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Personal Injury Article

A Frolic of His Own

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Exegesis and eisegesis. Exegesis is interpreting a text's meaning in accordance with the author's context and discoverable meaning. Eisegesis is when a reader imposes their own subjective interpretation on a text. Both have more than a passing similarity to the common law doctrine of precedent and the techniques of statutory interpretation.

In the case of *WM Morrison Supermarkets plc -v- Various Claimants* [2020] UKSC 12 the Supreme Court continued the process of diverting and refreshing the principles governing the law of vicarious liability by revisiting the case of *Mohamud -v- WM Morrison Supermarkets plc* [2016] UKSC and applying a further process of re-interpretation to the judgment of Lord Toulson in that case.

As noted by the Supreme Court:

1. *This appeal is primarily concerned with the circumstances in which an employer is vicariously liable for the conduct of its employees, and provides the court with an opportunity to address the misunderstandings which have arisen since its decision in the case of Mohamud v WM Morrison Supermarkets plc [2016] UKSC 11; [2016] AC 677. It also raises an important question about the Data Protection Act 1998 ("the DPA").*

The decision in this case focuses on the second stage of the enquiry into whether a party can be found to be vicariously liable for the tortious acts of another, and recasts the approach which might hitherto have applied.

The case was decided in the context of a group action for data breach and raised squarely before the court a question of whether the floodgates of tortious liability should be opened in the context of an employee, who deliberately decided to break the law to cause trouble, embarrassment and financial loss to his employer. The facts were noted by the Supreme Court as follows:

2. *The appellant, Morrisons, is a company which operates a chain of supermarkets. The respondents are 9,263 of its employees or former employees. I shall refer to them as the claimants. Personal information about them was published on the Internet by another of Morrisons' employees, Mr Andrew Skelton.*

3. *At the material time, Skelton was a senior auditor in Morrisons' internal audit team. In July 2013 he was subject to disciplinary proceedings for minor misconduct and was given a verbal warning. Following those proceedings, he harboured an irrational grudge against Morrisons, which led him to make the disclosures in question.*

> 7. *On 12 January 2014 Skelton uploaded a file containing the data of 98,998 of the employees to a publicly accessible file-sharing website, with links to the data posted on other websites ("the disclosure"). The file was created from the personal copy of the data which he had made on his USB stick on 18 November. He made the disclosure when he was at home, using the mobile phone, the false email account and Tor. Having made the disclosure, he deactivated the email account, and on 12 March deleted the data and the file from the USB stick.*

The Courts below found for the claimants on the basis of what they understood to be the law, not unreasonably because of what they had read in the law reports. However, the statement of principle relied upon, as formulated by Lord Toulson, was one of those passages which had an expansionary effect. As the wise judge knows when deciding a case, one goes as far as you need to and no further in formulating and applying the law. The mischief was whether or not the motivation of an employee committing wrongful acts was legally significant:

> 16. *The courts below applied what they understood to be the reasoning of Lord Toulson in Mohamud [2016] AC 677. They treated as critical, in particular, his reference in para 45 of his judgment to "the principle of social justice which goes back to Holt CJ", his references in para 47 to the connection between the employee's conduct in that case and his employment ("an unbroken sequence of events", or "a seamless episode"), which they appear to have regarded as referring to an unbroken temporal or causal chain of events, and his statement in para 48 that "Mr Khan's motive is irrelevant", Mr Khan being the employee whose conduct was in question in that case. The resultant approach, if correct, would constitute a major change in the law.*
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> 17. *Lord Toulson's judgment was not intended to effect a change in the law of vicarious liability: quite the contrary. That becomes clear if the judgment is read as a whole, as I shall explain. The judgments below focused on the final paragraphs, in which Lord Toulson summarised long-established principles in the simplest terms and applied them to the facts of the case then before the court. A few phrases in those paragraphs, taken out of context, were treated as establishing legal principles: principles which would represent a departure from the precedents which Lord Toulson was expressly following.*

In order to ground the new approach on principle, it was necessary to revert closely to earlier caselaw including the well-known *Dubai Aluminium* case and to explain how read in context Lord Toulson's statement did not mean what it might be thought to mean at all:

