MASTER'S LIABILITY FOR THE WILFUL TORTIOUS CONDUCT OF HIS SERVANT

JANE SWANTON*

The now traditional formulation of the circumstances in which a master is vicariously liable for the tortious misconduct[1] of his servant is that of Salmond.[2] He states that an act is deemed to be done in the 'course of employment' 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'; a master is liable for acts which are "so connected with acts which he has authorised that they may rightly be regarded as modes — although improper modes — of doing them.' One of the best-known judicial formulations is that of Willes J. in *Barwick* v *English Joint Stock Bank*[3] who said:

* Senior Lecturer, Law School, University of Sydney

1 As to the controversy about whether liability is for torts or acts see Gow, 'The Nature of the Liability of an Employer' (1958) 32 *A L J* 183, Glanville Williams, 'Vicarious Liability Tort of the Master or of the Servant?' (1956) 72 *L Q R* 522, Barak, 'Mixed and Vicarious Liability — A Suggested Distinction', Newark, 'Twine v Bean's Express Ltd ' (1954) 17 *M L R* 102, Hughes and Hudson, 'The Nature of a Master's Liability in the Law of Tort' (1953) 31 *Can Bar Rev* 18 Most writers prefer the former view, see e g Glass, McHugh and Douglas, *Liability of Employers* 2nd ed (1979) 86-93, P S Atiyah, *Vicarious Liability* (1967) 6-11, *Salmond and Heuston on Torts* 18th ed (1981) 426-8, *Clerk and Lindsell on Torts* 15th ed (1982) 3-35

2 18th ed (1981), at 437, adopted in e g Canadian Pacific Rly Co v Lockhart [1942] A C 591, London County Council v Cattermoles (Garages) Ltd [1953] 2 All E R 582, Daniels v Whetstone Entertainments Ltd [1962] 2 Lloyd's Rep 1, Keppel Bus Co Ltd v Ahmad [1974] 2 All E R 700, Deatons Pty Ltd v Flew (1949) 79 C L R 370 at 384-5 per Williams J , Warren v Henlys Ltd [1948] 2 All E R 935, Pettersson v Royal Oak Hotel Ltd [1948] N Z L R 136 — criticised by Atiyah, supra n 1, at 181-44, 199-200, 262-3 who would prefer the test to be stated in terms of whether there is a substantial risk that, in doing what he has been authorised to do, the servant will commit torts of the kind which has has in fact committed, and by F R Batt, *The Law of Master and Servant* 5th ed (1967) at 340 who prefers to ask whether the act was a reasonable method of performing the servant's duty Glass et al , supra n 1, at 95 think the Salmond formula means that the master is liable if the servant's conduct is different in degree only but not in kind, from any authorised behaviour

3 (1867) L R 2 Exch 259 at 266, quoted in Morris v C W Martin & Sons Ltd [1966] 1 Q B 716 at 735 per Diplock L J and at 740 per Salmon L J , George Whitechurch Ltd v Cavanagh [1902] A C 117 at 140-1 per Lord Brampton, Kooragang Investments Pty Ltd v Richardson and Wrench Ltd [1982] A C 462 at 472, Houldsworth v City of Glasgow Bank (1880) 5 App Cas 317 at 326 per Lord Selborne, Janvier v Sweeney [1919] 2 K B 316 at 326 per Bankes L J , N S W Country Press Co-op Ltd v Stewart (1911) 12 C L R 481 at 500 per O'Connor J , Lawrie v The Commonwealth Trading Bank of Australia [1970] Qd R 373 at 379 per Douglas J

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

The same judge stated the test in somewhat fuller terms in *Bayley* v *The Manchester, Sheffield and Lincolnshire Railway Co.*[4] He said:

> A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so intrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment.

This approach in terms of a wrongful and unauthorised 'manner' or 'mode' of doing what the servant is employed to do, though well enough suited to cases of negligent misconduct, since negligence can be described as a method or manner of performing an activity, certainly seems less appropriate in cases of wilful wrongdoing. It may appear artificial or even absurd to say that defrauding a client is a wrongful mode of handling the client's business,[5] that stealing a chattel is a wrongful mode of keeping custody of it[6] or that setting fire to premises is a wrongful mode of patrolling them.[7] Nonetheless all the abovementioned definitions of the 'course of employment' are to be found in cases concerning wilful misconduct.[8]

However there are writers and judges who continue to assert that a different test prevails in the case of wilful wrongdoing. Thus it has been said that in the case of intentional wrongdoing there is a "noticeably narrower delimitation of responsibility" which is "reflected in a decided preference for the test of 'real or ostensible authority' rather than 'course of employment' which holds undisputed sway in cases of mere

4 (1872) L R 7 C P 415 at 420, quoted in Percy v Glasgow Corp [1922] 2 A C 299 at 307-8 per Viscount Finlay and in Colonial Mutual Life Assurance Soc Ltd v The Producers and Citizens Co-op Assurance Co of Australia Ltd (1931) 46 C L R 41 at 63 per Evatt J

5 Lloyd v Grace Smith & Co [1912] A C 716

6 Morris v C W Martin & Sons Ltd [1966] 1 Q B 716

7 Photo Production Ltd v Securicor Transport Ltd [1980] A C 827

8 Both Barwick v English Joint Stock Bank (1867) L R 2 Exch 259, and Bayley v The Manchester, Sheffield and Lincolnshire Rly Co (1872) L R 7 C P 415 involved wilful wrongdoing, and see cases cited supra at nn 2-4 inclusive

negligence".[9] It seems to the present writer that such assertions no longer accurately state the effect of the case law; that the point has been reached where the test with respect to intentional as well as negligent wrongdoing is now stated in terms of whether what the servant has done can be described as an improper and unauthorised method of performing that which he was employed to do. Thus Salmond's assertion may be accepted, that: "If a servant does negligently that which he was authorised to do carefully, or if he does fraudulently that which he was authorised to do honestly, or if he does mistakenly that which he was authorised to correctly, his master will answer for that negligence, fraud or mistake."[10] The natural place for the application of a 'real or ostensible authority' test would seem to be in those situations where the employed person does not have the status of servant, so that the employer's liability must be placed on agency grounds rather than on the grounds of service. These agency rules have their main application in connection with the tort of deceit and are discussed further below.

It is true that in the past judges have been uneasy about imposing liability on a master for the wilful torts of his servants, but the trend is clearly in the direction of expanding the range of activities on the part of the servant for which the master will be liable[11] and of assimilating the test for determining whether wilful misconduct occurs within the 'course of employment' to that which is adopted in regard to negligence. It seems increasingly to be viewed as anomalous that in circumstances where a servant's conduct, if negligent, would involve the master in liability, the master should be absolved if the same damage is inflicted wilfully by the servant. It is sometimes thought to be offensive to reason that: "The greater the fault of the servant, the less the liability of the master".[12]

Thus there is today a greater readiness to find a sufficient nexus between a servant's wilful misconduct and his authorised duties to justify classifying the former as incidental to, or a mode of carrying out, the latter. The attitude seems to be that the possibility of servants engaging in wilful and even selfish wilful misconduct while on the job is one of the hazards of doing business and a risk which should be borne by the enterprise rather

9 J G Fleming, *Law of Torts* 6th ed (1983) at 533, see also E I Sykes and D Yerbury, *Labour Law in Australia* (1980) Vol 1, at 132-3, H G Hanbury, *The Principles of Agency* 2nd ed (1960) at 191, Paton, 'The Liability of a Master for the Torts of his Servant' (1935-8) 1 *Res Jud* 85, *Clerk and Lindsell on Torts*, supra n 2, at 3-29, Auckland Workingmen's Club and Mechanics Institute v Rennie [1976] N Z L R 278 at 282

10 Supra n 437-8, R v Levy Bros Co Ltd (1961) 26 D L R (2d) 760 at 762 per Ritchie J, but for criticism see Fleming, supra n 9, at 355

11 In Kooragang Investments Pty Ltd v Richardson and Wrench Ltd [1980] A C 462 at 471-2 the Privy Council said "The manner in which the common law has dealt with the liability of employers for acts of employees (masters for servants, principals for agents) has been progressive the tendency has been toward more liberal protection of innocent third parties"

12 Morris v C W Martin & Sons Ltd [1966] 1 Q B 716 at 733 per Diplock L J, see also Photo Production Ltd v Securicor Transport [1978] 3 All E R 146 at 150 per Lord Denning M R, who said that if the damage there had been due to the negligence of the servant no one would doubt that his conduct was within the course of employment, and the fact that it was done deliberately should make no difference

than the innocent victim. Clearly the Salmond and similar formulations are capable of incorporating an expanded content if the judges are prepared to define in broad terms the "class of acts" the servant is engaged to do, and then categorize the wrongful conduct in such a way as to fall within their scope. The way in which the Salmond test applies in a given case depends on the degree of generality or particularity with which the "class of acts" which the servant is authorised to perform is described, and thus its application is very largely a matter of semantics. It is usually flexible enough to permit the courts to arrive at the result which is considered desirable from the point of view of policy.[13]

Historically of course this attitude has not always prevailed. In the last century some judges took the view that to impose liability on an employer for the wilful misconduct of an employee was unfair even where the employer had reaped a benefit by the deception of his employee.[14] However this stand yielded and recovery was allowed at any rate where the servant or agent had acted in the employer's interests.[15] More difficulty was felt about imposing liability where the dishonest servant or agent acted to benefit himself. Initially it was thought to be undesirable or even impossible to fix liability on the employer since a servant who committed a wilful wrong for his own benefit must surely be on a frolic of his own.[16] *Lloyd* v *Grace Smith & Co.*[17] undoubtedly "exorcised" this "heresy",[18] but the true scope of the decision remained to be worked out in subsequent cases. The *ratio* of *Lloyd* might have been narrowly interpreted especially as it was clearly a 'hard case' where the sympathies of the Court were very obviously with the plaintiff[19] whose property had been dishonestly appropriated and disposed of for his own benefit by her solicitor's managing clerk. Moreover, in holding the solicitor liable the House of Lords emphasized the fact that the dishonest clerk was authorised and held out as having authority to conduct the conveyancing side of his master's business, unsupervised by him. The Court tended to use the contractual terminology of agency rather than the tort terminology of service, speaking of the "principal" being liable for the misconduct of his "agent", committed within the "scope of his authority",[20] even though the clerk was in fact a servant. Thus the decision in *Lloyd* might have been

