undoubtedly have resulted in the removal from the scene by the defendant of the source of the harm by the dismissal of Mr Grain and the report of the incident to the police.

8. The defendant is therefore vicariously liable for Mr Grain's failure to report the acts of abuse."

The judge entered judgment for the plaintiffs against the employers on liability, and ordered that damages be assessed. The judge gave leave to appeal to the Court of Appeal.

IV. The Court of Appeal decision

9. The employers appealed to the Court of Appeal. The plaintiffs did not cross-appeal the judge's decision that the employers were not negligent. The only remaining issue was therefore whether the employers were vicariously liable. But, like the judge, the Court of Appeal was bound by the previous Court of Appeal decision in *T v North Yorkshire County Council* [1999] LGR 584. In this situation counsel for the plaintiffs found it difficult to argue that the employers were vicariously liable for the sexual acts of the warden. Instead counsel for the plaintiffs defended the judgment in favour of his clients on the basis of the warden's failure to report his own conduct. By judgments delivered on 7 October 1999, The Times, 13 October 1999 the Court of Appeal dismissed this argument The reasoning of the Court of Appeal is encapsulated in the following sentence in the judgment of Waller LJ:

"The simple point in this case is that if wrongful conduct is outside the course of

employment, a failure to prevent or report that wrong conduct cannot be within the scope of employment so as to make the employer vicariously liable for that failure when the employer was not vicariously liable for the wrongful conduct itself."

The Court of Appeal accordingly allowed the appeal. In due course the House of Lords granted leave to appeal. The appeal proceeded at the instance of two appellants only.

V. The issues before the House

10. Since the decision in the Court of Appeal the law reports of two landmark decisions in the Canadian Supreme Court, which deal with vicarious liability of employers for sexual abuse of children, have become available: *Bazley v Curry* (1999) (1999) 174 DLR(4th) 45; *Jacobi v Griffiths* (1999) 174 DLR(4th) 71. Enunciating a principle of "close connection" the Supreme Court unanimously held liability established in *Bazley's* case and by a 4 to 3 majority came to the opposite conclusion in *Jacobi's* case. The Supreme Court judgments examine in detail the circumstances in which, though an employer is not "at fault," it may still be "fair" that that it should bear responsibility for the tortious conduct of its employees. These decisions have been described as "a genuine advance on the unauthorised conduct/unauthorised mode distinction": Peter Cane, "Vicarious Liability for Sexual Abuse" (2000) 116 LQR 21, 24. Counsel for the appellants invited your Lordships to apply the test developed in *Bazley's* case and in *Jacobi's* case and to conclude that the employers are vicariously liable for the sexual torts of their employee.

11. In another sense the approach to the appeals before the House differs from that adopted in the Court of Appeal. The House is not bound to follow the decision in *T v North Yorkshire County Council* [1999] LGR 584. On the contrary, quite apart from the high persuasive value of the two Canadian decisions, the first task of the House is to consider whether the decision in *T v North Yorkshire County Council*, when examined from a perspective of legal principle, correctly states the position. On the principal point the present appeals therefore in reality challenge the law as stated by the Court of Appeal in *T v North Yorkshire County Council* rather than in the cases under consideration.

12. Only if the arguments of the appellants, which seek an overruling of *T v North Yorkshire County Council,* fail will it become necessary to consider whether vicarious liability may nevertheless be based on the warden's failure to report his sexual intentions and misdeeds.

VI. The perspective of principle.

13. It is right to acknowledge at once that *T v North Yorkshire County Council* is a carefully considered and reasoned decision. The leading judgment was given by Butler-Sloss LJ whose views are entitled to great weight. Nevertheless, our allegiance must be to legal principle. That is the subject to which I now turn.

14. Vicarious liability is legal responsibility imposed on an employer, although he is himself free from blame, for a tort committed by his employee in the course of his employment. Fleming observed that this formula represented "a compromise between two conflicting policies: on the one end, the social interest in furnishing an innocent tort victim with recourse against a financially responsible defendant; on the other, a hesitation to foist any undue burden on business enterprise": *The Law of Torts,* 9th ed (1998), pp 409-410.

15. For nearly a century English judges have adopted Salmond's statement of the applicable test as correct. Salmond said that a wrongful act is deemed to be done by a "servant" in the course of his employment if "it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master": *Salmond on Torts,* 1st ed (1907), p 83; and *Salmond and Heuston on Torts,* 21st ed (1996), p 443. Situation (a) causes no problems. The difficulty arises in respect of cases under (b). Salmond did, however, offer an explanation which has sometimes been overlooked. He said (*Salmond on Torts,* 1st ed, pp 83-84) that "a master . . . is liable even for acts which he has not authorised, provided they are *so connected* with acts which he has authorised, that they may rightly *be regarded* as modes - although improper modes - of doing them" (my emphasis): see the citation of Salmond with

approval in *Canadian Pacific Railway Co v Lockhart* [1942] AC 591, 599 (*Salmond on Torts,* 9th ed, p 95) and in *Racz v Home Office* [1994] 2 AC 45, 53 (*Salmond and Heuston, Laws of Tort,* 19th ed (1987), pp 521-522; 20th ed (1992), p 457). *Salmond's* explanation is the germ of the close connection test adumbrated by the Canadian Supreme Court in *Bazley v Curry,* 174 DLR(4th) 45 and *Jacobi v Griffiths,* 174 DLR(4th) 71.

16. It is not necessary to embark on a detailed examination of the development of the modern principle of vicarious liability. But it is necessary to face up to the way in which the law of vicarious liability sometimes may embrace intentional wrongdoing by an employee. If one mechanically applies *Salmond's* test, the result might at first glance be thought to be that a bank is not liable to a customer where a bank employee defrauds a customer by giving him only half the foreign exchange which he paid for, the employee pocketing the difference. A preoccupation with conceptualistic reasoning may lead to the absurd conclusion that there can only be vicarious liability if the bank carries on business in defrauding its customers. Ideas divorced from reality have never held much attraction for judges steeped in the tradition that their task is to deliver principled but practical justice. How the courts set the law on a sensible course is a matter to which I now turn.

17. It is easy to accept the idea that where an employee acts for the benefit of his employer, or intends to do so, that is strong evidence that he was acting in the course of his employment. But until the decision of the House of Lords in *Lloyd v Grace, Smith & Co* [1912] AC 716 it was thought that vicarious liability could only be established if such requirements were satisfied. This was an overly restrictive view and hardly in tune with the needs of society. In *Lloyd v Grace, Smith & Co* it was laid to rest by the House of Lords. A firm of solicitors were held liable for the dishonesty of their managing clerk who persuaded a client to transfer property to him and then disposed of it for his own advantage. The decisive factor was that the client had been invited by the firm to deal with their managing clerk. This decision was a breakthrough: it finally established that vicarious liability is not necessarily defeated if the employee acted for his own benefit. On the other hand, an intense focus on the connection between the nature of the employment and the tort of the employee became necessary.

18. A good illustration of the correct approach is provided by *Williams v A & W Hemphill Ltd* 1966 SC(HL) 31. Contrary to the instructions of his employers a driver of a lorry deviated substantially from his route. On the detour an accident occurred owing to the fault of the driver. The question arose whether the employers of the lorry driver were vicariously liable. In a speech assented to by all the members of the House Lord Pearson analysed the position as follows, at p 46:

> "Had the driver in the present case been driving a lorry which was empty or contained nothing of real importance, I think that so substantial a deviation might well have constituted a frolic of his own. The presence of passengers, however, whom the servant is charged qua servant to drive to their ultimate destination makes it impossible (at all events, provided that they are not all parties to the plans for deviation) to say that the deviation is entirely for the servant's purposes. Their presence and transport is a dominant purpose of the authorised journey, and, although they are transported deviously, continues to play an essential part. It was said in argument that there must be some limits to that contention and that one could not hold that, if the driver had gone to Inverness, he would still be acting on his master's business. No doubt there are such limits to the argument as common sense may set on the facts of each case. But when there are passengers whom the servants on his master's behalf has taken aboard for transport to Glasgow, their transport and safety does not cease at a certain stage of the journey to be the master's business, or part of his enterprise, merely because the servant has for his own purposes chosen some route which is contrary to his instructions.
>
> The more dominant are the current obligations of the master's business in connection with the lorry, the less weight is to be attached to disobedient navigational extravagances of the

servant.

> In weighing up, therefore, the question of degree, whether the admittedly substantial deviation of the vehicle with its passengers and baggage was such as to make the lorry's progress a frolic of the servant unconnected with or in substitution for the master's business, the presence of the passengers is a decisive factor against regarding it as a mere frolic of the servant. In the present case the defenders remained liable, in spite of the deviation, for their driver's negligence."

This was vicarious liability in the context of negligence. Nevertheless, the reasoning throws light on the problem under consideration.