> 23. *In that passage, Lord Nicholls identified the general principle ("the best general answer", as he said at para 23) applicable to vicarious liability arising out of a relationship of employment: the wrongful conduct must*

be so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment. That test was repeated in later cases such as Bernard v Attorney General of Jamaica [2004] UKPC 47; [2005] IRLR 398, Brown v Robinson [2004] UKPC 56, and Majrowski v Guy's and St Thomas's NHS Trust [2006] UKHL 34; [2007] 1 AC 224. As Lord Phillips noted in Various Claimants v Catholic Child Welfare Society [2013] 2 AC 1, paras 83 and 85, the close connection test has been applied differently in cases concerned with the sexual abuse of children, which cannot be regarded as something done by the employee while acting in the ordinary course of his employment. Instead, the courts have emphasised the importance of criteria that are particularly relevant to that form of wrongdoing, such as the employer's conferral of authority on the employee over the victims, which he has abused.

24. *The general principle set out by Lord Nicholls in Dubai Aluminium, like many other principles of the law of tort, has to be applied with regard to the circumstances of the case before the court and the assistance provided by previous court decisions. The words "fairly and properly" are not, therefore, intended as an invitation to judges to decide cases according to their personal sense of justice, but require them to consider how the guidance derived from decided cases furnishes a solution to the case before the court. Judges should therefore identify from the decided cases the factors or principles which point towards or away from vicarious liability in the case before the court, and which explain why it should or should not be imposed. Following that approach, cases can be decided on a basis which is principled and consistent.*

25. *Having explained how the close connection case was expressed in Lister and elaborated in Dubai Aluminium, and having also explained that it had been applied in a number of subsequent cases at the highest level, Lord Toulson summarised the present law in paras 44-46 of his judgment ([2016] AC 677). "In the simplest terms", he said, the court had to consider two matters. The first question was what functions or "field of activities" had been entrusted by the employer to the employee. In other words, as Lord Nicholls put it in Dubai Aluminium at para 23, it is necessary to identify the "acts the … employee was authorised to do". Secondly, Lord Toulson said at para 45, "the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt CJ". That statement, expressly put in the simplest terms, was more fully stated by Lord Nicholls in Dubai Aluminium [2003] 2 AC 366, para 23: in a case concerned with vicarious liability arising out of a relationship of employment, the court generally has to decide whether the wrongful conduct was so closely connected with acts the employee was authorised to do that, for the purposes of the liability of his employer, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment. That statement of the law, endorsed in Mohamud and in several other decisions at the highest level, is authoritative.*

26. Lord Toulson was not suggesting any departure from the approach adopted in Lister and Dubai Aluminium. His position was the exact opposite. Nor was he suggesting that all that was involved in determining whether an employer was vicariously liable was for the court to consider whether there was a temporal or causal connection between the employment and the wrongdoing, and whether it was right for the employer to be held liable as a matter of social justice. Plainly, the close connection test is not merely a question of timing or causation, and the passage which Lord Toulson cited from Dubai Aluminium makes it clear that vicarious liability for wrongdoing by an employee is not determined according to individual judges' sense of social justice. It is decided by orthodox common law reasoning, generally based on the application to the case before the court of the principle set out by Lord Nicholls at para 23 of Dubai Aluminium, in the light of the guidance to be derived from decided cases. In some cases, the answer may be clear. In others, inevitably, a finer judgment will be called for.

The crucial passage on motive was this:

29. Lord Toulson concluded his analysis of the facts by stating, at para 48:

> *"Mr Khan's motive is irrelevant. It looks obvious that he was motivated by personal racism rather than a desire to benefit his employer's business, but that is neither here nor there."*
> *Read in isolation, the statement that "motive is irrelevant" would be misleading. Lord Toulson had just said, in the preceding paragraph, that one of his reasons for finding that there was a close connection was that Mr Khan was purporting to act about his employer's business, and that his conduct towards the customer was not, therefore, "something personal". So, the question whether Mr Khan was acting, albeit wrongly, on his employer's business, or was acting for personal reasons, was plainly important.*

30. When Lord Toulson said that Mr Khan's motive was irrelevant, he was addressing a point which the judge had mentioned, namely that the reasons why Mr Khan had become violent were unclear. As just mentioned, Lord Toulson had already concluded that Mr Khan was going, albeit wrongly, about his employer's business, rather than pursuing his private ends, and had treated that fact as supporting the existence of a close connection between his field of activities and the commission of the tort. Having reached that conclusion, the reason why Mr Khan had become so enraged as to assault the motorist could not make a material difference. That is all, I believe, that the remark that "Mr Khan's motive is irrelevant" was intended to convey.