13 See Atiyah, supra n 1, at 181-4, Stuart, 'Widening the "Scope of Employment"' [1980] *Scots L T* 241

14 e g Udell v Atherton (1861) 158 E R 437 per Bramwell and Martin B B

15 Barwick v English Joint Stock Bank (1867) L R 2 Ex 259, Mackay v Commercial Bank of New Brunswick (1874) L R 5 P C 394, Swire v Francis (1877) 3 App Cas 106, Dyer v Munday [1895] 1 Q B 742,

16 Willes J in the Barwick case (at 265) had said that "The general rule is, 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*"

17 [1912] A C 716

18 Morris v C W Martin & Sons Ltd [1966] 1 Q B 716, at 740 per Salmon J

19 Lord Macnaghten (at 738) said it would be "absolutely shocking if Mr Smith were not held liable for the fraud of his agent in the present case"

20 Though Lord Macnaghten (at 736) thought that expressions such as "acting within his authority", "acting in the course of his employment" and "acting within the scope of his agency" are synonymous

considered to be only authority for a proposition concerning the liability of a principal for the fraud of an agent whom he holds out as his representative authorised to negotiate and make contracts and transact business with others on his behalf — the only extension of earlier authority being a recognition that the principal may be liable even where the agent acts solely to serve his own interests. Or indeed, in view of the way the case was argued, and some of the dicta, it might have been held subsequently that the true basis of the solicitor's liability was contractual not tortious.[21]

However it became clear that the *ratio* of *Lloyd* was not so limited. In *Uxbridge Permanent Benefit Building Society* v *Pickard*[22] the Court of Appeal applied the principle to a situation where the person defrauded by the defendant solicitor's clerk was not a client but a third party, and in *United Africa Co. Ltd.* v *Saka Owoade*[23] the Privy Council applied the principle to the tort of conversion.[24] However it was emphasized in both cases that the employer had represented to the plaintiff that the particular servant whose dishonesty caused the loss had authority from him to conduct his business. It was not until 1965 that the *Lloyd* principle was applied in a situation where there was no representation of authority or holding out by the principal, or ostensible authority on the faith of which the plaintiff had acted. This was in *Morris* v *C. W. Martin & Sons Ltd.*[25] where the situation was that the plaintiff had contracted with a furrier for the cleaning of a fur, the furrier with the plaintiff's permission had subcontracted the work to the defendant, and the defendant's servant who was given the fur for cleaning, stole it. The decision in *Cheshire* v *Bailey*[26] where the Court of Appeal absolved from liability the employer of a coachman who connived with thieves in stealing the plaintiff's goods from the coach, seemed to stand in the way of imposing liability on the defendant here. However the Court of Appeal in *Morris* held that *Cheshire* was impliedly overruled by the House of Lords in *Lloyd* v *Grace Smith & Co.*[27]

It seems clear that Diplock & Salmon LJJ. in *Morris* v *C. W. Martin & Sons Ltd.*[28] treated *Lloyd* as authority for a wide proposition which might be expressed in terms of Salmond's assertion that conduct is within the course of employment if a servant does dishonestly that which he is employed to do honestly. The servant here was authorised to take charge

21 See arguments at 721-3 and 724 per Earl Loreburn L C

22 [1939] 2 K B 248, distinguished in Kooragang Investments Pty Ltd v Richardson and Wrench Ltd [1982] A C 462 at 474-5

23 [1955] A C 130

24 The Lloyd Case of course involved conversion of the title deeds as well as fraud

25 [1966] 1 Q B 716

26 [1904] 1 K B 237

27 [1912] A C 716

28 [1966] 1 Q B 716

of and clean the fur; his misappropriating it was a method, albeit wholly improper, of performing the assigned task. However the case is complicated by the fact that Lord Denning M.R. adopted a rather different avenue of approach. He preferred to hold the defendant liable on the ground that as a bailee for reward he owed a duty which was non-delegable. Thus the defendant would be liable for the negligent or wilful wrongdoing of any person, whether it be a servant acting in the course of employment or not, to whom he delegated his duty of safeguarding the goods.

The reasoning in *Morris* has been criticized on the ground that it involved a misapplication of the *Lloyd* principle, since there was no holding out or representation by the defendant to the plaintiff that the dishonest servant had his authority to take possession of the fur.[29] For this reason, and because of the rather different routes by which members of the Court of Appeal arrived at their decision, the case might have been narrowly interpreted as an authority concerning the duties of bailees for reward specifically,[30] rather than the broader area of a master's liability for the wilful torts of his servant. But the House of Lords has now applied it in a case quite outside the area of bailment. This was in *Photo Production Ltd.* v *Securicor Transport Ltd.*[31] where the question was whether the defendant security patrol service was liable for the act of its servant, a patrol officer, who deliberately[32] started a fire in the plaintiff's factory on one of his visits. The fire got out of control and resulted in destruction of the factory. All the members of the House of Lords agreed that, but for the protection which was held to be afforded by an exemption clause, Securicor would have been liable for the damage.

Morris v *C.W. Martin & Sons Ltd.*[33] was cited as authority for Securicor's vicarious liability in tort, by all the members of the House[34] except Lord Diplock who was content to ground liability in contract[35] and expressed no opinion that whether there would also be vicarious liability in tort. But, though it was argued by counsel for Securicor that what the patrolman did had nothing to do with what he was employed to do and that therefore he was on a frolic of his own in starting the fire, their Lordships did not choose to expatiate at any length on the issue of the vicarious liability of Securicor in tort. It was unnecessary for them

29 Jolowicz [1965] *C L J* 200, see also *Charlesworth on Negligence* 6th ed (1977) par 103

30 It has been applied in numerous bailment cases, e g Mendelssohn v Normand Ltd [1970] 1 Q B 177, Metrotex Pty Ltd v Freight Investments Pty Ltd [1969] V R 9 Port Swettenham Authority v T W Wu & Co [1979] A C 580

31 [1980] A C 827

32 The servant subsequently pleaded guilty to the offence of maliciously damaging a building, stock and property id at 830 However the action was brought alternatively in negligence or breach of contract

33 [1966] 1 Q B 716

34 [1980] A C at 846 per Lord Wilberforce (with whom Lord Scarman and Lord Keith agreed) and at 852 per Lord Salmon

35 Id at 851, Lord Wilberforce (at 846) agreed that liability would also arise in contract

to do so in view of their findings that liability would in any event, apart from the exemption clause, arise in contract, and that the exemption clauses excluded all liability whether tortious or contractual, for what had occurred. Presumably the reasoning would be that the errant patrolman was the individual to whom Securicor entrusted the care and protection of the premises in the same way that the thieving servant in *Morris* was entrusted with the task of taking charge of and cleaning the fur. Thus the patrolman's setting fire to the premises could be viewed as an improper and wrongful method of performing the assigned task of patrolling and safeguarding them.

Lord Denning M.R. in the Court of Appeal was more forthcoming about the scope of Securicor's liability in tort. He said that it was clear that if the patrolman had *negligently* lit a fire Securicor would be liable, and that the fact that the conduct was deliberate should make no difference. Citing *Lloyd* and *Morris* he expressed the opinion that not only the plaintiff factory-owner but *any* person who was injured or suffered damage in the fire, such as a passer-by or neighbour, would have a cause of action against Securicor in tort for the wrongful act of its servant.[36]

It seems likely that the trend towards expanding the range of circumstances in which a master will be held liable for the intentional torts of his servant will continue. The view may once have prevailed that vicarious liability, being a form of strict liability, is really only justifiable with respect to risks which are inherent in or typical of or, in a sense, a foreseeable consequence of, conducting an enterprise; and that, though negligently caused damage to others can usually be described as an expectable risk involved in running a business, this is less often so where wilful infliction of damage is concerned. But it appears that the underlying thinking now is that since on the whole employers are likely to have the resources to enable them to absorb, spread or insure against loss or damage caused by torts of their servants, imposition of vicarious liability for losses which may be said to have been 'caused', in a loose sense, by conducting the enterprise, is a convenient and efficient method of loss distribution; and that this remains true even though the loss was inflicted wilfully rather than negligently and is therefore less easily described as a typical or expectable consequence of running the business.[37]

Thus it is probable that some of the older case law is likely to meet the fate which befell *Cheshire* v *Bailey*[38] in *Morris* v *C. W. Martin & Sons Ltd*,[39] or alternatively to be distinguished on the ground that whether

36 Photo Production Ltd v Securicor Transport Ltd [1978] 3 All E R 146 at 150-1

37 In Leesh River Tea Co Ltd v British India Steam navigation Co Ltd [1967] 2 Q B 250 at 277 Salmon L J said "I can understand that there may be much to be said for the view that vis-a-vis his customer an employer should take the risk of the dishonesty of any of his servants or agents But this is not the way the law has developed in this country"

38 [1904] 1 K B 237

39 [1966] 1 Q B 716

conduct falls within the course of employment is a question of fact[40] and no two cases are identical. It is proposed in this article to draw attention to certain areas in relation to specific torts where such developments are likely to occur. Then the question will be addressed whether, if there is difficulty in imposing liability on the master under the traditional master/servant rules, there are any other bases on which liability may arise in the master.

