HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, HAYNE AND CALLINAN JJ

TRAVIS KANE SCOTT & ORS APPELLANTS

AND

GEOFFREY ARTHUR DAVIS RESPONDENT

Scott v Davis [2000] HCA 52
5 October 2000
A16/1999

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of South Australia

Representation:

W J N Wells QC with A L Tokley for the appellants (instructed by Johnston Withers)

D M Quick QC with K G Nicholson for the respondent (instructed by Thomson Playford)

CATCHWORDS

Scott v Davis

Negligence – Vicarious liability – Agency – Whether owner of aircraft vicariously liable for negligence of person who flew aircraft with owner's consent for a social purpose connected with owner.

Negligence – Vicarious liability – Aircraft – Motor vehicles – Negligent use of chattel of conveyance – Whether the principles in *Launchbury v Morgans* [1973] AC 127 apply – Non-delegable duties of care – Strict liability.

1 GLEESON CJ. The issue in this appeal is whether the respondent, the owner of a light aeroplane which crashed as a consequence of the negligence of the pilot, is vicariously liable for such negligence.

2 The pilot was killed in the crash. One of the appellants, who was a passenger, and who was being taken for a joy-ride, was seriously injured. The other appellants, the parents of the passenger, suffered nervous shock.

3 A claim that the respondent was personally negligent in relation to the circumstances surrounding the flight was unsuccessful at the trial, and was not pursued in this Court. The pilot was regarded by the respondent as competent. An allegation of carelessness in entrusting the control of the aeroplane to him was considered and rejected. The present appeal has been argued on the basis that the respondent was not personally at fault.

4 The facts are set out in the judgment of Gummow J. The principle upon which the appellants rely for their contention that those facts give rise to vicarious liability in the respondent is elusive. There are a number of reasons for that. They include the protean nature of the concept of agency, which bedevils this area of discourse. In the leading English case on the subject[1], Lord Wilberforce made the point that to describe a person as the agent of another, in this context, is to express a conclusion that vicarious liability exists, rather than to state a reason for such a conclusion. Nevertheless, some judges refer to agency as a criterion of liability, similar to employment. If that is to be done, it is necessary to be more particular as to what is meant.

5 It is not contended that the respondent was subject to a non-delegable duty of care, or that he authorised or ratified a negligent act of the pilot. Those possible grounds of liability may be put to one side.

6 A claim that an owner or a bailee of a chattel is vicariously liable for the negligence of another person who has the temporary management of the chattel, even when that other person is not an employee of the owner or bailee, is a familiar feature of modern litigation. It forms the foundation of many actions for damages for personal injury, or for injury to property, arising out of the use of a motor vehicle. In personal injury cases, such a claim is commonly supported by a statutory presumption which, in turn, forms part of a scheme of compulsory insurance[2]. Where there is no such statutory presumption, the claim requires the support of a principle of common law.

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1 *Launchbury v Morgans* [1973] AC 127 at 135.

2 See Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 733-734.

7 Whatever the principle is, even though the most common occasion for its application is, nowadays, the negligent driving of motor vehicles, it cannot apply only in respect of motor vehicles. There are three reasons for that.

8 First, even though the line of authority which the more recent cases profess to follow may provide an insecure foundation for some of the propositions enunciated in those cases, the earlier authorities relied upon were concerned with horse-drawn carriages which, at the time, provided commonplace examples of chattels which, if negligently managed, could cause harm to third parties. As was pointed out in *Soblusky v Egan*[3], the law governing the vicarious responsibility of the owner or bailee of a motor vehicle for the negligence of its driver was established in horse and buggy days[4]. Horse-drawn conveyances still exist. The law concerning them did not cease to apply with the invention of the motor vehicle. Furthermore, as the judgment of Jordan CJ in *Christmas v Nicol Bros Pty Ltd*[5] demonstrates, cases about ships and railway trains have involved the same issue. In 1975, the Supreme Court of Ireland divided on the principle to be applied to the case of a negligently managed teapot[6].

9 Secondly, the leading Australian and English cases are inconsistent with the suggestion that there is a special principle of common law applying to motor vehicles. As was noted, the rule applied in *Soblusky v Egan*[7] was traced back to horse and buggy days. In *Launchbury v Morgans*, Lord Wilberforce denied that a special rule applied to motor cars, and expressed the rule to be applied as one relating to chattels generally[8]. So did Lord Cross of Chelsea[9].

10 Thirdly, as a number of their Lordships pointed out in *Launchbury v Morgans*[10], to create a special rule for motor vehicles is a legislative, not a judicial, function. There is no legitimate basis upon which a court, in declaring

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3 (1960) 103 CLR 215 at 229 per Dixon CJ, Kitto and Windeyer JJ.