19. The classic example of vicarious liability for intentional wrong doing is *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 A woman wanted her mink stole cleaned. With her permission it was delivered to the defendants for cleaning. An employee took charge of the fur and stole it. At first instance the judge held that the defendants were not liable because the theft was not committed in the course of employment. The Court of Appeal reversed the judge's decision and held the defendants liable. It is possible to read the case narrowly simply as a bailment case, the wrong being failure to re-deliver. But two of the judgments are authority for the proposition that the employee converted the fur in the course of his employment. Diplock LJ observed, at pp 736-737:

> "If the principle laid down in *Lloyd v Grace, Smith & Co* [1912] AC 716 is applied to the facts of the present case, the defendants cannot in my view escape liability for the conversion of the plaintiff's fur by their servant Morrissey. They accepted the fur as bailees for reward in order to clean it. They put Morrissey as their agent in their place to clean the fur and to take charge of it while doing so. The manner in which he conducted himself in doing that work was to convert it. What he was doing, albeit dishonestly, he was doing in the scope or course of his employment in the technical sense of that infelicitous but time-honoured phrase. The defendants as his masters are responsible for his tortious act."

Salmon LJ held, at p 738, that "the defendants are liable for what amounted to negligence and conversion by their servant in the course of his employment". The deciding factor was that the employee had been given custody of the fur. *Morris's* case has consistently been regarded as high authority on the principles of vicarious liability. *Atiyah, Vicarious Liability in the Law of Torts ,* (1967), p 271 described it as "a striking and valuable extension of the law of vicarious liability". *Palmer, Bailment,* 2nd ed (1991), pp 424-425 treats *Morris's* case as an authority on vicarious liability beyond bailment. He states that "if a television repairman steals a television set he is called in to repair, his employers would be liable, for the loss occurred whilst he was performing one of the class of acts in respect of which their duty lay". And that does not involve bailment. Moreover, in *Port Swettenham Authority v T W Wu & Co (M) Sdn Bhd* [1979] AC 580 the Privy Council expressly approved *Morris's* case in respect of vicarious liability as explained by Diplock and Salmon LLJ.

20. Our law no longer struggles with the concept of vicarious liability for intentional wrongdoing. Thus the decision of the House of Lords in *Racz v Home Office* [1994] 2 AC 45 is authority for the proposition that the Home Office may be vicariously liable for acts of police officers which amounted to misfeasance in public office - and hence for liability in tort involving bad faith. It remains, however, to consider how vicarious liability for intentional wrongdoing fits in with Salmond's formulation. The answer is that it does not cope ideally with such cases. It must, however, be remembered that the great tort writer did not attempt to enunciate precise propositions of law on vicarious liability. At most he propounded a broad test which deems as within the course of employment "a wrongful and unauthorised mode of doing some *act* authorised by the master". And he emphasised the connection between the authorised *acts* and the "improper modes" of doing them. In reality it is simply a practical test serving as a dividing line between cases where it is or is not just to impose vicarious liability. The usefulness of the *Salmond* formulation is, however, crucially dependent on focussing on the right act of the

employee. This point was explored in *Rose v Plenty* [1976] 1 WLR 141. The Court of Appeal held that a milkman who deliberately disobeyed his employers' order not to allow children to help on his rounds did not go beyond his course of employment in allowing a child to help him. The analysis in this decision shows how the pitfalls of terminology must be avoided. Scarman LJ said, at pp 147-148:

> "The servant was, of course, employed at the time of the accident to do a whole number of operations. He was certainly not employed to give the boy a lift, and if one confines one's analysis of the facts to the incident of injury to the plaintiff, then no doubt one would say that carrying the boy on the float - giving him a lift - was not in the course of the servant's employment. But in *Ilkiw v Samuels* [1983] 1 WLR 991 Diplock LJ indicated that the proper approach to the nature of the servant's employment is a broad one. He says, at p 1004:
> 'As each of these nouns implies' - he is referring to the nouns used to describe course of employment, sphere, scope and so forth - 'the matter must be looked at broadly, not dissecting the servant's task into its component activities - such as driving, loading, sheeting and the like - by asking: what was the job on which he was engaged for his employer? and answering that question as a jury would.'
> Applying those words to the employment of this servant, I think it is clear from the evidence that he was employed as a roundsman to drive his float round his round and to deliver milk, to collect empties and to obtain payment. That was his job. . . He chose to disregard the prohibition and to enlist the assistance of the plaintiff. As a matter of common sense, that does seem to me to be a mode, albeit a prohibited mode, of doing the job with which he was entrusted. Why was the plaintiff being carried on the float when the accident occurred? Because it was necessary to take him from point to point so that he could assist in delivering milk, collecting empties and, on occasions obtaining payment."

If this approach to the nature of employment is adopted, it is not necessary to ask the simplistic question whether in the cases under consideration the acts of sexual abuse were modes of doing authorised acts. It becomes possible to consider the question of vicarious liability on the basis that the employer undertook to care for the boys through the services of the warden and that there is a very close connection between the torts of the warden and his employment. After all, they were committed in the time and on the premises of employers while the warden was also busy caring for the children.

VII. The correctness of T v North Yorkshire County Council

21. It is now opportune to take a closer look at the Court of Appeal decision in *T v North Yorkshire County Council* [1999] LGR 584. The appeal was from a decision on a preliminary issue arising on the pleadings. The pleaded facts were as follows, at p 592:

> "(1) At all material times the defendants operated a school for mentally handicapped children . . . whereat the plaintiff attended from about May 1990.
>
> (2) The defendants' servants or agents who were the staff at the school organised a holiday trip to Spain which took place on 28 May to 4 June 1991 and the plaintiff, with other pupils, went on the trip and was totally within the control, and subject to the care, of the defendants' said servants or agents, the staff at the said school.
>
> (3) Whilst on the holiday in Spain the plaintiff shared a bedroom with the deputy headmaster of the said school, the defendants' servant or agent, one MS, and on several nights during the holiday the plaintiff was indecently assaulted by the said MS."

Accordingly, it was alleged, the council was vicariously responsible because the indecent assaults were committed by MS "whilst carrying out his supervisory role as a schoolmaster in charge of the plaintiff and responsible for his care". No breach of duty by the council was alleged. Chadwick LJ further observed, at p 594:

> "There is no allegation in the particulars of claim that the council itself owed to the plaintiff a duty to ensure that he was free from harm during the Spanish holiday. No doubt there were thought to be good reasons for pleading the case without alleging any duty owed by the council itself. I express no view on whether such an allegation could be made good. This court must decide this appeal on the basis that the preliminary issue is defined by the allegations which were before the judge. It would not be safe to proceed on the basis that the case might have been put in some other way which the plaintiff has not chosen to plead."

Butler-Sloss LJ may have been influenced by similar considerations for at the end of her judgment she observed, at p 592: "on the basis of the case set out in the pleadings which is the only issue before this court, the blame for these events cannot be laid at the door of the council". This was a rather restricted and technical view of the dispute. It would not have been overly bold to say that, although the council was not itself in breach of any duty, it had undertaken to exercise reasonable care of the children on the Spanish holiday through the deputy headmaster. That would not have been the end of the matter but it would have facilitated a more realistic appraisal of the issue.

22. The Court of Appeal treated the *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 line of authority as applicable only in bailment cases. That was the Court of Appeal's answer to the argument that, in the context of vicarious liability, the law ought not to incur the reproach of showing greater zeal in protecting jewellery than in protecting children. My Lords, I trust that I have already shown that *Morris's* case cannot be so easily dismissed. It is only necessary to add that in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 the House of Lords took the view that the principles enunciated in *Morris's* case by Diplock and Salmon LJ are of general application. The plaintiffs had contracted with the defendants for the provision of a night patrol service for their factory. The perils the parties had in mind were fire and theft. A patrol man deliberately lit a fire which burned down the factory. It was an unresolved issue whether the employee intended to cause only a small fire or burn down the whole factory: see at p 840D. The question was whether Securicor was protected by an exemption clause. The basis of the prima facie liability of Securicor therefore had to be determined. Lord Wilberforce pointed out that it could be put on more than one basis. He said, at p 846:

> "it could be put upon a vicarious responsibility for the wrongful act of Musgrove - viz, starting a fire on the premises: Securicor would be responsible for this upon the principle stated in *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, 739."

Lord Keith of Kinkel and Lord Scarman expressed agreement with Lord Wilberforce. In a separate speech Lord Salmon observed, at p 852:

> "There can be no doubt that but for the clause in the contract which I have recited, Securicor would have been liable for the damage which was caused by their servant, Musgrove, whilst indubitably acting in the course of his employment: *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716."

It is therefore plain that the Court of Appeal in *T v North Yorkshire County Council* [1999] LGR 584 erred in treating *Morris's* case as reflecting a special rule application in bailment cases only.