Specific torts

There are some very restrictive decisions in cases involving the tort of deceit, which may not survive. In *Grant* v *Norway*[41] it was held that the master of a ship was not acting within the scope of his actual or ostensible authority in signing a bill of lading for goods which had never been shipped, even though the "authority of the master of a ship is very large and extends to all acts that are usual and necessary for the use and enjoyment of the ship",[42] including signing bills of lading for goods shipped. Thus the shipowner was not liable to persons who had made advances on the faith of a bill of lading signed for goods which had not in fact been put on board. And in *George Whitechurch Ltd.* v *Cavanagh*[43] the House of Lords held that the secretary of a company who had authority to certify transfer of shares, that is, to endorse on transfers a certificate stating that the share certificate had been lodged with the company, was not acting within the scope of his authority in certifying a transfer when the relevant share certificate was not in fact in the company's possession (though Lord Brampton acknowledged that if the secretary's conduct had been merely negligent rather than fraudulent the company might have been liable[44]). It was thought to be unreasonable and unfair to impose liability on the principal for the frauds of his agent "which might be effected to an unlimited extent ruinous to the principal".[45] However these cases were decided before *Lloyd* v *Grace Smith & Co.*[46] and were coloured by the idea that it was a hardship and contrary to policy to impose liability on an employer where the employee had acted in his own rather than the employer's interests. Moreover the reasoning at some points is faulty as it seems sometimes to be assumed that the employer is only liable if

40 This is said repeatedly e g Keppel Bus Co Ltd v Ahmad [1974] 2 All E R 700 at 702, but for criticism see Atiyah, supra n 1, at 179-81

41 (1851) 10 C B 665, 138 E R 263, applied in Coleman v Riches (1855) 16 C B 104, 139 E R 695

42 Id at 687 per Jervis C J

43 [1902] A C 117, see also Ruben v Great Fingall Consolidated [1906] A C 439 The scope of a company secretary's authority is now wider see Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd [1971] 2 Q B 711

44 Id at 139

45 Id at 134 per Lord James

46 [1912] A C 716, although Whitechurch was applied by the House of Lords in the later case of Kleinwort, Sons & Co v Associated automatic Machine Corp Ltd (1934) 50 T L R 244

the actual wrongful act is authorised rather than the line of conduct in the course of which the wrongful act occurred.

These decisions seem hard to square with *Lloyd* v *Grace Smith & Co.*[47] and *Uxbridge Permanent Benefit Building Society* v *Pickard*,[48] and have received much criticism.[49] If the proper test for a master's liability for fraud is thought to be the 'course of employment' test then it would seem that, in Salmond's terminology, the servants' conduct in these cases should have been classified as wrongful modes of performing authorised tasks. If the proper approach is thought to be in terms of a supposedly less generous 'actual or ostensible authority' test[50] then it would seem that the agents' conduct consisted of acts to which the ostensible performance of the principal's work gave occasion or which were committed under cover of the authority the agent was held out as possessing or of the position in which he was placed as a representative of his principal.[51]

In connexion with the tort of conversion[52] also it might be expected that further developments in the direction of expanding the scope of the master's liability will occur. The question of the master's liability in conversion is most likely to arise at the suit of a bailor whose goods are stolen by his bailee's servant. The case law has only gone so far as to impose liability where the bailment is one for reward and the thief is the very servant to whom the goods were entrusted by the master, or, at any rate, a servant whose work involved using or dealing with the goods in some way.[53] It has often been said that a master is not liable merely because the servant's employment affords him the opportunity of converting a chattel.[54] Admittedly the Salmond definition of the 'course of employment' may be thought to require some such nexus between the wrongdoing servant and the chattel as that the thief was entrusted with the goods. But from the point of view of policy it may be maintained that there is no good reason to distinguish theft by a servant who is given custody of the goods as part of his work from theft by a servant whose

47 Id

48 [1939] 2 Q.B 248 (at 258), MacKinnon L.J.'s purported reconciliation seems to assume that a solicitor's manahing clerk has ostensible authority to commit fraud. For other cases where liability arose see Barrow v Bank of N.S W. [1931] V.L R 323, Royal-Globe Life Assurance Co. Ltd v Kovacevic (1979) 22 S.A S R 78; but cf National Trustees Executors and Agency Co of Australasia v Peile [1964] V R 325 and Sorrell v. Finch [19] A C. 728.

49 See Lord Robertson in George Whitechurch Ltd v Cavanagh [1902] A C 117 at 137, Atiyah, supra n 1 at 235-7 S J Stoljar, *The Law of Agency* (1961) at 76, *Bowstead on Agency* 14th ed (1976) at 313, Reynolds, 'Warranty of Authority' (1967) 83 *L Q R* 189, Wright (1935) 13 *Can Bar Rev* 116

50 Fleming, supra n.9, at 355.

51 The Lloyd principle was stated in these terms by Dixon J. in Deatons Pty Ltd v. Flew (1949) 79 C L R. 370 at 381

52 Salmon L J in Morris v C.W Martin & Sons Ltd [1966] 1 Q B 716 at 738 said that where there is a duty to take reasonable care to keep goods safe and a duty not to convert them, theft of the goods gives rise to a cause of action which could be described either as neligence or conversion.

53 Morris v. C.W. Martin & Sons Ltd [1966] 1 Q.B 716, see discussion in N E Palmer, *Bailment* (1979) at 475-89.

54 Id at 727-8 per Lord Denning M R.; at 737 per Diplock L J and at 740-1 per Salmon L J., Leesh River Tea Co Ltd v British India Steam Navigation Co. Ltd [1967] 2 Q.B 250; Metrotex Pty Ltd v Freight Investments Pty Ltd [1969] V.R. 9 at 14 per Winneke C J. and Gowans J. See also Lawrie v Commonwealth Trading Bank of Australia [1970] Qd R. 373 and Kooragang Investments Pty. Ltd v Richardson and Wrench Ltd. [1982] A.C. 462.

employment only provides the physical proximity which enables him to steal them;[55] arguably in both cases the enterprise should bear the loss as part of the cost of doing business. Moreover it might seem anomalous that a bailee is liable for the negligence of *any* servant who, in the course of carrying out his authorised duties, caused loss of or damage to goods bailed to his master, but only liable for conversion by that limited class of servants whose work involves dealing with the goods in some way. This analogy with the position with respect to negligence would also suggest that even a gratuitous bailee, or a person who is under a duty to deal with a chattel in some way, though not as a bailee at all, should be liable for his servant's theft.[56]

In assault[57] cases the courts have felt more comfortable with the Salmond formula and almost invariably apply it.[58] Often it involves no artificiality to speak of an assault by a servant being an improper method of carrying out his authorised duties. This is especially so where the nature of the work is such that use of a degree of physical force is expressly permitted[59] or at any rate foreseeable.[60] Where servants have acted with excessive zeal or under a mistake in supposed furtherance of their masters' interests the courts have not had too much difficulty in imposing liability.[61] However there is one suggested limitation which may seem hard to justify. It was said in *Poland* v *John Parr & Sons*[62] that use of excessive violence may take the case out of the class of acts which the servant was authorised or employed to do. Obviously the thinking is that it is unfair on the employer to hold him liable if the servant's conduct is beyond all

55 Atiyah, supra n 1, at 271

56 Palmer, supra n 53, at 201, 306-10

57 Strictly speaking not all the cases involving wilful misconduct resulting in personal injury involved the tort of trespass, even so far as the liability of the servant was concerned e g Poland v John Parr & Sons [1927] 1 K B 236 (semble negligence), Pettersson v Royal Oak Hotel Ltd [1948] N Z L R 136 (negligence), Exchange Hotel Ltd. v Murphy [1947] S A S R 112 (negligent trespass), Power v Central S M T Co Ltd [1949] S L T 302 (wilful infliction of indirect injury), Janvier v Sweeney [1919] 2 K B. 316 (wilful infliction of nervous shock) The position is complicated by the old rule that an action could not be brought in trespass against the master unless the master had ordered it (see T Baty, *Vicarious Liability* (1916) Ch 5) and the reports are not always clear about precisely what cause of action the plaintiff was relying on. The old rule is sometimes restated in modern cases (e g Stoneman v Lyons (1975) 133 C L R 550 at 562 per Stephen J. and at 573-4 per Mason J Teakle v Tom the Cheap (S A) Pty Ltd [1971] 2 S.A S R 258 at 260-1, McCorquodale v The Shell Oil Co of Aust Ltd (1933) 33 S R (N S W) 151 but at other times apparently disregarded (e g Deatons Pty Ltd v Flew (1949) 79 C L R 370, McAlary v Stafford (1902) 2 S R (N S W) 386, Exchange Hotel Ltd v Murphy [1947] S A S R 112, and see the droving cases n 72 infra) For a discussion of the scope of the torts of assault and battery see Trindale, 'Intentional Torts Some Thoughts on Assault and Battery (1982) 2 *O J L S* 211

58 Keppel Bus Co Ltd v Ahmad [1974] 2 All E R 700 at 702, Deatons Pty. Ltd v Flew (1949) 79 C L R 370 at 378 per Latham C J and at 384-5 per Williams J ; Poland v John Parr & Sons [1927] 1 K B 236 at 240 per Bankes L J , Daniels v Whetstone Entertainments Ltd [1962] 2 Lloyd's Rep 1 at 5 per Davies L J and at 9 per Buckley J , Warren v Henlys [1948] 2 All E R 935 at 937; Pettersson v Royal Oak Hotel Ltd [1948] N Z L R 136 at 149, some judges, however, still fall into talk of actual authority being required e g Deatons at 383 per McTiernan J and Auckland Workingmen's Club and Mechanics Institute v Rennie [1976] 1 N Z L R 278 at 282

59 See, e g , Daniels v Whetstone Entertainments Ltd [1962] 2 Lloyd's Rep 1 (steward at a dance hall)

60 See, e g , Dyer v Munday [1895] 1 Q B 742 (repossession of furniture), Janvier v Sweeney [1919] 2 K B 316 (threats foreseeable)

61 See, e.g., Bayley v Manchester, Sheffield and Lincolnshire Rly Co (1872) L R 7 C P 415, Whittaker v London County Council [1915] 2 K B 676; Poland v John Parr & Sons [1927] 1 K B 236

62 [1927] 1 K B 236 at 243 per Scrutton L J. and at 245 per Atkin L J

reasonable anticipation; for example,[63] if in *Poland* the servant had fired a shot at, rather than cuffed the supposedly pilfering child. Logically such an exception is hard to justify since the Salmond formula is equally satisfied whatever the weaponry used. Moreover from the point of view of policy, such a limitation may not find favour today, especially as it is clear that once conduct is recognised as taking place within the course of employment the fact that the loss or injury resulting from such conduct is unforeseeably serious or extensive is no argument against liability. Obviously it was no defence to the master in *Poland* that the result of the servant's cuffing the boy was that he fell under the wheels of the vehicle and lost a leg, or to Securicor in *Photo Production Ltd.* v *Securicor Transport Ltd.*[64] that the result of lighting a small fire was destruction of the entire factory.