This, in turn, led to the resurrection of a very old approach to the question of whether vicarious liability applied or not, shorn of the developments of the last 20 years was the act of which complaint was made, so closely connected to the employee's conduct the employer was liable, or was it, instead in the time hallowed phrase, an act

where the employee was off on a frolic of his own? This is a point which I remember pleading and arguing up hill and down dale over the years when dealing with over enthusiastic ticket collectors or nightclub bouncers who have, for better or for worse, thumped a customer with legal action unsurprisingly following.

> *38. More recently, the issue of liability for acts performed by an employee in the course of an independent venture of his own was considered by Lord Nicholls in Dubai Aluminium [2003] 2 AC 366, para 32:*
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> > *"A distinction is to be drawn between cases such as Hamlyn v John Houston & Co [1903] 1 KB 81, where the employee was engaged, however misguidedly, in furthering his employer's business, and cases where the employee is engaged solely in pursuing his own interests: on a 'frolic of his own', in the language of the time-honoured catch phrase … The matter stands differently when the employee is engaged only in furthering his own interests, as distinct from those of his employer. Then he 'acts as to be in effect a stranger in relation to his employer with respect to the act he has committed': see Isaacs J in Bugge v Brown (1919) 26 CLR I10, 118."*

It follows that applying the test as to whether the employee was on a frolic of his own, Mr Skelton plainly was and the court concluded accordingly.

> *47. All these examples illustrate the distinction drawn by Lord Nicholls at para 32 of Dubai Aluminium [2003] 2 AC 366 between "cases … where the employee was engaged, however misguidedly, in furthering his employer's business, and cases where the employee is engaged solely in pursuing his own interests: on a 'frolic of his own', in the language of the time-honoured catch phrase." In the present case, it is abundantly clear that Skelton was not engaged in furthering his employer's business when he committed the wrongdoing in question. On the contrary, he was pursuing a personal vendetta, seeking vengeance for the disciplinary proceedings some months earlier. In those circumstances, applying the test laid down by Lord Nicholls in Dubai Aluminium in the light of the circumstances of the case and the relevant precedents, Skelton's wrongful conduct was not so closely connected with acts which he was authorised to do that, for the purposes of Morrisons' liability to third parties, it can fairly and properly be regarded as done by him while acting in the ordinary course of his employment.*

But what if Mr Skelton had not been malicious, but simply careless? If he had lost a data stick or an unencrypted laptop containing the pertinent data? In those circumstances his employer might still have been liable for his careless actions resulting in a data breach:

> 54. *Attractively though this argument was presented, it is not persuasive. The imposition of a statutory liability upon a data controller is not inconsistent with the imposition of a common law vicarious liability upon his employer, either for the breach of duties imposed by the DPA, or for breaches of duties arising under the common law or in equity. Since the DPA is silent about the position of a data controller's employer, there cannot be any inconsistency between the two regimes. That conclusion is not affected by the fact that the statutory liability of a data controller under the DPA, including his liability for the conduct of his employee, is based on a lack of reasonable care, whereas vicarious liability is not based on fault. There is nothing anomalous about the contrast between the fault-based liability of the primary tortfeasor under the DPA and the strict vicarious liability of his employer. A similar contrast can often be drawn between the fault-based liability of an employee under the common law (for example, for negligence) and the strict vicarious liability of his employer, and is no more anomalous where the employee's liability arises under statute than where it arises at common law.*

Already some commentators are suggesting that the effect of the decision will be to dampen down the fires of data breach litigation.

I would suggest it will do no such thing, as the decision of the Supreme Court confirms that an employer can be vicariously liable for actions of its employee who carelessly or innocently causes a data breach.

There will be many more cases of carelessness than cases of deliberate misconduct.

The position is thus reached that when a data breach does occur through the careless actions of an employee, it will be for the employer to make the argument that they should not be liable, and that will be an argument very difficult indeed to make good.

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