4 The word used was "settled", but that may be an exaggeration.

5 (1941) 41 SR (NSW) 317.

6 *Moynihan v Moynihan* [1975] IR 192.

7 (1960) 103 CLR 215.

8 [1973] AC 127 at 135.

9 [1973] AC 127 at 144-145.

10 [1973] AC 127 at 136-137 per Lord Wilberforce, 142-143 per Lord Pearson, 145-146 per Lord Cross of Chelsea, 151 per Lord Salmon.

the common law, can conclude that there is one rule for motor vehicles and a different rule for horse-drawn carriages, railway trains, motor boats, sailing vessels, or aeroplanes. Legislatures may draw, and have drawn, such distinctions, but that illustrates the difference between legislation and judicial development of the principles of the common law[11].

11 The principle by which the existence of vicarious liability is to be determined is to be distinguished from evidentiary considerations concerning the facts relevant to the application of the principle. The nature of the chattel in question, or, if it be a motor vehicle, the nature of the motor vehicle, or the nature of the occasion of its use, may be significant for the purpose of drawing inferences as to the relationship between an owner or bailee and a person for whose negligence the owner or bailee is claimed to be responsible[12]. However, such considerations are immaterial in the present case, where the facts as to the relationship between the respondent and the pilot of the aeroplane are known.

12 In *Soblusky v Egan*[13] the bailee of a motor vehicle was a passenger in the vehicle, asleep, when negligence of the driver resulted in the damage the subject of the action. The bailee was held by this Court to be vicariously responsible for the driver's negligence. The principle upon which that conclusion was based was said to be drawn from a long line of authority, including the decision of the Privy Council in *Samson v Aitchison*[14]. The Court said[15]:

> "It means that the owner or bailee being in possession of the vehicle and with full legal authority to direct what is done with it appoints another to do the manual work of managing it and to do this on his behalf in circumstances where he can always assert his power of control. Thus it means in point of law that he is driving by his agent. It appears quite immaterial that Soblusky went to sleep. That meant no more than a complete delegation to his agent during his unconsciousness. The principle of the cases cited is simply that the management of the vehicle is done by the hands of another and is in fact and law subject to direction and control. This therefore must be regarded as an obvious case."

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11 cf *McLoughlin v O'Brian* [1983] 1 AC 410 at 429-430 per Lord Scarman.

12 This matter is discussed in *Christmas v Nicol Bros Pty Ltd* (1941) 41 SR (NSW) 317 and *Jennings v Hannan* (*No 2*) (1969) 71 SR (NSW) 226.

13 (1960) 103 CLR 215.

14 [1912] AC 844.

15 (1960) 103 CLR 215 at 231 per Dixon CJ, Kitto and Windeyer JJ.

13 Some years earlier, in *Christmas v Nicol Bros Pty Ltd*[16], in the Supreme Court of New South Wales, Jordan CJ said, delivering the judgment of the Court, in a case concerning a motor vehicle:

> "If a person sustains physical injury to himself or his property through the negligent use of an article by another person, it is the user of the article who is liable in tort. Its owner is not liable as such; but he too incurs liability if, for example, it is established that the user was his employee, and that the use was in the course of his employment. If so, his ownership is of itself irrelevant to his liability, which is vicarious and arises out of the relationship of master and servant … As an exception, however, to the general rule, in the special case of a vehicle plying for hire in a public street or used there for the conveyance for hire of passengers or goods, the owner is in New South Wales liable as well as the driver, by virtue of ss 4 and 260 of the *Transport Act*, 1930 … But, save in this special case, in order to fix with vicarious liability a person other than the negligent driver himself, it is necessary to show that the driver was at the time an agent of his, acting for him and with his authority in some matter in respect of which he had the right to direct and control his course of action. If this is proved, liability is established on the part of the other person, and it is immaterial whether he is the owner of the vehicle or has begged, borrowed or stolen it."

14 The reference to the right to direct and control the driver's course of action cannot be taken to include a reference to a right which is not, in practice, capable of being exercised. So understood, the passage is consistent with *Soblusky v Egan*. It may be noted that Jordan CJ did not merely apply the question-begging label "agent"; he went on to explain what he meant by it.

15 In the present case, the Court was not invited to depart from *Soblusky v Egan*. However, that decision does not assist the appellants.

16 The pilot was not the agent of the respondent in the sense explained in the above passages. At the time of the pilot's negligent act, the respondent was not in a position to assert a power of control over the manner in which the pilot was flying the aeroplane. The pilot was neither in fact, nor in law, subject to his direction and control at the critical time.

17 The appellants contend for a principle wider than that accepted and applied in *Soblusky v Egan*. The principle, they say, is to be found in

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16 (1941) 41 SR (NSW) 317 at 319-320.