There is one type of assault case where the courts have shown a marked reluctance to impose liability on the master. This is in the not uncommon type of situation where an altercation or dispute has arisen between the servant and a customer of the master, on a matter which involves the master's business, and this has developed to the point where the servant strikes a blow in anger. In most of such cases the servant's conduct is branded as an act of personal spite, resentment or vengeance for which the master is not responsible.[65] It seems likely that the actual decisions in these cases were influenced by the probability that in many cases of them the plaintiff himself was guilty of provocative conduct.[66] Thus in a contest with a wholly innocent party such as the employer the sympathy of the court is likely to be with the defendant. It is significant that in the one case where the plaintiff was a wholly innocent bystander injured by a barman's flinging a glass at another customer, the plaintiff succeeded.[67] However it has been suggested that courts should direct more attention to the policy question of whether it is just that the victim should be compensated by the employer and that a more liberal approach should be adopted.[68] Now that it has been accepted in the fraud and

63 Example given by Atkin L J (at 245)

64 [1980] A C 827

65 See, e g , Keppel Bus Co Ltd v Ahmad [1974] 2 All E R 700, Deatons Pty Ltd v Flew (1949) 79 C L R 370, Fontin v Katapodis (1962) 108 C.L R 177, Warren v Henlys [1948] 2 All E R 935, Power v Central S M T Co Ltd 1949, S L T 302, Auckland Workingmen's Club and Mechanics Institute v Rennie [1976] 1 N Z L R 278

66 Webb J in Deatons Pty Ltd v Flew (1949) 79 C L R 370 at 388 thought that the jury, who found for the plaintiff, must have disbelieved the evidence about provation as "No jury would be likely to award heavy damages to a truculent, foulmouthed ruffian"

67 Pettersson v Royal Oak Hotel Ltd [1948] N Z L.R 136 But this is not the explanation of the decision given judicially In Daniels v Whetstone Entertainments Ltd [1962] 2 Lloyd's Rep 1 at 6 per Davies L J it was said that the ratio of the decision is that what the barman did was in the course of his duty to keep order and properly to manage affairs in the bar; and in Keppel Bus Co Ltd v Ahmad [1974] 2 All E R 700 at 704 it was said to be reconcilable with the apparently dissimilar decision in Deatons Pty Ltd v Flew (1949) 79 C L R 370 on the ground that while in both the servant was retaliating for a personal affront, in Pettersson he was also encouraging an undesirable to leave the premises

68 Rose, 'Liability for an Employee's Assaults' (1977) 40 *M L R* 420, see also Burns, 'Employer Liability for Assaults by Employees' (1983) 48 *M L R* 655

theft cases that conduct can fall within the course of employment even where a servant's sole motivation is to serve his own ends, it seems inconsistent to absolve the master where an assault is the outcome of a dispute with the master's customer in a matter involving the master's business.

A similar comment might be made about cases involving the torts of false imprisonment and malicious prosecution. The courts have been ungenerous in defining the "class of acts" which the servant was "put in his place to do",[69] insisting that the servant in question should have been in a position where he was authorised to arrest suspects or institute criminal proceedings. They have been reluctant to discover any such implied authority at any rate where there was no situation of imminent danger requiring urgent action in defence of the master's interests. Thus in *Bank of N.S.W.* v *Owston*[70] the Privy Council held that it was not within the province of a bank manager to prosecute offenders for stealing the bank's property without consulting the general manager or board of directors. This attitude seems hard to reconcile with cases concerning physical assaults in defence of the master's property where the courts are not unwilling to impose liability. This is especially so where, as in *Bank of N.S.W.* v *Owston* the servant has been placed in a senior position where the inference might have been drawn that, in Willes J's[71] terminology, the employer had "left it to him to determine when an act within the class of authorised acts was to be done", and "trusted him for the manner of its performance".

Cases of trespass to land arise less often than trespass to person. Here too the main factor is whether the servant's conduct was designed, or operated in fact, to further the master's interests. Thus Australian courts have been very ready to impose liability on the employers of drovers in charge of travelling livestock who trespass on land in order to depasture the animals.[72] It is openly acknowledged that justice requires that the employer, who has had the benefit of the trespass, should pay the price. Otherwise, it has been said, no pastoralist's grass and water would be safe as in most cases the remedy against the drover would be quite

69 The terminology being that of Willes J (see supra n.3 and n 4).

70. (1879) 4 App. Cas. 270; applied in Bremner v The Union Bank of Australia (1896) 12 W N (N S W.) 175 where it was said not to be within the ordinary province of a bank manager to seize sheep, see also Hanlon v Manson (1881) 2 L R (N.S.W) 291, Hunting v The Orient Steam Navigation Co Ltd (1922) 39 W N (N S W) 18, Hamilton v. Hordern (1903) 3 S R. (N.S W) 139; Hamilton v The Railway Commissioners (1905) 5 S R (N.S W) 267; A. Simpson & Son Ltd. v Ray (1961) 35 A L.J R. 195, Jobling v Blacktown Municipal Council [1969] 1 N S.W R. 129

71 Bayley v The Machester, Sheffield and Lincolnshire Rly. Co., n 4. supra

72 Foreman v. McNamara (1897) 23 V L.R. 501; Thorley v Iseppi [1925] St.R Qd. 299; Gilchrist, Watt and Cunningham v Logan [1927] St.R.Qd. 185, affd. 33 A L R. 321. It seems the master was liable in trespass in these cases even though the trespass was not ordered by him; cf. Photo Production Ltd. v Securicor Transport Ltd [1980] A.C. 827 where the servant's conduct was trespassory but the action against the master was brought in negligence and breach of contract.

illusory.[73] However where the servant's conduct can be classified as designed to benefit himself rather than the master, the latter is likely to be absolved. Thus in *Joseph Rand Ltd.* v *Craig*[74] a master was held not liable where carters whom he employed to take rubbish to a dump, tipped it instead, for their own convenience and in breach of instructions, on the plaintiff's land. This case seems hard to square with *Photo Production Ltd.* v *Securicor Transport Ltd.*[75] as the damage to the land in the latter case was totally gratuitous whereas in *Rand* it was at least connected with the performance of the master's work.

Finally, reference may be made to the tort of defamation. Here too the courts have taken a restrictive attitude towards the imposition of vicarious liability. They have insisted that the servant must have been in a position where he had authority to make statements or comments or express opinions, and that he must have been given a certain amount of discretion about how to perform his work. However some of the decisions are difficult to reconcile. For example in *Citizens' Life Assurance Co. Ltd.* v *Brown*[76] an insurance company was liable for defamatory statements made in a circular distributed by a superintendent to policy-holders, which was designed to counteract derogatory statements which had been made about the company by the plaintiff; in *Bonette* v *Woolworths Ltd.*[77] the defendant store was held liable for accusations of theft made by its shop manager and floor-man against a customer; and in *Colonial Mutual Life Assurance Society Ltd.* v *The Producers & Citizens Co-operative Assurance Co. of Australia Ltd.*,[78] the High Court held that an insurance company was liable for defamatory statements concerning a rival insurance company made by a canvasser while attempting to secure proposals for insurance. In the last-mentioned case the majority[79] view was that the class of acts which the canvasser was employed to do necessarily involved the use of arguments and statements for persuading the public to effect insurance, and that the company had confided to his judgment the choice of inducements and arguments. The Company had thus authorised such observations as the canvasser deemed appropriate, and the wrong arose from the mistaken and erroneous manner in which that authority was exercised.[80]

73 Gilchrist, Watt & Cunningham v Logan [1927] St R Qd 185 at 197 per Macnaughten J

74 [1919] 1 Ch 1, criticised by Batt, supra n 2, at 340-1

75 [1980] A C 827

76 [1904] A C 423

77 (1937) 37 S R (N S W) 142

78 (1931) 46 C L R 41, see also Crescent Sales Pty Ltd v British Products Pty Ltd [1936] V L R 336, Coroneo v Jurri Kurri and South Maitland Amusement Co Ltd (1934) 51 C L R 328, Dawson v Council of the Shire of Bulli (1927) 27 S R (N S W) 509, affd 2 A L J 38

79 Gavan Duffy C J , Starke, Rich and Dixon JJ (Evatt and McTiernan JJ dissenting)

80 Per Gavan Duffy C J and Starke J. 46 C L R at 47 and at 50 per Dixon J Cf N S W Country Press Co-op Co Ltd (1911) 12 C L R 481 (freelance canvasser with a special and limited authority), and Craig v Inveresk Paper Merchants Ltd [1970] S L T (Notes) 50

On the other hand the House of Lords absolved a municipal corporation from liability for slanderous statements by a tax collector accusing the plaintiff of forgery and tax evasion. The tax collector had no authority, it was said, to express any opinion or make any comment about the falsity or genuineness of receipts produced by the plaintiff (*Glasgow Corporation* v *Lorimer*[81]). Similarly it was said that it was not within the course of employment of a railway police inspector, authorised to make investigations concerning fare evasion, to make statements with regard to the plaintiff's use of tickets which implied fraudulent conduct on his part; the expression of an opinion as to the plaintiff's character or conduct was no part of the inspector's authorised duties (*Mandelston* v *The North British Rly. Co.*[82]). Nor was the manager of a restaurant acting within the course of her employment in accusing a chef of misappropriation of the restaurant proprietor's property (*Nicklas* v *The New Popular Cafe Co. Ltd.*[83]). These decisions denying liability are hard to justify in the light of current authority. In none of them was the servant acting other than from a desire to serve the master's interests. There was no suggestion that the servant was motivated in any way by personal spite or ill-will towards the plaintiff. Moreover it is certainly arguable that the servant in question was vested with sufficient discretion concerning the conduct of his master's business that the statements in question could be described as a reckless, overzealous or erroneous method of carrying out authorised tasks. The analogy with some of the assault cases[84] where masters have been held liable for overzealous performance of the master's work suggests that liability should have arisen.