23. But at the root of the reasoning of the Court of Appeal lay a terminological difficulty. Butler-Sloss LJ thought, at p 591, that the sexual assaults were "far removed from an unauthorised mode of carrying out a teacher's duties on behalf of his employer" Chadwick LJ, at pp 592-593, found it "impossible to hold that the commission of acts of indecent assault can be

regarded as a mode - albeit, an improper or unauthorised mode - of doing what . . . the deputy headmaster was employed by the council to do . . . Rather, it must be regarded as an independent act of self-indulgence or self-gratification". In giving the unanimous judgment of the Canadian Supreme Court in *Bazley v Curry*,174 DLR(4th) 45 McLachlin J criticised the decision in *T v North Yorkshire County Council* in the following terms, at p 57, para 24,:

> "the opinion's reasoning depends on the level of generality with which the sexual act is described. Instead of describing the act in terms of the employee's duties of supervising and caring for vulnerable students during a study trip abroad, the Court of Appeal cast it in terms unrelated to those duties. Important legal decisions should not turn on such semantics. As Atiyah points out (*Vicarious Liability in the Law of Torts*, p 263): 'conduct can be correctly described at varying levels of generality, and no one description of the "act" on which the servant was engaged is necessarily more correct than any other'."

I am in respectful agreement with this comment.

24. It is useful to consider an employer's potential liability for non-sexual assaults. If such assaults arise directly out of circumstances connected with the employment, vicarious liability may arise: see Rose, "Liability for an employee's assaults" (1977), 40 MLR 420, 432-433. Butler-Sloss LJ considered this analogy. In the critical paragraph of her judgment, which I have already quoted in full, she stated, at p 591:

> "Acts of physical assault may not be so easy to categorise, since they may range, for instance, from a brutal and unprovoked assault by a teacher to forceful attempts to defend another pupil or the teacher himself. But in the field of serious sexual misconduct, I find it difficult to visualise circumstances in which an act of the teacher can be an unauthorised mode of carrying out an authorised act, although I would not wish to close the door on the possibility."

If I correctly understand this passage, it appears to be indicating that there could not be vicarious liability by an employer for a brutal assault, or serious sexual misconduct whatever the circumstances. That appears to be a case of saying "The greater the fault of the servant, the less the liability of the master": *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, 733, per Diplock LJ. A better approach is be to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort.

25. In my view the approach of the Court of Appeal in *T v North Yorkshire County Council* [1999] LGR 584 was wrong. It resulted in the case being treated as one of the employment furnishing a mere opportunity to commit the sexual abuse. The reality was that the county council were responsible for the care of the vulnerable children and employed the deputy headmaster to carry out that duty on its behalf. And the sexual abuse took place while the employee was engaged in duties at the very time and place demanded by his employment. The connection between the employment and the torts was very close. I would overrule *T v North Yorkshire County Council.*

26. It is not necessary to consider case law on the words "in the course of his employment" which are to be found in section 32(1) of the Race Relations Act 1976 and section 41 of the Sex Discrimination Act 1975.

VII. The application of the correct test

27. My Lords, I have been greatly assisted by the luminous and illuminating judgments of the Canadian Supreme Court in *Bazley v Curry,* 174 DLR(4th) 45 and *Jacobi v Griffiths,* 174 DLR(4th) 71. Wherever such problems are considered in future in the common law world these

judgments will be the starting point. On the other hand, it is unnecessary to express views on the full range of policy considerations examined in those decisions

28. Employing the traditional methodology of English law, I am satisfied that in the case of the appeals under consideration the evidence showed that the employers entrusted the care of the children in A House to the warden. The question is whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. On the facts of the case the answer is yes. After all, the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in A House. Matters of degree arise. But the present cases clearly fall on the side of vicarious liability.

VIII. The alternative argument

29. Having concluded that vicarious liability has been established on the appellants' primary case, it is not necessary to express a view on the alternative argument based on the employee's alleged breach of a duty to report his sexual intentions or the consequences of his misdeeds. Nevertheless, this line of argument may require further consideration. For example, if the employee was aware of a physical injury sustained by a boy as a result of his conduct, it might be said to be part of his duties to report this fact to his employers. If that is so, why should the same not be true of psychological damage caused by his sexual abuse of a boy? In the present case those issues do not need to be decided. Possibly they could arise in other cases, eg where otherwise a limitation issue may arise. I express no view on this aspect.

IX. The outcome

30. I would allow the appeal and order that judgment on liability be entered in favour of the appellants. Damages are to be assessed.

LORD CLYDE

My Lords,

31. Between 1979 and 1982 while the appellants were in their early teenage years they attended a school for maladjusted and vulnerable boys which was owned and managed by the respondents. During the course of that period they were the victims of repeated sexual and physical abuse by the warden of a boarding house in which they were resident as students of the school. The warden was employed by the respondents to look after and care for the students resident in the house. The warden was later tried and convicted for a large number of offences against the appellants and other boys. The appellants have claimed damages from the respondents for personal injury. It is not now contended that the respondents had failed to take reasonable care in selecting or supervising the warden. The claims now rest on the basis that the respondents are vicariously liable for the acts of their employee.

32. Before the Court of Appeal the case proceeded upon the proposition that the warden had failed in a duty to report his wrongful intentions and conduct to the respondents. In light of the decision in *T v North Yorkshire County Council* [1999] LGR 584 it was not open to the appellants either at first instance or in the Court of Appeal to present the case on the basis of a vicarious liability on the respondents for the acts of abuse themselves. In this House however that latter approach became the principal ground presented by the appellants. As regards the former proposition I would say nothing more than that it seems to be a somewhat artificial basis for the claim. But in light of the view which I am taking on the principal point there is no need to explore it in the present case. The critical question now is whether the respondents can and should be held vicariously liable for the acts of abuse committed by the warden on the appellants.

33. Questions may arise in some cases whether the person who committed the tort was in such a relationship with another as to enable the concept of a vicarious liability on that other person to arise. In some circumstances difficult questions may occur in this regard. However that complication does not exist in the present case. The warden was plainly an employee and in a relationship of employment with the respondents. The situation is accepted to be one where a vicarious liability may arise. The question is whether there is a vicarious liability for the particular tortious, and indeed criminal, conduct complained of. In accordance with well-established law the question is whether that conduct fell within the scope of the employment.

34. It is not useful to explore the historical origins of the vicarious liability of an employer in the hope of finding guidance in the principles of its modern application. In *Kilboy v South Eastern Fire Area Joint Committee* 1952 SC 280, 285 the Lord President (Cooper) said of the rule respondeat superior "What was once presented as a legal principle has degenerated into a rule of expediency, imperfectly defined, and changing its shape before our eyes under the impact of changing social and political conditions". Holmes (*The Common Law*, ch 1, p 5 in the 41st printing of 1951), noting how rules may survive the customs or beliefs or needs which established them, described the situation more generally:

> "The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things: and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career."

35. A variety of theories have been put forward to explain the rule. The expression "respondeat superior" and the maxim "qui facit per alium facit per se", while they may be convenient, do not assist in any analysis. Lord Reid observed in *Staveley Iron & Chemical Co Ltd v Jones* [1956] AC 627, 643 "The former merely states the rule baldly in two words, and the latter merely gives a fictional explanation of it". Lord Pearce stated in *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656, 685, "The doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice". I am not persuaded that there is any reason of principle or policy which can be of substantial guidance in the resolution of the problem of applying the rule in any particular case. Theory may well justify the existence of the concept, but it is hard to find guidance from any underlying principle which will weigh in the decision whether in a particular case a particular wrongful act by the employee should or should not be regarded as falling within the scope of the employment.

36. A convenient starting point is the exposition which can be traced from the first edition of *Salmond on Torts* in 1907, p 83 to the 21st edition of *Salmond and Heuston on Torts,* p 443. The passage was of course drafted before the decision in *Lloyd v Grace, Smith & Co* [1912] AC 716 which affirmed that vicarious liability could still arise where the fraud of the agent was committed solely for the benefit of the agent. But it has remained as a classic statement of the concept:

> "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 authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master".

As regards the second of these two cases the text continues:

> "But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes - although improper modes - of doing

them."

37. That latter observation seems to me to be of particular importance. An act of deliberate wrongdoing may not sit easily as a wrongful mode of doing an authorised act. But recognition should be given to the critical element in the observation, namely the necessary connection between the act and the employment. The point is made by Salmond even in the first edition, at p 84, where he states:

> "On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible."

What has essentially to be considered is the connection, if any, between the act in question and the employment. If there is a connection, then the closeness of that connection has to be considered. The sufficiency of the connection may be gauged by asking whether the wrongful actings can be seen as ways of carrying out the work which the employer had authorised.

38. In the first edition the statement which I quoted earlier is supported by reference to a passage in *Clerk & Lindsell's Law of Torts*, 4th ed (1906), p 75 where the same idea is expressed. On the previous page of that work the authors refer for the ascertainment of what constitutes scope of employment to *Sanderson v Collins* [1904] 1 KB 628, and to *Heiton & Co v M'Sweeney* [1905] 2 IR 47, in which that decision was recognised and adopted. *Sanderson v Collins* was a case of bailment. The defendant's coachman had taken out for his own purposes a dog-cart which belonged to the plaintiff and had been lent to the defendant. It was held that the defendant was not vicariously liable for the coachman's actions. Collins MR observed, at p 632 "If the servant in doing any act breaks the connection of service between himself and his master, the act done under those circumstances is not that of the master".