Launchbury v Morgans[17], and in earlier cases such as *Hewitt v Bonvin*[18] and *Ormrod v Crosville Motor Services Ltd*[19]. In its application to the present facts, it is said to be that, even if the pilot was not under the respondent's control at the time of the accident, he was using the aeroplane at the respondent's request and for the respondent's purposes, and on that ground the respondent is vicariously liable.

18 I am unable to accept that there is a principle of such width. There are a number of objections to it. First, as the reasons of Gummow J demonstrate, it has no adequate foundation in authority. Secondly, it is impossible to reconcile with the general rule that a person is not vicariously liable for the negligence of an independent contractor. An independent contractor may be using an article at another's request and for the other's purposes, but the other is not ordinarily responsible for the contractor's negligence. Thirdly, the criterion of application of the principle is ill-defined and likely to be capricious in its operation. There are many circumstances, in which the owner or bailee of a chattel may request or permit another person to use or operate it, which do not yield readily to classification according to whether a purpose of the owner or bailee is being served. The difficulties which have been experienced in deciding whether a motor car, available for the use of a number of family members, is, on a particular occasion, being used for a purpose of the owner, illustrate the point. The unsuccessful attempt to develop a special doctrine for the family car is a reflection of those difficulties. In a social setting, judgments formed on the basis of assigning purposes can be artificial and contrived.

19 In *Launchbury v Morgans*[20], Lord Wilberforce spoke of the use of a chattel, such as the driving of a car, "under delegation of a task or duty". There may be cases in which the driver of a motor vehicle is to be regarded as the representative of an owner or bailee who has no immediate control over the vehicle, in circumstances which make the owner or bailee liable on the same principle as was applied to an independent contractor in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*[21]. The present is not such a case. All that the pilot did was to render, on a social occasion, a voluntary service at the request of the respondent. He was not a representative or delegate of the respondent.

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17 [1973] AC 127.

18 [1940] 1 KB 188.

19 [1953] 1 WLR 409; [1953] 1 All ER 711; [1953] 1 WLR 1120; [1953] 2 All ER 753.

20 [1973] AC 127 at 135.

21 (1931) 46 CLR 41.

20 The wider principle for which the appellants contend should not be accepted in this country.

21 On the findings of fact made by the trial judge, the respondent did nothing wrong. There is no principle upon which he can be made vicariously responsible for what the pilot did. The appeal should be dismissed with costs.

22 McHUGH J. The owner of a motor vehicle is liable for the negligent conduct of a driver when the owner is present in the vehicle – even if he is asleep when the conduct occurs[22]. The first appellant was injured as the result of the negligent flying of a two seater aeroplane. His father had asked the owner of the plane whether the first appellant could be given a ride in the plane. The owner agreed but got a licensed pilot to fly the plane. The owner remained on the ground without any means of directing or instructing the pilot during the flight. Is the owner liable for the negligence of the pilot? That is the ultimate issue in this appeal which is brought against an order of the Full Court of the South Australian Supreme Court setting aside a verdict of the District Court of that State holding the owner liable for the consequences of the negligence.

23 In my opinion, the District Court was correct in finding that the owner was liable for the pilot's negligence. That is because the owner had delegated to the pilot a task which the owner had agreed to perform, the pilot was not acting as an independent principal but was subject to the owner's general direction and control, and the pilot was acting within the scope of the authority conferred on him by the owner. The pilot was therefore an agent for whose negligence the owner was responsible.

The factual background

24 The injury to the first appellant occurred in 1990 while the three appellants were at the respondent's property in the Barossa Valley to celebrate the birthday of the respondent's daughter. The first appellant is the son of the second and third appellants and the nephew of the respondent, who was the owner of the plane.

25 On the property, the respondent had several planes and an airstrip. During the day in question, the second appellant and another man asked the respondent, an amateur pilot, whether their children could be flown in one of the respondent's planes. The respondent said that he would think about it. Later, he asked his wife to ask a Mr Bradford, another guest, if he would take the boys on a flight. Mr Bradford later took the first appellant up in a two seater Aeronca plane, owned by the respondent. After taking off, the plane crashed, killing Mr Bradford and injuring the first appellant.

26 The first appellant sued the respondent in negligence and for breach of statutory duty in respect of the injuries that he suffered in the crash. The second and third appellants also sued the respondent for negligence and breach of statutory duty to recover the economic and non-economic losses they claimed to have suffered as a result of the crash.

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22 *Samson v Aitchison* [1912] AC 844; *Soblusky v Egan* (1960) 103 CLR 215.