In the defamation cases any suggestion that the servant bore any personal ill-will or animosity towards the plaintiff and used the ostensible performance of his master's work to vent his spleen seems fatal to a claim that the conduct was within the course of employment.[85] Admittedly many of the cases were decided before *Lloyd* v *Grace Smith & Co.*,[86] but since then this approach should be indefensible. If the defamatory statements can be described as having uttered in the course of ostensible performance of the master's work or under cover of the authority the servant was held out as possessing, then the master should be liable, even though the servant was actuated by spite or personal animosity. Thus

81 [1911] A C 209

82 [1917] S C 442

83 (1908) 15 S L T 735

84 See, e g , cases cited in nn 59-61

85 See, e g , Finburgh v Moss' Empires Ltd 1908 S C 928 per Lord Ardwall at 938, Aiken v The Caledonian Rly Co 1913 S C 66, Avery v The Sydney Harbour Trust Commissioners (1905) 22 W N (N S W) 54, Colonial Mutual Life Assurance Society Ltd v The Producers and Citizens Co-op Assurance Co of Australia Ltd (1931) 46 C L R 41 per Evatt J dissenting (the majority did not discuss the question whether there was personal ill-will on the part of the agent)

86 [1912] A C 716

it is arguable that the employer ought to have been liable in the circumstances of *Aiken* v *The Caledonian Railway. Co.*[87] where the defendant's manager, in dismissing the plaintiff, made false and malicious accusations of theft. The employer was held not liable for defamation. Yet in view of the fact that it was part of the manager's duty to engage and dismiss servants for the defendant, his slanderous statements might be described as having occurred in ostensible performance of this task and under cover of his authority to give reasons for dismissal. However it does not seem that the courts have yet held that a master can be liable for defamatory statements by a servant who was acting in his own rather than his master's interests.[88]

Many of the judgments in the defamation cases express a fear of imposing an unfair burden of liability on employers if the circumstances in which they are liable for defamatory statements made by servants in the course of performing their duties are not closely circumscribed.[89] It seems that this fear of 'opening the floodgates' is less strongly felt nowadays so far as other torts are concerned and thus it may be expected that some of the older authorities would be differently decided today. The tendency in the earlier cases narrowly to confine the class of authorised acts so as to exclude expressions of opinion about the character and conduct of others, and the refusal to concede that the servant has a degree of discretion about the mode of performance of his duties, now seems out of line. On the other hand it could be that the attitude expressed in these defamation cases will prove more resistant to change than is the case with respect to torts involving physical injury to person or property. It may be that defamation is regarded as a more personal tort for which the actual offender rather than the enterprise employing him should pay. Perhaps too the interest protected arouses less sympathy and less concern about efficient loss distribution than do interests in the person and in property.

Other bases of liability

If there is doubt or difficulty about whether, on the traditional master/servant rules, the master is vicariously liable for harm caused by his servant's wilful tortious conduct, it is pertinent to ask whether there is

87 1913 S C 66 (Lloyd was distinguished by Lord Salvesen (at 77) as a case involving contractual or quasi-contractual liability

88 Evatt J (dissenting) in Colonial Mutual Life Assurance Society Ltd v The producers and Citizens Co-op Assurance Co of Australia Ltd (1931) 46 C L R 41 thought that the employee was actuated by personal ill-will but the majority judges did not advert to this issue In any event as the profit which resulted or was intended to result from the statements would go to the employer, the agent could be said to have acted in the employer's interests

89 See, e g , Colonial Mutual Life Assurance Society Ltd v The Producers and Citizens Co-op Assurance Co, of Australia Ltd (1931) 46 C L R 41 at 72 per McTiernan J , Aiken v The Caledonian Rly Co 1917 S C 442 at 449 per Lord Mackenzie, Nicklas v The New Popular Cafe Co Ltd (1908) 15 S L T 735 at 737, Avery v The Sydney Harbour Trust Commissioners (1905) 22 W N (N S W) 54 at 55

any other basis on which liability may be imposed on the master. Of course there is the obvious possibility that the master may be guilty of personal negligence which is actionable either in tort or in contract. For example the master or those for whom he is responsible may have failed to take reasonable care in the selection of an honest and trustworthy servant,[90] or he may have failed to take reasonable steps to prevent foreseeable injury resulting from the proclivity of a servant to indulge in 'horseplay' which is dangerous to others.[91] If there is personal negligence of this kind then the master may be liable despite the fact that the conduct of the servant was outside the course of employment and would not therefore give rise to vicarious liability.

More difficult is the issue of whether, even though the master cannot be made liable on the ground that his servant has committed a tort in the course of employment, he may nevertheless be liable on agency principles. The question is whether it is possible, even though the relationship is in fact one of master and servant, to impose a wider liability on the master by classifying the relationship at the time of the wrongful conduct, as one of principal and agent. Can the master be liable in his capacity as principal for an agent's tort committed within the scope of his authority, when he would not be liable in his capacity as master for his servant's tort in the course of employment. It seems that the answer is probably in the negative.

There is endless disputation about the content of and relationship between the categories of servant, agent and independent contractor,[92] and in particular the extent to which it is true to say that a 'principal' is liable for the torts of his 'agent'. These questions are incapable of resolution as long as there continues to be an absence of uniformity in the usage of the terminology. It has been said that: "No word is more commonly and constantly abused than the word 'agent'".[93] Of course there is general agreement that the main province of the law of agency is in relation to contract and disposition of property: that its main function is to define the circumstances in which an 'agent' can create contractual

90 See, e g , Williams v The Curzon Syndicate Ltd (1919) 35 T L R 475, Adams (Durham) Ltd v Trust Houses Ltd [1960] 1 Lloyd's Rep 380, John Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd [1965] 2 Q B 495 In Photo Production Ltd v Securicor Transport Ltd [1980] A C 827 at 846 Lord Wilberforce recognised that there would be an implied obligation to use due care in selecting patrolmen

91 See, e g , Hudson v Ridge Manufacturing Co Ltd [1957] 2 Q B 348, cf Smith v Crossley Bros Ltd (1951) 95 *Sol J* 655 and Antoniak v Cwth (1962) 4 F L R 454, Oleck, 'Horseplay by Employees' (1968) 17 *Clev Mar L Rev* 438

92 Described as a 'futile debate' and a 'sterile controversy' by S J Stoljar, *The Law of Agency* (1961) 4, 10 For a discussion of these categories see G H L Fridman, *The Law of Agency* 4th ed (1976) 19-25, R Powell, *The Law of Agency* 2nd ed (1961) at 7ff

93 Kennedy v De Trafford (1897) A C 180 at 188 per Lord Herschell, quoted by the High Court in International Harvester Co of Aust Pty Ltd v Carrigan's Hazeldene Pastoral Co (1958) 100 C L R 644 at 652 and by Dixon J in Colonial Mutual Life Assurance Soc Ltd v The Producers and Citizens Co-op Assurance Co of Aust Ltd (1931) 46 C L R 41 at 50 See also Pliner, 'Agents or Employees? Some Problems of A M P Soc v Chaplin' (1977-8) 6 *Adel L Rev* 480 and Fleming, supra n 9, at 341-2

relations between his principal and a third party or effectively dispose of the property of his principal.[94] On one view the terminology of agency ought not to be used in relation to the law of tort at all; its use should be avoided where the legal liability which results from one person's acting on behalf of another is liability in tort not contract. On this view the expressions 'servant' and 'independent contractor' would cover the whole field of persons whose wrongful conduct while employed by or acting on behalf of another can involve the other in either vicarious liability or breach of a non-delegable duty (though a servant or independent contractor could of course also be an agent if he had authority to enter contracts on behalf of his employer.[95]) This suggestion flies in the face of judicial usage since the term 'agent' is often used synonomously with servant or independent contractor. It also involves the artificiality of asserting that certain persons should be classified as servants who would not be so called in ordinary parlance or for the purpose of other legal rules (e.g. a wife driving her husband to work in the husband's car), and of extending the accepted range of so-called non-delegable duties.

At the other extreme is the assertion that all servants and independent contractors, since they are engaged to do work for others, are properly to be described as agents,[96] though the term 'agent' encompasses a wider field. On this view the term 'agent' includes any person who is employed by another or acts on behalf of another and whose activities may involve that other in *either* tortious or contractual liability.[97] Another view is that the word 'agent' should be reserved, so far as tort is concerned, for persons who do work for others, but not under a contract of service; that is, used synonomously with 'independent contractor'.[98]

It makes for greater clarity however if the terminology of 'agency' in the law of tort is reserved for those situation where one person's apparently vicarious liability for another's tort can be explained (without artificiality) neither on the ground of his being a master whose servant has committed a tort within the course of employment, nor on the basis that the liability is in fact personal since he is under a non-delegable duty with respect to the operation in the course of which the tort was committed.[99] The question then is, in what circumstances is a principal vicariously liable for the torts of his 'agent' as so defined (disregarding situations where the principal authorised the very act which constitutes the tort, since liability here is personal not vicarious). Unfortunately there is no clear

94 Cf *Restatement (Second) of Agency* which treats vicarious liability in tort as part of the law of agency

95 See, e g , a waiter (servant) or stock-broker (independent contractor)

96 *Clerk and Lindsell on Torts*, supra n 4, at 3-54, Batt, supra n 2, at 9, *Salmond and Heuston on Torts*, supra n 1, at 429

97 *Restatement (Second) of Agency* at s 12

98 See, e g , Chaplin v A M P Society (1978) 18 A L R 385, but cf Gros v Cook (1969) 113 S J 408 (reviewer for a newspaper held to be an 'agent' not an independent contractor)

99 *Bowstead on Agency* 14th ed (1976) 310, Atiyah, supra n 1, at 33

law on the matter. It is sometimes asserted by judges and writers that the law recognises a general principle of liability in the principal for the torts of an agent; that is, that a person who authorises another to carry out a task for him is liable for torts committed by the agent if the conduct can be described as falling within the scope of the agent's authority.[100] By this it is not meant that the conduct must be actually authorised but that the conduct is incidental to authorised activities or falls to be described as a method, albeit wrongful and unauthorised, of performing the authorised task. But those who propound this view are unable to explain why there are to be found in the case law, innumerable dogmatic assertions that an employer of an independent contractor, as opposed to the employer of a servant, is not as a general rule liable for his torts. The existence of or general rule of liability for torts of an agent is impossible to reconcile with the general rule of no-liability for the torts of an independent contractor.[101]

However there are circumstances in which the law imposes liability on a person who employs another, where that other is not a servant in the conventional sense and nor is the situation one which has been said to involve a non-delegable duty. Thus the most accurate way of stating the present position would be to say that there are isolated instances where the authorities to act is liable for the agent's torts committed within the scope of the authority. Street[102] maintains that there are only two exceptions to the general rule that the category of agents has no relevance in the law of tort (except in so far as all servants and independent contractors may loosely be described as 'agents'). The first is with respect to the tort of deceit. If a principal appoints an agent to make or negotiate a contract for him and authorises that person to make representations on his behalf, he is liable for the fraudulent misrepresentations of his agent if they fall within the scope of his authority.[103] Obviously it was in recognition of the existence of this principle in the law at the time that the House of Lords in *Lloyd* v *Grace Smith & Co*4.[104] and judges in subse-