39. This area of the law is one where Scotland and England have each drawn on the other's jurisprudence and the importance of the existence of a sufficient connection has also been noticed in Scots law. In *Kirby v National Coal Board* 1958 SC 514, 532-533, the Lord President (Clyde), in a passage part of which was quoted in this House by Lord Pearce in *Williams v A & W Hemphill Ltd* 1966 SC (HL) 31, 44, observed that from the decisions:

> "four different types of situation have been envisaged as guides to the solution of this problem. In the first place, if the master actually authorised the particular act, he is clearly liable for it. Secondly, where the workman does some work which he is appointed to do, but does it in a way which his master has not authorised and would not have authorised had he known of it, the master is nevertheless still responsible, for the servant's act is still within the scope of his employment. On the other hand, in the third place, if the servant is employed only to do a particular work or a particular class of work, and he does something outside the scope of that work, the master is not responsible for any mischief the servant may do to a third party. Lastly, if the servant uses his master's time or his master's place or his master's tools for his own purposes, the master is not responsible. . ."

The Lord President continued, under reference to the passage in *Salmond* to which I have already referred and to Lord Thankerton's approval of that passage in *Canadian Pacific Railway Co v Lockhart* [1942] AC 591, 599:

> "It is often difficult in the particular case to distinguish between the second and the third of these situations, but the criterion is whether the act which is unauthorised is so connected with acts which have been authorised that it may be regarded as a mode - although an improper mode - of doing the authorised act, as distinct from constituting an independent act

for which the master would not be liable. . ."

40. Salmond refers to the "course" of the employment and not the "scope" of the employment. Both phrases are sometimes used interchangeably in the context of vicarious liability. In so far as the liability on the employer arises through the scope of the authority which the employer has expressly or impliedly delegated to the employee, the latter expression may be preferable. At the least the use of the word "scope" may help to distinguish the present case from the various statutory occasions where the phrase "in the course of has employment" or some such words have often been used. It may well be that some assistance may be found in the considerable case-law which has followed on the Workmen's Compensation Acts from 1897 to 1945 or the later social security legislation. Indeed some cross-fertilisation of ideas has occurred, for example in *Canadian Pacific Railway Co v Lockhart*, at p 599, where reference was made to the observation by Lord Dunedin in *Plumb v Cobden Flour Mills Co Ltd* [1914] AC 62 , a case under the Workmen's Compensation Act 1906, that, at p 67: "there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment". But some caution has to be exercised in looking for assistance from cases where the court is engaged in an exercise of statutory construction. The language and the purpose of the provision may call for an approach and a solution which may not exactly accord with the application of the rule of vicarious liability. A particular statutory context may determine the extent of the application of the phrase and make the example an unsafe precedent to apply to vicarious liability. An example may be found in the context of legislation on sexual and racial discrimination in *Jones v Tower Boot Co Ltd* [1997] ICR 254.

41. It was observed by the Lord President in *Kirby v National Coal Board* 1958 SC 514, 532, that "It is probably not possible and it is certainly inadvisable to endeavour to lay down an exhaustive definition of what falls within the scope of the employment. Each case must depend to a considerable extent on its particular facts." While, as has been seen, what is or is not included within the scope of the employment is very much a matter of fact, and very many of the reported cases are decisions which have turned essentially upon their own circumstances. Three matters however which are relevant to the present case deserve consideration.

42. The first is that in considering the scope of the employment a broad approach should be adopted. Where there is an express prohibition imposed on the employee the distinction mentioned by Lord Dunedin in *Plumb v Cobden Flour Mills Co Ltd* [1914] AC 62, 67 to which I have already referred has to be drawn, namely, whether it is a prohibition which limits the sphere of the employment or only one which deals with the conduct within the sphere of employment In *Ilkiw v Samuels* [1963] 1 WLR 991, 1004 Diplock LJ said that:

> "the decision into which of these two classes the prohibition falls seems to me to involve first determining what would have been the sphere, scope, course (all these nouns are used) of the servant's employment if the prohibition had not been imposed. As each of these nouns implies, the matter must be looked at broadly, not dissecting the servant's task into its component activities — such as driving, loading, sheeting and the like — by asking: what was the job on which he was engaged for his employer? and answering that question as a jury would."

Thus in *Rose v Plenty* [1976] 1 WLR 141 the employer was held liable where the prohibitions against the milk roundsman giving others lifts on his float and against employing others to help him in the delivery of the milk were regarded as prohibitions relating to the conduct of the work and not as limiting the sphere of the employment.

43. If a broad approach is adopted it becomes inappropriate to concentrate too closely upon the particular act complained of. Not only do the purpose and the nature of the act have to be

considered but the context and the circumstances in which it occurred have to be taken into account. The particular act of lighting a cigarette and throwing away the match, if viewed narrowly, may not in itself be an act which an employee was employed to do. But viewed more broadly it can be seen as incidental to and within the scope of his employment. Vicarious liability was thus established in *Century Insurance Co Ltd v Northern Ireland Road Transport Board* [1942] AC 509 where the lighting of a match to light a cigarette and throwing it on the floor while transferring petrol from a lorry to a tank was held to be in the scope of employment. Both the negligent quality of the act and the connection with the employment have to be assessed against the background of the particular circumstances.

44. Secondly, while consideration of the time at which and the place at which the actings occurred will always be relevant, they may not be conclusive. That an act was committed outside the hours of employment may well point to it being outside the scope of the employment. But that the act was done during the hours of the employment does not necessarily mean that it was done within the scope of the employment. So also the fact that the act in question occurred during the time of the employment and in the place of the employment is not enough by itself. There can be cases where the place where the wrongful act was committed can be said to have been one where the employee was no longer to be treated as within the scope of his employment, such as *Kirby v National Coal Board* 1958 SC 514, where the mine worker retired from the working face to the waste and was no longer acting in the scope of his employment, or the various cases on travel, such as *Williams v A & W Hemphill Ltd* 1966 SC (HL) 31, where a deviation from an intended route may or may not take the employee outwith the scope of his employment. The acting may be so unconnected with the employment as to fall outside any vicarious liability. Where the employer's vehicle is used solely for a purpose unconnected with the employer's business, when, to use the language of Parke B in *Joel v Morison* (1834) 6 C & P 501, 503, the driver is "going on a frolic of his own", the employer will not be liable. Acts of passion and resentment (as in *Deatons Pty Ltd v Flew* (1949) 79 CLR 370) or of personal spite (as in *Irving v Post Office* [1987] IRLR 289) may fall outside the scope of the employment. While use of a handbasin at the end of the working day may be an authorised act, the pushing of the basin so as to cause it to move and startle a fellow-employee may be an independent act not sufficiently connected with the employment: *Aldred v Nacanco* [1987] IRLR 292.

45. Thirdly, while the employment enables the employee to be present at a particular time at a particular place, the opportunity of being present at particular premises whereby the employee has been able to perform the act in question does not mean that the act is necessarily within the scope of the employment. In order to establish a vicarious liability there must be some greater connection between the tortious act of the employee and the circumstances of his employment than the mere opportunity to commit the act which has been provided by the access to the premises which the employment has afforded: *Heasmans v Clarity Cleaning Co Ltd* [1987] ICR 949.

46. Among the multifarious kinds of employment one situation relevant to the present case is where the employer has been entrusted with the safekeeping or the care of some thing or some person and he delegates that duty to an employee. In this kind of case it may not be difficult to demonstrate a sufficient connection between the act of the employee, however wrong it may be, and the employment. One obvious example is *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716. There a fur had been entrusted to the defendants. They entrusted it to their employee. They were vicariously liable for his wrongdoing in converting it. In *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 the defendants had undertaken to provide a night patrol service for a factory. The factory was burned down by one of their employees who had started a fire on the premises while on duty patrol. But for the provisions of an exceptions clause in the contract for the night patrol service the defendants would have been liable in damages to the owners of the

factory.

47. In *Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co* 1925 SC 796, a night watchman employed by garage proprietors to whom a car had been entrusted for safe keeping took the car out for his own purposes and damaged it in a collision with another vehicle. It was held that as the garage proprietors had delegated to their employee the duty of keeping the car safely secured in the garage they were liable to the owners of the car for the employee's failure in performance. Lord Cullen, with whose opinion the Lord President (Clyde) expressly agreed, noted, at p 502, the difficulty which can occur in deciding whether a particular act falls within the "purely personal and independent sphere of life and action" which an employee may enjoy or within the sphere of service:

"The question is not to be answered merely by applying the test whether the act in itself is one which the servant was employed or ordered or forbidden to do. The employer has to shoulder responsibility on a wider basis; and he may, and often does, become responsible to third parties for acts which he has expressly or impliedly forbidden the servant to do. A servant is not a mere machine continuously directed by his master's hand, but is a person of independent volition and action, and the employer, when he delegates to him some duty which he himself is under obligation to discharge, must take the risk of the servant's action being misdirected, when he is, for the time, allowed to be beyond his master's control. It remains necessary to the master's responsibility that the servant's act be one done within the sphere of his service or the scope of his employment, but it may have this character although it consists in doing something which is the very opposite of what the servant has been intended or ordered to do, and which he does for his own private ends. An honest master does not employ or authorise his servant to commit crimes of dishonesty towards third parties; but nevertheless he may incur liability for a crime of dishonesty committed by the servant if it was committed by him within the field of activities which the employment assigned to him, and that although the crime was committed by the servant solely in pursuance of his own private advantage. The servant is a bad servant who has not faithfully served but has betrayed his master; still, quoad the third party injured, his dishonest act may fall to be regarded as an ill way of executing the work which has been assigned to him, and which he has been left with power to do well or ill."