100 *Halsbury's Laws of England* 4th ed , Vol 1, 'Agency' para 847, 3rd ed , Vol 37, 'Tort', para 239, *Charlesworth on Negligence* 6th ed (1977) para 106, Houldsworth v City of Glasgow Bank (1880) 5 App Cas 317 at 326-7 per Lord Selbourne, Heatons Transport, (St Helens) Ltd v T G W U [1973] A C 15 at 99 per Lord Wilberforce (cf at 49 per Lord Denning M R), Soblusky v Egan (1960) 103 C L R 215 at 229

101 Atiyah supra n 1 at 106-7, *Salmond and Heuston on Torts* supra n 1 at 429 see also the denial of the existence of any such general principle by Dixon J in Colonial Mutual Life Assurance Society Ltd v The Producers & Citizens Co-op Assurance Co of Australia Ltd (1931) 46 C L R 41 at 49 also Lucas v Mason (1875) L R 10 Ex 251

102 *The Law of Torts* 7th ed (1983) at 418-20 cf *Clerk and Lindsell on Torts* supra n 1, at 3-54 who argue that there is only one true exception since the cases concerning motor vehicles can be explained on master/servant grounds

103 Bruss v Woolley [1934] A C 333, S Pearson & Son Ltd v Lord Mayor etc of Dublin [1907] A C 351, Australasian Brokerage Ltd v The A N Z Banking Corp Ltd (1934) 52 C L R 430, British Railway Traffic and Electric Co Ltd v Roper (1939) 162 L T 217, Royal-Globe Life Assurance Co Ltd v Kovacevic (1980) 22 S A S R 78 Dethan v Amev Life Assurance Co Ltd (1981) 56 F L R 34, Atiyah supra n 1, ch 10, T Batt, *Vicarious Liability* (1916) ch 6 As to the special problem regarding the states of mind of principal and agent see Armstrong v Strain [1952] 1 K B 232, Fridman supra n 92 at 245-7 Spencer Bower & Turner *Actionable Misrepresentation* 3rd ed (1974) paras 151-2, Stoljar, supra n 92 at 67-71

104 [1912] A C 716

quent cases such as *Uxbridge Permanent Benefit Building Society* v *Uxbridge Pickard*[105] spoke in terms of 'agency' rather 'service' even though the employed person was in fact a servant. However the employed person need not be an agent in the strict sense of one who is empowered to enter a contract for his principal. For example a vendor may be liable for a fraudulent misrepresentation concerning the condition of the property made by an estate agent who is engaged only to find a vendor but is not authorised to enter a contract of sale on his behalf.[106] The other exception is in relation to motor vehicles. It is established law that the owner of a vehicle is liable for the negligence of the driver, even though the driver is not a servant in the conventional sense, if the vehicle is being used at the owner's request for a journey which is (at least in part) for the owner's purposes.[107]

However it seems that in Australian law at any rate, the first exception must be regarded as wider than Street stated it to be. This is because of the decision of the High Court in *Colonial Mutual Life Assurance Society Ltd.* v *The Producers & Citizens Co-operative Assurance Co. Ltd.*[108] It will be remembered that the action there was in defamation and in holding the principal liable the High Court accepted the proposition that a principal is liable for the torts of his agent where "the function entrusted is that of representing the person who requests its performance in a transaction with others, so that the very service to be performed consists in standing in his place and assuming to act in his right and not in an independent capacity".[109] But, although it was not expressly stated in the *Colonial Mutual Case* to be so limited, it seems that the principle has only been applied so far to *statements*[110] made by the agent in the course of transacting business with others, and not to physical conduct. However it has been pointed out[111] that if the principle is framed in such a way as to include situations where physical conduct, causing damage to the plaintiff, resulted from a statement by the agent, then it is possible to accommodate

105 [1939] 2 K B 248

106 Though there was no liability in the circumstances of these particular cases the possibility was recognised in Sorrell v Finch A C 728, Armstrong v Strain [1952] 1 K B 232 and Presser v Caldwell Estates Pty Ltd [1971] 2 N S W L R 471

107 Morgans v Launchbury [1973] A C 127, Soblusky v Egan (1960) 103 C L R 215 Some writers argue that despite their use of the language of agency these cases should be treated as involving master/servant relationships, e g *Clerk and Lindsell on Torts*, supra n 1, at 3-54, Stoljar, supra n 92, at 10 It is generally agreed that the explanation for the evolution of this body of case law is the desire to find a financially responsible defendant i e to reach the owner's insurance company

108 (1931) 46 C L R 41, see also Gros v Cook (1969) 113 Sol J 408 (newspaper liable for defamation by book reviewer) But the latter case is doubted by Street, supra n 102, at 419 and the *Report of the Committee on Defamation* (1975) (Cmnd 5909) para 272

109 Id at 48-9 per Dixon J , Gavan Duffy C J and Starke J (at 47) expressly relied on Lloyd v Grace Smith & Co [1912] A C 716

110 See Atiyah, supra n 1, at 113-5, *Bowstead on Agency* 14th ed (1976) at 313 With respect to negligent misstatement by estate agents, see Presser v Caldwell Estates Pty Ltd [1971] 2 N S W L R 471, Roots v Oentory Pty Ltd [1983] 2 Qd R 745 In the United States a principal is not liable for physical acts of non-servant agents but generally liable for non-physical torts, see *Restatement (Second) of Agency* ss 250-264

111 Atiyah, supra n 1, at 115

within the principle some otherwise anomalous cases which have held that a client is liable in certain circumstances for the conduct of his solicitor. It has been held that if a solicitor gives misleading instructions to the sheriff in a writ of fi. fa., and as a result the sheriff seizes goods belonging to the plaintiff rather than the judgment debtor, then the client as well as the solicitor is liable.[112]

Can circumstances ever arise where these agency principles might work to impose liability on the master for wilful torts of his servant where the ordinary rules of master and servant would not do so? It seems not. It might have been thought at the time *Lloyd* v *Grace Smith & Co.*[113] was decided that this was a case explicable solely on agency grounds. If the courts, in subsequent cases, had held that a master is only liable for the wilful torts of his servant committed for the servant's own benefit, in circumstances where the wrongdoing employee was held out or represented to others as having authority to transact business on the employer's behalf, and where a third party was led to change his position on the faith of that ostensible authority,[114] it might have been said that *Lloyd* was a case decided on agency principles, even though the employed person happened to be a servant. But the *ratio* of *Lloyd* has not been so confined. It has been treated as authority for the proposition that a master can be liable for the wilful torts of his servant, committed for the servant's own benefit, so long as it is possible to describe the servant's conduct as a method, albeit wrongful, of doing what the servant was employed to do. The courts have not required, for the application of the *Lloyd* principle, that the particular wrongdoing servant must be held out as having ostensible authority to transact business on the master's behalf;[115] nor that there must be detrimental reliance on the representation of authority; nor that the tortious activity must consist of fraudulent misrepresentation or at any rate some kind of wrongful statement rather than wrongful physical conduct.[116]

Thus it seems there is nothing to be gained by seeking to rely on agency principles to impose liability on a master for wilful torts of a person who is in fact a servant. Wherever those principles might be invoked it would seem that the ordinary rules of vicarious liability of a master for his servant's torts will also be applicable. If the conduct can be described as 'within the scope of his authority' if the tortfeasor is regarded as an

112 Id at chapter 15

113 [1912] A C 716

114 This was said to be the distinguishing feature of the Lloyd principle in Uxbridge Permanent Benefit Building Society v Pickard [1939] 2 K B 248 at 253-4 per Lord Greene M R

115 Though this was regarded as important at one stage, see United Africa Co Ltd v Saka Owoade [1955] A C 130

116 Morris v C W Martin & Sons Ltd [1966] 1 Q B 716, Photo Production Ltd v Securicor Transport Ltd [1980] A C 827

agent, it will equally be classifiable as being 'within the course of employment' if he is regarded as a servant. The two expressions 'scope of his authority' (more often used with respect to agents) and 'course of employment' (more commonly used with respect to servants) are either synonymous,[117] or, if not, then it seems that the latter clearly has a wider compass than the former.[118]

Liability on agency grounds may therefore be viewed as a theoretical alternative basis[119] of liability but one which is no wider than the liability which would arise on the grounds of service.[120] It is otherwise with contract however. The existence of a contract between the plaintiff and the master whose servant tortiously injures the plaintiff may provide a head of liability which is wider than that which would result from the application of the tort rules of vicarious liability. A situation may arise where the master is not vicariously liable in tort because the servant's conduct falls outside the course of employment, but he is nevertheless guilty of breach of a personal duty owed by contract. One possibility is that, as already mentioned,[121] there may be breach of a contractual duty to take care in selecting or supervising the wrongdoing servant. But apart from this, it may be possible to argue that, although the servant's conduct was not within the course of employment for the purpose of liability in tort, nevertheless it constituted a breach of the express or implied terms of a contract for which the master would be liable in an action for breach of contract. This would be the case if the wrongdoing servant was the person who was deputed by the master to perform the master's contractual duties. Since most duties in contract are in effect absolute or non-delegable the master would remain liable if the way in which the servant purported to perform the contract amounted to non-fulfilment of an express or implied term.

The judgment of Lord Diplock in *Photo Production Ltd.* v *Securicor Transport Ltd.*[122] is instructive in this connection. Having pointed out that nearly all commercial contracts are today entered into not by natural legal persons but by fictitious ones, that is, companies, his Lordship said:

117 Lloyd v Grace Smith & Co [1912] A C 716 at 736 per Lord Macnaghten, Heatons Transport (St Helens) Ltd v T G W U [1973] 15 at 99, Navarro v Moregrand Ltd [1951] 2 T L R 674 at 680 per Denning L J , Royal-Globe Life Assurance Co Ltd v Kovacevic (1980) 22 S A S R 78 at 81, Barrow v Bank of N S W [1931] V L R 323 at 334-5 per McArthur J , *Clerk and Lindsell on Torts*, supra n 1, at 3-18, Atiyah supra n 1, at 173

118 *Bowstead on Agency*, supra n 99, at 312, Street, supra n 102, at 394, Fridman, supra n 92, at 244

119 So treated by Dixon J in Deatons Pty Ltd v Flew (1949) 79 C L R 370 at 381, cf Stoljar, supra, n 92 at 8 who argues that where a servant commits an economic wrong such as fraud he is acting as an agent as distinct from a servant since he would have no opportunity of committing the fraud unless he was in the position of agent and thus able to deal contractually with the third party

120 Although *Bowstead on Agency*, supra n 99, at 312-3 contemplates that "there may be cases where the agent, though a servant, is not acting within the course of his employment, and yet it seems appropriate to hold the principal liable, simply because of the connection of the tort with the representative function of the agent" However no examples are given

121 See cases supra in n 90 and n 91

122 [1980] A C 827

> Where what is promised to be done involves the doing of a physical act, performance of the promise necessitates procuring a natural person to do it; but the legal relationship between the promisor and the natural person by whom the act is done, whether it is that of master and servant, or principal and agent, or of parties to an independent sub-contract, is generally irrelevant. If that person fails to do it in the manner in which the promisor has promised to procure it to be done, as, for instance, with reasonable skill and care, the promisor has failed to fulfil his own primary obligation. This is to be distinguished from "vicarious liability" — a legal concept which does depend on the existence of a particular legal relationship between the natural person by whom a tortious act was done and the person sought to be made vicariously liable for it. In the interests of clarity the expression should, in my view, be confined to liability for tort.[123]

Lord Diplock went on to say that in the contract before him, which provided for the supply of a night patrol service by Securicor to the plaintiff's factory, there would, in the absence of the exclusion clause, be implied an absolute obligation on Securicor to procure that the visits by the night patrol to the factory were conducted by natural persons who would exercise reasonable skill and care for the safety of the factory.[124] Lord Wilberforce[125] (with whom Lord Keith and Lord Scarman agreed) also accepted that liability would, in the absence of the exclusion clause, arise in contract. He said that there would be a breach of an implied obligation to operate the service with due and proper regard to the safety and security of the premises. However, unlike Lord Diplock, Lord Wilberforce went on to express the view that an alternative ground of liability would be vicarious responsibility for the wrongful act of the patrolman in starting a fire on the premises, citing *Morris* v *C. W. Martin & Sons Ltd.*[126] Lord Salmon[127] was content to say that, but for the exclusion clause, Securicor would have been liable for the damage caused by their servant whilst "indubitably" acting in the course of his employment, also citing *Morris*. Lord Denning M.R. in the Court of Appeal thought it clear beyond doubt that the patrolman was acting in the course of his employment, and that liability arose both in contract and in tort.[128]

123 Id at 848.
124 Id. at 851
125. Id at 846
126 [1966] 1 Q B. 716
127 [1980] A C at 852
128 [1978] 3 All E R 146 at 150, the other judges did not discuss the matter since, for the purposes of the appeal, Securicor conceded that its servant was acting in the course of his employment

Lord Diplock's exposition of the distinction between personal liability in contract and vicarious liability in tort demonstrates how an argument based on contract may often be useful in the context of intentional torts committed by a servant. It may be possible to avoid the artificiality involved in striving to apply the Salmond and similar formulae and seeking to describe wilful selfish misconduct as a wrongful mode or manner of performing the master's work. Whereas in an action in tort the vital questions are whether the wrongdoer is a servant and whether his conduct is within the course of employment, in an action in contract neither of these questions should be relevant. Instead the inquiry would be, firstly, what are the primary promissory obligations undertaken by the master as a contracting party, and secondly, whether those obligations have been fulfilled either by the master or his delegate. Thus in the situation in *Photo Production* contractual liability would, apart from the exclusion clause, have arisen simply because Securicor failed to ensure, as promised, that patrols were conducted by natural persons who would have due and proper regard for the safety and security of the premises. Securicor would have failed to fulfil that positive absolute undertaking. It might have been thought that the House of Lords in *Photo Production* would have been content to base liability on the less controversial ground of breach of contract and express no opinion about vicarious liability in tort. Similarly it might have been expected that in *Lloyd* v *Grace Smith & Co.*[129] the House of Lords would, in view of the commonly held belief at the time that there was no vicarious liability for fraud committed for an agent's own benefit, have dealt with the solicitor's liability solely in terms of breach of contract. Indeed Earl Loreburn gave it as his opinion that, apart from liability in tort, there was "a breach by the defendant's agent of a contract made by him as defendant's agent to apply diligence and honesty in carrying through a business within his delegated powers and entrusted to him in that capacity".[130] In an earlier case Lord Bramwell had said that "every person who authorises another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract".[131]

One situation where it may be possible to discover a wider liability in contract than tort is with respect to bailments. In a number of cases

129 [1912] A C 716

130 Id at 724, Lord Salvesen in Aiken v The Caledonian Rly Co 1913 S C 66 at 77 expressed a preference for this explanation of the decision in Lloyd, as did Baty, supra n 103, at 125-6

131 Weir v Bell (1878) L R 3 Ex 238 at 245, approved by Lord Macnaghten in Lloyd v. Grace Smith & Co [1912] A C 716 at 737 and Lord Haldane in Mair v Rio Grande Rubber Estates Ltd [1913] A C 853 at 862.

132 The Coupe Co v Maddick [1891] 2 Q B 413, The Central Motors (Glasgow) Ltd v The Cessnock Garage and Motor Co 1915 S C 796, Adams (Durham) Ltd. & Day v Trust Houses Ltd [1960] 1 Lloyd's Rep 380; British Road Services Ltd v Arthur V Crutchley & Co Ltd [1967] 2 All E R 785 at 790, [1968] 1 All E R. 811; Aitchison v Page Motors Ltd (1935) 154 L T 128, cf Sanderson v Collins [1904] 1 K B. 628

where there was, on the authorities at the time, some difficulty in treating an employee's wilful misconduct as within the course of employment and holding the bailee vicariously liable in tort, courts have been prepared to place liability on a contractual basis.[132] It has been suggested that an approach in terms of contractual liability could solve many of the problems and obviate much of the confusion surrounding the bailee's liability for non-personal misconduct. A simpler and surer method of establishing the bailee's liability would, it is said, be to inquire, not what duty the law of tort imposes on him, but what personal duty he has undertaken under the contract.[133] Furthermore, it is argued, the same approach could be taken with respect to non-contractual bailments such as gratuitous bailments and sub-bailments; non-contractual bailments could be said to "possess a sufficient affinity with contract to justify the implication into such bailments of undertakings which are broadly based on the more standard contractual model."[134]

Another possibility is that, though there may be no bailment, a person may have a contractual duty to protect goods from theft or depredation. In this situation it seems the contracting party may be liable for the wilful misconduct of his servants in an action in contract though he may not be liable in tort. Examples of such duties might be that of the keeper of a boarding house in respect of guests' goods and that of the owner of a vehicle which he hires out with a driver in respect of the hirer's goods left in the vehicle.[135]

Another area where arguably a contractual duty might be broken is with respect to carriage of passengers. If it can be said that the carrier has a contractual duty to protect passengers from danger[136] then personal liability might arise in circumstances where vicarious liability has hitherto been denied, such as in the case of an assault by the carrier's servant.[137] Similarly it might be argued that the owners of premises to which the public are invited, such as bars and restaurants, owe to their patrons a contractual duty to exercise reasonable care for their safety, of which they would be in breach if injury was caused to a patron by the wilful misconduct of the owner's servant.[138]

Perhaps the reason for there being a preference for an analysis in terms of tort rather than contract in many cases is the diffidence judges may feel about enunciating explicitly what they understand to be the implied terms or the implied 'primary obligations' in the contract. However it

133 Palmer, supra n 53, at 487, also Atiyah, supra n 1, at 271

134 Id at 488

135 Morris v C W Martin & Sons Ltd [1966] 1 Q B 716 at 726-7 per Lord Denning M R , Hobbs v Petersham Transport Co Pty Ltd (1971) 124 C L R 220 at 229 per Barwick C J , Palmer, supra n 53, at 223-4

136 Rose, supra n 68, at 430-1

137 See, e g , Keppel Bus Co Ltd v Ahmad [1974] 2 All E R 700, Power v Central S M T Co Ltd 1949 S L T 302

138 Atiyah, supra n 1, at 278

would seem that there ought to be no more difficulty in implying into contracts an undertaking by contracting parties that they and their servants and agents will act honestly and refrain from wilfully inflicting damage or injury on the other party, than there is in implying a promise that they will exercise due care or refrain from negligence. It may be that the possibility of suing the master in contract for damage caused by wilful tortious conduct on the part of a servant has been overly-neglected avenue of relief.

Apart from contract, another type of claim which may be available is an action in quasi-contract for money had and received. If the master has not received a benefit as a result of the servant's tort then he is only in quasi-contract if the servant's tortious conduct occurred within the course of employment.[139] But if the master received a benefit, even as a result of the servant acting outside the course of employment, it seems that he must restore it; he cannot approbate and reprobate.[140]

Finally, mention should be made of the possibility that where the master is under a so-called non-delegable duty with respect to a particular task or activity, his liability for wilful tortious conduct on the part of his servant may be wider than it is on the ordinary rules of vicarious liability. The context in which this question is most likely to arise is with respect to bailments. As previously mentioned Lord Denning M.R. in *Morris* v *C. W. Martin & Sons Ltd.*[141] placed his decision to the effect that the defendant was liable for the theft of the fur by its servant on the ground that the defendant, as a bailee for reward, was under a non-delegable duty to safeguard the plaintiff's goods. His Lordship preferred this ground to the conventional 'course of employment' reasoning because of the difficulty which he thought arose in explaining why it is that where a servant unauthorisedly takes a vehicle bailed to his master on a 'joyride' or 'frolic of his own' and negligently causes a collision, the master is not liable for damage caused to a third party in the collision,[142] yet he is liable to the bailor for damage to the car bailed.[143] He found it impossible to accept that the journey could be described as taking place outside the course of employment vis-a-vis the third party but within the course of employment vis-a-vis the bailor. His solution to the quandary[144] was to explain the liability of the master to the bailor in terms of breach of the personal non-delegable duty which he owes by virtue of his status as a bailee for