48. Cases which concern sexual harassment or sexual abuse committed by an employee should be approached in the same way as any other case where questions of vicarious liability arises. I can see no reason for putting them into any special category of their own. In the Scottish case *Ward v Scotrail Railways Ltd* 1999 SC 255 it appears to have been effectively conceded that the employee's conduct was not such as to attract a vicarious liability, but the judge held that in the circumstances the employee was indulging in an unrelated and independent venture of his own. In light of the particular facts of the case the concession seems to have been soundly made. The Canadian case of *Bazley v Curry* 174 DLR(4th) 45 concerned vicarious liability for acts of sexual abuse carried out by an employee of a children's foundation who had been engaged to act as a parent-figure caring for emotionally troubled children in a children's home. The careful and comprehensive discussion of the problem by McLachlin J. was presented in the context of policy considerations, but the essence of the decision seems to me to lie in the recognition of the existence of a sufficient connection between the acts of the employee and the employment. This in turn was explored by reference to various factors by reference to which the strength of the connection can be established. In that case vicarious liability was held to exist. On the other hand in *Jacobi v Griffiths* 174 DLR(4th) 71 vicarious liability was not established. In that case the acts, with one minor exception, took place in the employee's home outside working hours and away from the club which was the principal place of employment. That the club had provided an opportunity to establish a friendship with the children did not constitute a sufficient connection. These two decisions seem to be consistent with the traditional approach recognised in this

country.

49. The Canadian cases were decided after the decision of the Court of Appeal in *T v North Yorkshire County Council* [1999] LGR 584. The Court of Appeal did not have the guidance which those cases afford in stressing the importance of finding a sufficient connection between the actings of the employee and the employment. The court proceeded upon the rather more narrow approach of looking to see if the conduct was an unauthorised way of carrying out a teacher's duties. That test however, as I have already sought to explain, is not to be taken too precisely. Moreover in light of the way the case was pled the Court of Appeal felt that they were not able to take account of any duty which the employer might have had to take care of the children. Thus they were prevented from treating the case as comparable with the line of cases like *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 to which I have already referred. In my view the decision was unsound.

50. I turn finally to the facts of the present case. It appears that the care and safekeeping of the boys had been entrusted to the respondents 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 in itself constitute a sufficient connection between his wrongful actings 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 which he had been employed to do. It appears that the respondents gave the warden a quite general authority in the supervision and running of the house as well as some particular responsibilities. His general duty was to look after and to care for, among others, the appellants. That function was one which the respondents had delegated to him. That he performed that function in a way which was an abuse of his position and an abnegation of his duty does not sever the connection with his employment. The particular acts which he carried out upon the boys have to be viewed not in isolation but in the context and the circumstances in which they occurred. Given that he had a general authority in the management of the house and in the care and supervision of the boys in it, the employers should be liable for the way in which he behaved towards them in his capacity as warden of the house. The respondents should then be vicariously liable to the appellants for the injury and damage which they suffered at the hands of the warden.

51. I agree that the appeal should be allowed.

LORD HUTTON

My Lords,

52. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. I agree with it and for the reasons which he has given I, too, would allow this appeal.

LORD HOBHOUSE OF WOODBOROUGH

My Lords,

53. These appeals are described as raising a question of the vicarious liability for acts of sexual abuse by an employee. Indeed this is how the question has been described in articles (*eg*, Peter Cane, "Vicarious Liability for Sexual Abuse" 116 LQR 21; Feldthusen, "Vicarious Liability for Sexual Torts", *Torts Tomorrow: A Tribute to John Fleming* (1998) and in the leading Canadian authority *Bazley v Curry* 174 DLR(4th) 45. It is true that sexual abuse is a particularly offensive and criminal act of personal gratification on the part of its perpetrator and can therefore be easily described as the paradigm of those acts which an employee could not

conceivably be employed to do. It is thus argued that an employer should never be made vicariously liable for such acts; the employer should only be held liable where separate personal fault of the employer has been proved. This argument succeeded in the Court of Appeal in *T v North Yorkshire County Council* [1999] LGR 584 which was binding upon the Court of Appeal in the present cases and was followed. Negligence in deciding to employ Mr Grain was not proved against the defendants. The argument that there was a vicarious liability for Mr Grain's failure to report what had happened to the plaintiffs and to other boys whom he had abused was also rejected, a point to which I will have briefly to revert. Accordingly the Court of Appeal allowed the defendants' appeals and entered judgment for the defendants in the actions.

54. What these cases and *T's* case in truth 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 that duty. 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 and, accordingly, are to be contrasted with the situation where a defendant is simply in proximity to the plaintiff so that it is foreseeable that his acts may injure the plaintiff or his property and a reasonable person would have taken care to avoid causing such injury. The category into which the present cases fall is recognised by the agreed facts and the useful summary of Judge Walker adopted by Swinton Thomas LJ:

> "The defendant admits it had a duty of care towards the plaintiffs. That duty of care was to take all reasonable steps to safeguard the plaintiffs (and other pupils) in their physical, moral and educational development whilst at the school. In carrying out that duty of care the defendant, a limited company, necessarily had to appoint a hierarchy of responsible agents ... each of whom had either general or particular responsibilities which bore upon this duty of care. Mr Grain in particular was responsible for the boys while at A House ... ".

The fact that sexual abuse was involved does not distinguish this case from any other involving the care of the young and vulnerable and the duty to protect them from the risk of harm.

55. 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 their visitors, occupiers of 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 are still liable. The employee, because he has, through his obligations to his employers, adopted the same relationship towards and come under the same duties to the plaintiff, is also liable to the plaintiff for his own breach of duty. The liability of the employers is a *vicarious* liability because the actual breach of duty is that of the employee. The employee is a tortfeasor. The employers are liable for the employee's tortious act or omission because it is to him that the employers have entrusted the performance of their duty. The employers' liability to the plaintiff is also that of a tortfeasor. I use the word "entrusted" in preference to the word "delegated" which is commonly, but perhaps less accurately, used. Vicarious liability is sometimes described as a 'strict' liability. The use of this term is misleading unless it is used just to explain that there has been no *actual* fault on the part of the employers. The liability of the employers derives from their voluntary assumption of the relationship towards the plaintiff and the duties that arise from that relationship and their choosing to entrust the performance of those duties to their servant. Where these conditions are satisfied, the motive of the employee and the fact that he is doing something expressly forbidden and is serving only his own ends does not negative the vicarious liability for his breach of the 'delegated' duty.

56. The duty which I have described is also to be found in relation to the loss of or damage to

goods. The leading case in this connection is *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, a case upon the liability of a bailee, already referred to by my noble and learned friend Lord Steyn. A bailor is a person who entrusts the possession and care of goods to the bailee. It is a legal relationship giving rise to common law obligations owed by the bailee to the bailor. Diplock LJ analysed the law, at pp 731-737:

"Duties at common law are owed by one person to another only if there exists a relationship between them which the common law recognises as giving rise to such duty. One of such recognised relationships is created by the voluntary taking into custody of goods which are the property of another. By voluntarily accepting ... the custody of a fur ... they brought into existence between the plaintiff and themselves the relationship of bailor and bailee…" (p 731) "One of the common law duties owed by a bailee of goods to his bailor is not to convert them, ie, not to do intentionally in relation to the goods an act inconsistent with the bailor's right of property therein." (p 732) "If the bailee in the present case had been a natural person and had converted the plaintiff's fur by stealing it himself, no one would have argued that he was not liable to her for its loss. But the defendant bailees are a corporate person. They could not perform their duties to the plaintiff to take reasonable care of the fur and not to convert it otherwise than vicariously by natural persons acting as their servants or agents. It was to one of their servants to whom they had entrusted the custody and care of the fur for the purpose of doing work upon it who converted it by stealing it. Why should they not be vicariously liable for this breach of their duty by the vicar whom they had chosen to perform it?…" (pp 732-733) "They accepted the fur as bailees for reward in order to clean it. They put [their servant] as their agent in their place to clean the fur and to take charge of it while doing so. The manner in which he conducted himself in doing that work was to convert it. What he was doing, albeit dishonestly, he was doing in the scope or course of his employment in the technical sense of that infelicitous but time-honoured phrase. The defendants as his masters are responsible for his tortious act." (pp 736-737) "I base my decision in this case on the ground that the fur was stolen by the very servant whom the defendants as bailees for reward had employed to take care of it and clean it." (p 737)

Salmon LJ expressed himself similarly, referring to the duties of a bailee. He said, at p 738: "the act of stealing the fur was a glaring breach of the duty to take reasonable care to keep it safe - and this is negligence." Doing the opposite of what it is your duty to do is still a breach of that duty. My Lords, I feel it necessary to mention this because one of the arguments which was advanced by the respondents (and which has found some favour) has been that it cannot be a breach of a duty to take care of a child to abuse him. It is an exemplary and egregious breach of the servant's duty both to his employer and to the child. The appreciation that there are duties involved is at the heart of the analysis and the identification of the criteria for the existence or no of vicarious liability.