139 Navarro v Moregrand Ltd [1951] 2 T L R 674, Sorrell v Finch [1977] A C 728, Royal-Globe Life Assurance Co Ltd (1979) 22 S A S R 78, Derham v Amev Life Assurance Co Ltd (1981) 56 F L R 34

140 Barrow v Bank of N S W [1931] V L R 323 at 343-4 per McArthur J and at 362 per Maclarlan J

141 [1966] 1 Q B 716

142 Storey v Ashton (1869) L R 4 Q [illegible]

143 Aitchison v Page Motors Ltd (19[illegible] T L R 137

144 Not everyone views it as a quandary, see the criticism by Jolowicz in [1965] *C L J* 200 and in *Winfield and Jolowicz on Torts* 11th ed (1979) at 564-5, and *Clerk and Lindsell on Torts* supra n 1, at par 3-27, 3-28

reward. Thus the reason the defendant in the case before him was liable for its servant's theft of the fur was because the authorities justify the proposition that:

> [W]hen a principal has in his charge the goods or belongings of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or depredation, then if he entrusts that duty to a servant or agent, he is answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable. So also if the servant or agent himself steals them or makes away with them.[145]

Diplock and Salmon LJJ. however were prepared to decide the case on conventional vicarious liability grounds. They held that because the fur was stolen by the very servant deputed by the defendant to clean and take care of it, the servant's conduct could be described as having taken place within the course of his employment.[146]

The question arises whether the 'bailee's duty' approach could in any circumstances result in wider liability than the 'course of employment' approach. It seems that, on the contrary, if anything the latter basis may be wider than the former, at any rate if *Morris* v *C. W. Martin & Sons Ltd.*[147] is taken as the guide. Whereas Lord Denning M.R. seems to require that the servant who stole the goods must be one to whom the master delegated his duty to protect the goods from theft and depredation, Diplock and Salmon LJJ. appear only to require that the delinquent servant was employed to do something in relation to the goods bailed or was deputed by the master to discharge some part of his duty of taking reasonable care. Thus the 'bailee's duty' approach seems to require that the wrongdoing servant must have control over the goods or be entrusted with their custody while the 'course of employment' test seems only to require that the servant must have been employed to do something which involved contact with but not necessarily control over or entrustment with, the goods. Thus the latter basis of liability appears to be wider than the former.

It certainly seems to be clear law at the moment that if a servant whose authorised duties do not involve contact in any way with the goods bailed, converts them, the master is not liable. The mere fact that the servant's

145 [1966] 1 Q B 716 at 728

146 This interpretation of their judgments was accepted in Rustenburg Platinum Mines Ltd v South African Airways [1977] 1 Lloyd's Rep 564 at 575

147 [1966] 1 Q B 716, though of course the 'bailee's duty' approach is wider in the sense that it involves liability for independent contractors

employment furnishes an opportunity for the theft is not enough.[148] However it has been suggested that from the bailor's point of view there is much to be said for imposing liability on a bailee for theft by any of his servants.[149] And it is argued that, though this could not be justified on simple principles of vicarious liability, it could be justified by adopting Lord Denning's view that the bailee owes a non-delegable duty to take reasonable care of the goods. Genuinely non-delegable duties, it is pointed out, may involve liability for the act of servants acting outside the course of employment.[150] If the law were to be taken in this direction it would mean that the position with respect to wilful wrongdoing would be assimilated to that with respect to negligence. It seems clear that if any of the bailee's servants in the course of performing authorised duties were negligently to damage goods bailed the master would be liable. For example if the tea-lady in a warehouse negligently wheeled her trolley into a pile of crockery the master would be liable to the owner of the goods for the damage.[151] It would be otherwise however, as the law stands at the moment, if she wilfully converted an item.

Discussion of the categories of non-delegable duty usually takes place in the context of liability for the negligence of independent contractors, rather than of liability for the wilful misconduct of servants acting outside the course of employment. Thus it seems there is little guidance, outside the bailment situation, about whether and in what circumstances the presence of a non-delegable duty may result in wider liability on the master for wilful torts of his servant than would result from the ordinary rules of vicarious liability. However it seems that the potential exists, where the master's duty is considered to be non-delegable, for holding him liable, if it is thought desirable from the point of view of policy, for conduct of his servant which could not easily be described as falling within the course of employment.

Conclusion

It seems now to be generally accepted by the courts that the verbal formulae applicable for determining whether tortious conduct of a servant is conduct for which his master is vicariously liable, is the same whether the wrongdoing servant acts negligently or intentionally, though clearly the application of the test tends to result in a narrower delimitation of responsibility with respect to wilful torts. It is usually easier to find the required nexus between what the servant has done and what he was employed to do in the case of negligence. The courts no longer think it

148 See cases cited supra at n 54

149 Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd [1967] 2 Q B 250 at 277 per Salmon L J

150 Atiyah, supra n 1, at 271

151 Palmer's example, supra n 53, at 480

appropriate or necessary (as once they did in deference to the terminology used in *Lloyd* v *Grace Smith & Co.*[152]) to speak, in cases of wilful wrongdoing, in terms of the servant's 'real or ostensible authority' rather than the 'course of employment' and to ask whether the master held out or represented the servant as authorised to, transact business for him and whether the servant could be said to have committed a tort under cover of that authority, in ostensible performance of his master's work.

The position would seem to be that, in addition to the rules with respect to the master's vicarious liability for his servant's torts committed within the course of employment, there exist rules with respect to vicarious liability for the misconduct of employed persons who are not necessarily servants and who might therefore be described more broadly as agents. The agency rules seem only to be appropriate in two types of situation: Firstly, where "the function entrusted is that of representing the person who requests its performance in a transaction with others, so that the very service to be performed consists in standing in his place and assuming to act in his right and not in an independent capacity". In such cases the employer or principal "must be considered as itself conducting the negotiation in his person".[153] However it seems that the case law only supports liability on this basis where the wrong is one involving statements, (such as a deceit, defamation and possibly negligence in word and injurious falsehood) rather than physical conduct. If the employed person is in fact a servant then in these situations the master's vicarious liability may be expressed either in terms of his agent having committed a tort within the scope of his authority or his servant having committed a tort within the course of his employment. But however expressed, whether in terms of agency or service, it seems that the test for determining whether the master is liable amounts to the same thing. It is a matter of asking whether the servant's or agent's act can be described as "a wrongful and unauthorised mode of doing some act authorised by the master"[154] or principal, or a "manner" of doing the "class of acts"[155] he was put in his place to do. The test is the same, though the application of the test may produce different results as a servant's authority is usually more extensive than that of an agent.[156] The other type of situation where agency rules are applicable in the law of tort is where the owner or bailee of a motor vehicle allows another to drive the vehicle on a journey in which he, the owner, has an interest.

Though the rules with respect to agency may have provided the initial

152 [1912] A C 716

153 Colonial Mutual Life Assurance Soc Ltd v The Producers and Citizens Co-op Assurance Co of Aust Ltd (1954) 46 C L R 41 at 48-9 per Dixon J

154 Terminology of Salmond, supra n 2

155 Terminology of Willes J , supra n 3 and n 4

156 Heatons Transport (St Helens) Ltd v T G W U [1973] A C 15 at per Lord Wilberforce

impetus to the courts' commencing an expansion of the circumstances in which a master will be held vicariously liable for the wilful, and especially the wilful selfish, torts of his servant, it could be said that the law regarding the relationship of 'service' has broken away from its early agency connection. There appears to be an increasing recognition by the courts, if only *sub silentio*, that the various rationalisations of the master's vicarious liability apply as much to wilful, and even selfish wilful, as to negligent wrongdoing. The policy arguments which are most commonly given in support of the master's vicarious liability are: that as the master obtains the benefit or the advantages of delegated work, it is fair that he should bear the burden or responsibility for any detriment caused by the work to others; that the master usually has a 'deeper pocket' than his servant and is more likely to be able to satisfy judgments; that employers are likely to be in a position to pass on the cost of accidents in the form of higher prices for their goods or services or to insure against them and are therefore efficient loss distributors; and that imposing liability on masters can be expected to operate as an incentive to accident prevention.[157] None of these considerations suggests that the master's liability should be limited to the sorts of accidents which may be described as incidental to, or typical of, or a natural consequence of, conducting the enterprise.

Yet there has been the feeling that it is a hardship on the master to impose liability for a servant's wilful torts, especially those committed for the servant's own benefit. Presumably this sentiment derives from the idea that the master should only be liable for the broad range of risks which are naturally incidental to the enterprise and which he can be expected to foresee and guard against.[158] These would typically be risks resulting from his servants' negligence. However the argument against imposing liability on the master for wilful or even selfish wilful torts, based on unfairness to the master, loses force when it is remembered that *all* vicarious liability is strict in any event; that few employers bear the cost of accident losses personally, in a position to pass on or insure against the cost; and that, though the master may be morally innocent, so too is the plaintiff, and thus the contest is between two equally innocent parties.

Admittedly the policy considerations which weigh for or against imposing liability on the master are not identical with respect to all torts and no doubt this will affect developments in the law. But it seems likely that in the future the judges will be disposed, either by a generous

157 See Atiyah, supra n 1, chapter 2, Baty, supra n 103, chapter 8

158 Id at 27-8, Fleming, supra n 9, at 349; Batt, supra n 2, at 323, Thom, 'Agency Liability of the Master to Third Persons for Intentional Torts of the Servant' (1976) 29 *Okla L Rev* 946, at 955

interpretation of the Salmond formula or by a ready acceptance of some other feasible ground of liability, to give greater practical application in the context of a master's liability for intentional torts generally to the "old, robust and moral principle"[159] that "seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger".[160]

159 Morris v C W Martin & Sons Ltd [1966] 1 Q B 716 at 735 per Diplock L J

160 Hern v Nichols [1701] 1 Salk 289, 91 E R 256 per Holt C J , quoted in Lloyd v Grace Smith & Co [1912] A C 716 at 727 per Earl of Halsbury, at 740 Lord Shaw, Bugge v Brown (1919) 26 C L R 110 at 117 per Isaacs J , Rose v Plenty [1976] 1 W L R 141 at 148 per Scarman L J , British Rly Traffic & Electric Co Ltd v Roper (1939) 162 L T 217 at 222, Derham v Amev Life Assurance Co ltd (1981) 56 F L R 34 at 44