57. The decision in *Morris v C W Martin & Sons Ltd* was reasoned applying the principles of vicarious liability. One of the cases followed was *Lloyd v Grace, Smith & Co* [1912] AC 716, which also involved a special relationship between the defendant solicitors and their client, the plaintiff. Another case which was followed was *Meux v Great Eastern Railway Co* [1895] 2 QB 387 where the plaintiff was suing the railway company for carelessly damaging his goods but did not himself have a contract with the company. It is noteworthy that the conclusion that a duty was owed by the railway company towards the goods owner was based upon cases which had held that a railway company owed a duty of care towards passengers injured by the carelessness of that company's employee even though the passenger had bought his ticket from another company. No distinction was drawn between an employee injuring the plaintiff and damaging or losing his property. Similar reasoning was adopted in the leading modern case on gratuitous bailments, *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd* [1970] 1 WLR 1262, in which Lord Pearson giving the judgment of the Privy Council approved and followed *Morris v*

Martin, citing cases on both personal injuries, *Foulkes v Metropolitan District Railway Co* (1880) 5 CPD 157, and the loss of or damage to goods, *Hooper v London & North Western Railway Co* (1881) 50 LJQB 103. Your Lordships have also been referred to statements to the same effect in *Photo Production v Securicor* [1980] AC 827, a case of arson in relation to a building. All these cases illustrate the general proposition that, where the defendant has assumed a relationship to the plaintiff which carries with it a specific duty towards the plaintiff, the defendant is vicariously liable in tort if his servant, to whom the performance of that duty has been entrusted, breaches that duty.

58. In *Ilkiw v Samuels* [1963] 1 WLR 991, Diplock LJ stated the law in similar terms to those he was later to use in *Morris v Martin*. It was a personal injuries case concerning an issue of vicarious liability for the careless manoeuvring of a lorry by the defendants' servant. Diplock LJ said, at p 1005:

"A person who makes use of a vehicle for the purpose of his business is under a duty in tort so to control it so that it is driven with reasonable care while being used for that purpose. If he delegates the performance of the acts which give rise to this duty to his servant, he is vicariously liable if the servant fails to perform it. In this sense he may be said to delegate the duty though he cannot divest himself of it, as his continuing vicarious liability shows. The test whether the master has in this sense delegated the duty to his servant is whether the servant owes to the master a contractual duty to perform those acts which give rise to the master's duty owed to his neighbours."

In the same case Diplock LJ encouraged a broad approach to what the duties of the employee were towards his employer and this approach was expressly approved by Scarman LJ in *Rose v Plenty* [1975] 1 WLR 141, 147-148.

59. The classic Salmond test for vicarious liability and scope of employment has two limbs. The first covers authorised acts which are tortious. These present no relevant problem and the present cases clearly do not fall within the first limb. The defendants did not authorise Mr Grain to abuse the children in his charge. The argument of the respondent (accepted by the Court of Appeal) is that Mr Grain's acts of abuse did not come within the second limb either: abusing children cannot properly be described as a mode of caring for children. The answer to this argument is provided by the analysis which I have set out in the preceding paragraphs. Whether or not some act comes within the scope of the servant's employment depends upon an identification of what duty the servant was employed by his employer to perform. (Diplock LJ *sup*) If the act of the servant which gives rise to the servant's liability to the plaintiff amounted to a failure by the servant to perform that duty, the act comes within 'the scope of his employment' and the employer is vicariously liable. If, on the other hand, the servant's employment merely gave the servant the opportunity to do what he did without more, there will be no vicarious liability, hence the use by Salmond and in the Scottish and some other authorities of the word "connection" to indicate something which is not a casual coincidence but has the requisite relationship to the employment of the tortfeasor (servant) by his employer: *Kirby v National Coal Board* 1958 SC 514; *Williams v A & W Hemphill Ltd* 1966 SC(HL) 31.

60. My Lords, the correct approach to answering the question whether the tortious act of the servant falls within or without the scope of the servant's employment for the purposes of the principle of vicarious liability is to ask what was the duty of the servant towards the plaintiff which was broken by the servant and what was the contractual duty of the servant towards his employer. The second limb of the classic Salmond test is a convenient rule of thumb which provides the answer in very many cases but does not represent the fundamental criterion which is the comparison of the duties respectively owed by the servant to the plaintiff and to his employer. Similarly, I do not believe that it is appropriate to follow the lead given by the

Supreme Court of Canada *Bazley v Curry* 174 DLR(4th) 45. The judgments contain a useful and impressive discussion of the social and economic reasons for having a principle of vicarious liability as part of the law of tort which extends to embrace acts of child abuse. But an exposition of the policy reasons for a rule (or even a description) is not the same as defining the criteria for its application. Legal rules have to have a greater degree of clarity and definition than is provided by simply explaining the reasons for the existence of the rule and the social need for it, instructive though that may be. In English law that clarity is provided by the application of the criterion to which I have referred derived from the English authorities.

61. It follows that the reasoning of the Court of Appeal in *T v North Yorkshire County Council* [1999] LGR 584 and the present cases cannot be supported. On the undisputed facts, the present cases satisfy the criteria for demonstrating the vicarious liability of the defendants for the acts of Mr Grain.

62. There remains for brief mention the point which was considered in the Court of Appeal and had formed the basis of the decision of Judge Walker. Faced with the binding decision in *T's* case, the plaintiffs had sought to rely upon a failure by Mr Grain to report to his employers what had happened and the psychological trauma being suffered by the plaintiffs (whom it must be remembered were already emotionally disturbed). This was an artificial argument because it was premised upon the assumption that Mr Grain's breaches of duty in abusing the plaintiffs were legally irrelevant. The Court of Appeal were unwilling to accept this artificiality given that they were not treating the abuse itself as coming within the scope of Mr Grain's employment. However, it was part of both the duty of the carers towards the plaintiffs and of Mr Grain towards his employers to report to them any incident which was relevant to the health and well-being of the plaintiffs: finding 5 in Judge Walker's list. It follows from this and what I have previously said about the nature of the duties owed to the plaintiffs and the principles governing the issue of vicarious liability that the Court of Appeal were mistaken in not attaching more validity to this way of putting the plaintiffs' case. In truth, there were a whole succession of breaches of the duty to care for the plaintiffs by Mr Grain. The fact that the defendants might not have been liable for some of them does not alter the fact that the defendants would have been liable for the others. All it does is to put the former class of acts into the same category as acts done by some third party but of which, or of the consequences of which, Mr Grain was aware. To take one of the hypothetical judge's examples, say, there might have been a groundsman at A House and he might have been the abusing party; Mr Grain might have discovered what had happened and the distress it had caused to the boy but did nothing about it and did not report the incident to the defendants. The defendants might not be liable for what the groundsman did; he was employed to look after the grounds, not to have anything to do with the boys. But the defendants would be liable for the breach of Mr Grain who was employed to care for the boys and their welfare. The liability of the defendants might not be so grave or extensive as if Mr Grain had been the abuser himself but it would in principle be capable of existing.

63. Accordingly, for these reasons and for those given by my noble and learned friend Lord Steyn, I agree that these appeals should be allowed.

LORD MILLETT

My Lords,

64. The question in this appeal is whether in principle the owner of a residential school for boys can, without fault on its part, be held vicariously liable for indecent assaults carried out by the warden of the school on the boys in his care. The facts are stated in the speech of my noble and learned friend Lord Steyn and I need not repeat them. The case calls for a reconsideration of the recent decision of the Court of Appeal in *T v North Yorkshire County Council* [1999] LGR

584. More generally it raises in a particularly stark form the question in what circumstances an employer may be vicariously liable for the deliberate and criminal wrongdoing of his employee, wrongdoing in which the employee indulged for his own purposes and which the employer must be taken to have expressly or at least impliedly prohibited.

65. Vicarious liability is a species of strict liability. It is not premised on any culpable act or omission on the part of the employer; an employer who is not personally at fault is made legally answerable for the fault of his employee. It is best understood as a loss-distribution device: (see Cane's edition of *Atiyah's Accidents, Compensation and the Law* 6th ed (1999), p 85 and the articles cited by Atiyah in his monograph on *Vicarious Liability in the Law of Torts,* at p 24. The theoretical underpinning of the doctrine is unclear. Glanville Williams wrote ("Vicarious Liability and the Master's of Indemnity" (1957) 20 MLR 220, 231):

> "Vicarious liability is the creation of many judges who have had different ideas of its justification or social policy, or no idea at all. Some judges may have extended the rule more widely or confined it more narrowly than its true rationale would allow; yet the rationale, if we can discover it, will remain valid so far as it extends".

Fleming observed (*The Law of Torts,* 9th ed (1998), p 410) that the doctrine cannot parade as a deduction from legalistic premises. He indicated that it should be frankly recognised as having its basis in a combination of policy considerations, and continued:

> "Most important of these is the belief that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise . . ."

Atiyah, *Vicarious Liability in the Law of Torts* wrote to the same effect. He suggested, at p 171:

"The master ought to be liable for all those torts which can fairly be regarded as reasonably incidental risks to the type of business he carries on".

These passages are not to be read as confining the doctrine o cases where the employer is carrying on business for profit. They are based on the more general idea that a person who employs another for his own ends inevitably creates a risk that the employee will commit a legal wrong. If the employer's objectives cannot be achieved without a serious risk of the employee committing the kind of wrong which he has in fact committed, the employer ought to be liable. The fact that his employment gave the employee the opportunity to commit the wrong is not enough to make the employer liable. He is liable only if the risk is one which experience shows is inherent in the nature of the business.

66. While this proposition has never, so far as I am aware, been adopted in so many words as a test of vicarious liability in any of the decided cases, it does I think form the unspoken rationale of the principle that the employer's liability is confined to torts committed by an employee *in the course of his employment*. The problem is that, as Townshend-Smith has observed ((2000) 8 Tort Law Review 108, 111), none of the various tests which have been proposed to determine this essentially factual question is either intellectually satisfying or effective to enable the outcome of a particular case to be predicted. The danger is that in borderline situations, and especially in cases of intentional wrongdoing, recourse to a rigid and possibly inappropriate formula as a test of liability may lead the court to abandon the search for legal principle.

67. In the very first edition of his book on *Torts* Sir John Salmond wrote, at p 83:

> "1. 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 (a) a wrongful act

> authorised by the master or (b) a wrongful and unauthorised *mode* of doing some act authorised by the master."

This passage has stood the test of time. It has survived unchanged for 21 editions, and has probably been cited more often than any other single passage in a legal textbook. Yet it is not without blemish. As has often been observed, the first of the two alternatives is not an example of vicarious liability at all. Its presence (and the word "deemed") may be an echo of the discredited theory of implied authority. More pertinently, the second is not happily expressed if it is to serve as a test of vicarious liability for intentional wrongdoing.

68. In the present case the warden was employed to look after the boys in his care and secure their welfare. It is stretching language to breaking-point to describe the series of deliberate sexual assaults on them on which he embarked as merely a wrongful and unauthorised mode of performing that duty. In *T v North Yorkshire County Council* [1999] LGR 584 the employee in question was the deputy headmaster of a special school run by the local council. He was charged with the responsibility of caring for a handicapped teenager on a foreign holiday, and he sexually assaulted the boy. Butler-Sloss LJ asked rhetorically whether that was in principle an improper mode of carrying out an authorised act on behalf of his employer or an independent act outside the course of his employment. She held that it fell into the latter category, because, at p 591:

> "His position of caring for the plaintiff by sharing a bedroom with him gave him the opportunity to carry out the sexual assaults. But availing himself of that opportunity seems to me to be far removed from an unauthorised mode of carrying out a teacher's duties on behalf of his employer. Rather it is a negation of the duty of the council to look after the children for whom it was responsible".

In the same case Chadwick LJ agreed that the traditional test was not satisfied. He said, at pp 592-593:

> "I find it impossible to hold that the commission of acts of indecent assault can be regarded as a mode - albeit, an improper and unauthorised mode - of doing what, on the case advanced, the deputy headmaster was employed by the council to do. In the circumstances alleged, [MS] was employed to supervise the plaintiff's welfare while on the holiday in Spain. The commission by him of acts of indecent assault on a pupil in his charge cannot be regarded as a way of doing that. *Rather, it must be regarded as an independent act of self-indulgence or self-gratification"* (my emphasis).

This antithesis lies at the heart of the present appeal.

69. In a passage which is unfortunately less often cited, however, Sir John Salmond (*Salmond on Torts,* 1st ed) continued his exposition as follows, at pp 83-84:

> "But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they may rightly be regarded as modes - although improper modes - of doing them."

This could, I think, usefully be elided to impose vicarious liability where the unauthorised acts of the employee are so connected with acts which the employer has authorised that they may properly be regarded as being within the scope of his employment. Such a formulation would have the advantage of dispensing with the awkward reference to "improper modes" of carrying out the employee's duties; and by focussing attention on the connection between the employee's duties and his wrongdoing it would accord with the underlying rationale of the doctrine and be applicable without straining the language to accommodate cases of intentional wrongdoing.

70. But the precise terminology is not critical. The *Salmond* test, in either formulation, is not a statutory definition of the circumstances which give rise to liability, but a guide to the principled application of the law to diverse factual situations. What is critical is that attention should be directed to the closeness of the connection between the employee's duties and his wrongdoing and not to verbal formulae. This is the principle on which the Supreme Court of Canada recently decided the important cases of *Bazley v Curry* 174 DLR(4th) 45 and *Jacobi v Griffiths* 174 DLR(4th) 71 which provide many helpful insights into this branch of the law and from which I have derived much assistance.

71. Cases of intentional wrongdoing have always proved troublesome. At one time it was thought that the employer could not be held vicariously liable for his employee's deliberate wrongdoing. This view was not maintained, but even as late as the beginning of the 20th century it was regarded as axiomatic that an employer could not be vicariously liable for his employee's dishonest acts unless they were committed for the benefit of his employer: see *Cheshire v Bailey* [1905] 1 KB 237 where the defendant was held not responsible for the theft of his customer's goods by his employee because the theft was outside the scope of his employment. As Salmon LJ explained in *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, 738-739, this view derived from a misunderstanding of what Willes J. had said in *Barwick v English Joint Stock Bank* (1867) LR 2 Exch 259, 265. Observing that no sensible distinction could be drawn between the case of fraud and any other wrong, he had stated that the general rule was that

> "the master is answerable for every such wrong of the servant or agent as is committed in the course of the service *and for the master's benefit,* though no express command or privity of the master be proved" (my emphasis).

But this was very different, as Lord Macnaghten pointed out in *Lloyd v Grace, Smith & Co* [1912] AC 716, 732, from saying that a master cannot be liable for the fraud of his servant unless carried out for his benefit or with his privity. This may be a sufficient condition of liability, but it is not a necessary one.

72. The heresy was not exposed until *Lloyd v Grace, Smith & Co,* and despite this has proved remarkably resilient. It took another 50 years until *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 for it to be recognised that *Cheshire v Bailey* [1905] 1 KB 237 was no longer good law; and regrettable traces of it appear in *T v North Yorkshire County Council* [1999] LGR 584. If the employer is to be absolved from liability in that case (or this) it cannot be because the acts complained of were "independent acts of self-indulgence or self-gratification."

73. In *Lloyd v Grace, Smith & Co* [1912] AC 716 a solicitor's managing clerk defrauded a client of the firm by obtaining her instructions to realise her property. He induced her to hand over the title deeds and to execute conveyances in his favour which he did not read over or explain to her. They enabled him to sell the property and pocket the proceeds. The firm was held liable for the fraud even though it was committed for the clerk's own benefit. In the course of argument before your Lordships in the present case it was accepted that the firm would not have been liable if the clerk had stolen the contents of his client's handbag. That is true, for the clerk would merely have been taking advantage of an opportunity which his employment gave him. But there was a much closer connection between the clerk's duties and his wrongdoing than that. The firm's liability arose from the fact that throughout the transaction the fraudulent clerk acted as the representative of the firm, and he received the custody of the documents of title with the consent of the client given because he was acting in that capacity.

74. In the same year Laski (in "The Basis of Vicarious Liability" (1916) 26 Yale Law Journal 105, 130) had observed that there was no valid a priori reason why the doctrine of vicarious liability should cease to operate at that border where tort becomes crime. In England this had

already been established: see *Dyer v Munday* [1895] 1 QB 742. Once this limitation on the operation of the doctrine is rejected, it is impossible to maintain the fiction that it is based on any kind of implied authority. An excessively literal application of the *Salmond* test must also be discarded. Stealing a client's property cannot sensibly be described as an unauthorised mode of dealing with it on her behalf. It is, as Butler-Sloss LJ put it in *T v North Yorkshire County Council* [1999] LGR 584, 591, the negation of the employer's duty. Yet the employer may be liable nonetheless.

75. In *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 a firm of cleaners was held vicariously liable to a customer whose fur was stolen by one of its employees. The firm was a sub-bailee for reward, but the decision was not based on the firm's own failure to take care of the fur and deliver it upon termination of the bailment. It was held vicariously liable for the conversion of the fur by its employee. Diplock LJ said, at p. 737, that he based his decision:

> "on the ground that the fur was stolen *by the very servant* whom the defendants as bailees for reward had employed to take care of it and clean it" (my emphasis).

Salmon LJ too, at p 740, was anxious to make it plain that the conclusion which he had reached depended on the fact that the thief was

> "the servant through whom the defendants chose to discharge their duty to take reasonable care of the plaintiff's fur."

He added, at pp 740-741, that

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

The employee's position gave him the opportunity to steal the fur, but as Diplock LJ was at pains to make clear, at p. 737, this was not enough to make his employer liable. What brought the theft within the scope of his employment and made the firm liable was that in the course of its business the firm had entrusted him with the care of the fur, and he stole it while it was in his custody as an employee of the firm.

76. As my noble and learned friend Lord Steyn has observed, *Morris v Martin* has consistently been held to be an authority on vicarious liability generally and not confined to cases of bailment. The case was expressly approved by the Privy Council in *Port Swettenham Authority v T W Wu & Co (M) Sdn Bhd* [1979] AC 580, 591, not altogether surprisingly as the opinion of the Board was delivered by Lord Salmon. That was another case of bailment. But in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, where a patrolman employed by a security firm deliberately set fire to the premises he was employed to protect, neither Lord Wilberforce nor Lord Salmon saw any difficulty in holding the employer vicariously liable on the principle stated in *Morris v Martin*. That was not a case of bailment. Yet the patrolman was said (per Salmon LJ, at p 852) to be "indubitably acting in the course of his employment."

77. Just as an employer may be vicariously liable for deliberate and criminal conduct on the part of his employee, so he may be vicariously liable for acts of the employee which he has expressly forbidden him to do. In *Ilkiw v Samuels* [1963] 1 WLR 991 a lorry driver was under strict instructions from his employers not to allow anyone else to drive the lorry. He allowed a third party, who was incompetent, to drive it without making any inquiry into his competence to do so. The employers were held vicariously liable for the resulting accident. Diplock LJ

explained, at p. 1004, that some prohibitions limited the sphere of employment and others only dealt with conduct within the sphere of employment. In order to determine into which category a particular prohibition fell it was necessary to determine what would have been the sphere, scope, or course (nouns which he considered to amount to the same thing) if the prohibition had not been imposed. In a passage which is of some importance in the present case, he added:

> "As each of these nouns implies, the matter must be looked at broadly, not dissecting the servant's task into its component activities - such as driving, loading, sheeting and the like - by asking: what was the job on which he was engaged for his employer? and answering that question as a jury would."

He reasoned that the job which the driver was engaged to perform was to collect a load of sugar and transport it to its destination, using for that purpose his employers' lorry, of which he was put in charge. He was expressly forbidden to permit anyone else to drive the lorry in the course of performing this job. That was not a prohibition which limited the scope of his employment, but one which dealt with his conduct within the sphere of his employment.

78. The case was followed in *Rose v Plenty* [1976] 1 WLR 141 where despite strict instructions not to do so a milk roundsman employed a boy to help him deliver milk and let him accompany him on his float. The employer was held liable for injuries sustained by the boy when he fell off the float as a result of the roundsman's negligent driving. Scarman LJ agreed that the roundsman was certainly not employed to give the boy a lift, and that if one confined one's analysis of the facts to the incident which caused injury to the boy, then it could be said that carrying the boy on the float was not in the course of his employment. But quoting with approval, at pp 147-148 the passage cited above from the judgment of Diplock LJ in *Ilkiw v Samuels* [1963] 1 WLR 991, 1004 he adopted a broad approach to the nature of the roundsman's employment. His job was to deliver milk, collect empties, and obtain payment. Disregarding his instructions he enlisted the boy's assistance in carrying out his job. If one asked: why was the boy on the float? the answer was that it was because he was assisting the roundsman to do his job.

79. So it is no answer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty. The cases show that where an employer undertakes the care of a client's property and entrusts the task to an employee who steals the property, the employer is vicariously liable. This is not only in accordance with principle but with the underlying rationale if *Atiyah* has correctly identified it. Experience shows that the risk of theft by an employee is inherent in a business which involves entrusting the custody of a customer's property to employees. But the theft must be committed by the very employee to whom the custody of the property is entrusted. He does more than make the most of an opportunity presented by the fact of his employment. He takes advantage of the position in which the employer has placed him to enable the purposes of the employer's business to be achieved. If the boys in the present case had been sacks of potatoes and the defendant, having been engaged to take care of them, had entrusted their care to one of its employees, it would have been vicariously liable for any criminal damage done to them by the employee in question, though not by any other employee. Given that the employer's liability does not arise from the law of bailment, it is not immediately apparent that it should make any difference that the victims were boys, that the wrongdoing took the form of sexual abuse, and that it was committed for the personal gratification of the employee.

80. Employers have long been held vicariously liable in appropriate circumstances for assaults committed by their employees. Clearly an employer is liable where he has placed the employee

in a situation where he may be expected on occasions to have to resort to personal violence: see *Dyer v Munday* [1895] 1 QB 742, where the employer was held vicariously liable for a criminal assault committed by his employee while attempting to repossess his employer's property. Equally clearly the employer is not liable for an assault by his employee on a customer merely because it was the result of a quarrel arising out of his employment: see *Warren v Henlys Ltd* [1948] 2 All ER 935, where a petrol pump attendant assaulted a customer as a result of a dispute over payment. The case was decided partly on the ground that the customer had paid for the petrol and was driving away when he was assaulted, and partly on the ground that he was assaulted because he had threatened to report the attendant to his employer. The reasoning has been criticised, and the better view may be that the employer was not liable because it was no part of the duties of the pump attendant to keep order. Attention must be concentrated on the closeness of the connection between the act of the employee and the duties he is engaged to perform broadly defined.

81. In *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 the owner of a hotel was held not to be vicariously liable for an unprovoked assault by a barmaid who threw a glass of beer into a customer's face. The ground of decision was that the barmaid was not in charge of the bar - the publican was close at hand - and she did not throw the glass in the course of maintaining discipline or restoring order. In the words of Dixon J, at pp 381-382 it was:

> "an act of passion and resentment done neither in furtherance of the master's interests nor under his express or implied authority *nor as an incident to or in consequence of anything the barmaid was employed to do*. It was a spontaneous act of retributive justice. The occasion for administering it and the form it took may have arisen from the fact that she was a barmaid but retribution was not within the course of her employment as a barmaid" (my emphasis).

In other words, the barmaid's employment gave her the opportunity to wreak some personal vengeance of her own, but that was all; and it was not enough to make her employer liable. Had she been in charge of the bar and authorised to maintain order, the result might well have been different. It would not, in my opinion, have been enough in itself to exclude the employer's liability that she had been paying off a private score of her own. If so, then there is no a priori reason why an employer should not be vicariously liable for a sexual assault committed by his employee, though naturally such conduct will not normally be within the scope of his employment.

82. In the present case the warden's duties provided him with the opportunity to commit indecent assaults on the boys for his own sexual gratification, but that in itself is not enough to make the school liable. The same would be true of the groundsman or the school porter. But there was far more to it than that. The school was responsible for the care and welfare of the boys. It entrusted that responsibility to the warden. He was employed to discharge the school's responsibility to the boys. For this purpose the school entrusted them to his care. He did not merely take advantage of the opportunity which employment at a residential school gave him. He abused the special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boys. It is not necessary to conduct the detailed dissection of the warden's duties of the kind on which the Supreme Court of Canada embarked in *Bazley* and *Jacobi*. I would hold the school liable.

83. I would regard this as in accordance not only with ordinary principle deducible from the authorities but with the underlying rationale of vicarious liability. Experience shows that in the case of boarding schools, prisons, nursing homes, old people's homes, geriatric wards, and other residential homes for the young or vulnerable, there is an inherent risk that indecent assaults on the residents will be committed by those placed in authority over them, particularly if they are in

close proximity to them and occupying a position of trust.

84. I would hold the school vicariously liable for the warden's intentional assaults, not (as was suggested in argument) for his failure to perform his duty to take care of the boys. That is an artificial approach based on a misreading of *Morris v Martin*. The cleaners were vicariously liable for their employee's conversion of the fur, not for his negligence in failing to look after it. Similarly in *Photo Production v Securicor Transport Ltd* the security firm was vicariously liable for the patrolman's arson, not for his negligence. The law is mature enough to hold an employer vicariously liable for deliberate, criminal wrongdoing on the part of an employee without indulging in sophistry of this kind. I would also not base liability on the warden's failure to report his own wrongdoing to his employer, an approach which I regard as both artificial and unrealistic. Even if such a duty did exist, on which I prefer to express no opinion, I am inclined to think that it would be a duty owed exclusively to the employer and not a duty for breach of which the employer could be vicariously liable. The same reasoning would not, of course, necessarily apply to the duty to report the wrongdoing of fellow employees, but it is not necessary to decide this.

85. I would overrule *T v North Yorkshire County Council* [1999] LGR 584 and allow the appeal.