The decision of the trial judge

27 The trial judge held that Mr Bradford was negligent and that his negligence caused the crash. His Honour made no findings in respect of the cause of action for breach of statutory duty. That cause of action is no longer relevant. In determining whether the respondent was liable for Mr Bradford's negligence, the trial judge held that "[n]either the relationship of master and servant, nor that of principal and agent on contractually agreed terms existed". However, the learned trial judge said that, in addition to the master/servant and principal/agent categories:

> "[T]here are a number of situations in which, in tort, one person may be liable for the acts of another, quite independently of any contract between them. Of present relevance are the so-called 'motor cases'."

28 His Honour held that the present case was one where the owner was liable for the tort of the pilot because the pilot was his agent.

The decision of the Full Court of the South Australian Supreme Court

29 By majority[23], the Full Court of the South Australian Supreme Court allowed the appeal and set aside the judgment of the trial judge[24]. The majority judges accepted that, where the negligence of the driver of a motor vehicle causes damage, the owner will be liable for that negligence if two elements are present: (1) a request by the owner that the driver use the vehicle and (2) an interest by the owner in the purpose for which the vehicle is being driven[25]. However, their Honours thought that "the better approach is to confine the wider approach to vicarious liability to cases involving motor vehicles"[26]. As the negligence in this case involved the use of a plane, they held that the respondent was not liable for Mr Bradford's negligence. Millhouse J dissented on the ground that it was not logical to distinguish between liability for the negligent driving of a motor vehicle and liability for the negligent flying of an aeroplane[27].

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23 Doyle CJ and Nyland J; Millhouse J dissented.

24 *Davis v Scott* (1998) 71 SASR 361 at 382-383.

25 *Davis v Scott* (1998) 71 SASR 361 at 375-376.

26 *Davis v Scott* (1998) 71 SASR 361 at 376.

27 *Davis v Scott* (1998) 71 SASR 361 at 386-387.

The issues

30 Given the approach of the trial judge and the judges in the Full Court of the Supreme Court of South Australia, three principal issues arise. First, is a principal liable only for those wrongful acts of the agent which he or she has authorised, instigated or ratified? Second, if that is the general rule, is there an exception in respect of the liability of owners concerning the use of their motor vehicles? Third, if the exception exists, should it be confined to motor vehicles?

31 Many modern writers on agency would contend that each of these three questions should be answered in the affirmative. Thus, the learned authors of *Bowstead and Reynolds on Agency*[28] summarise the law of vicarious liability as follows:

> "(1) If an agent is the servant of his principal, the principal is liable for loss or injury caused by the wrongful act of the agent when acting in the course of his employment.
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> (2) A principal is liable for loss or injury caused by the tort of his agent, whether or not his servant, in the following cases:
>
> (a) if the wrongful act was *specifically instigated, authorised or ratified* by the principal;
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> (b) if the wrongful act amounts to a breach by the principal of a duty personal to himself, liability for non-performance or non-observance of which cannot be avoided by delegation to another;
>
> (c) (perhaps) in the case of a statement made in the course of representing the principal made within the actual or apparent authority of the agent: and for such a statement the principal may be liable notwithstanding that it was made for the benefit of the agent alone and not for that of the principal." (emphasis added)

32 According to this formulation, a principal is not *generally* liable for the wrongful act of an agent who is not a servant unless the principal directly instigated, authorised or ratified that act.

33 Like their English counterparts, text writers in Australia have doubted that in Australia, cases involving motor vehicles aside, a principal is vicariously liable

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28 Reynolds, *Bowstead and Reynolds on Agency*, 16th ed (1996) at 502 (footnotes omitted).

for the acts of his or her agent done on his or her behalf and within the scope of the agent's authority. The general academic view[29] in Australia appears to be that:

(1) an employer is vicariously liable for the actions of its employees within the course of employment;

(2) a principal is not generally vicariously liable for the actions of its independent contractors; and

(3) the "principal/agent" concept is not useful when discussing vicarious liability for tort.

34 In my view, however, an analysis of the authorities justifies the conclusion that a principal is also liable for the wrongful acts of an agent where the agent is performing a task which the principal has agreed to perform or a duty which the principal is obliged to perform and the principal has delegated that task or duty to the agent, provided that the agent is not an independent contractor. The principal is also liable for the wrongful acts of a person who is acting on the principal's behalf as a representative and not as an independent principal and within the scope of the authority conferred by the principal.

35 For a number of reasons, I do not regard the passage in *Bowstead and Reynolds* as a complete statement of the circumstances in which a principal may be liable for the wrongful acts of an agent. First, it fails to take account of numerous statements by eminent common lawyers which suggest a wider liability than that expressed in that passage. Second, it cannot be reconciled with the many cases that hold that the owner of a motor vehicle may be liable for the negligence of a driver who is not the owner's servant[30]. Third, it fails to take into account that many persons over whom an employer has no right of physical control are no longer classed as independent contractors for whose conduct the employer is not responsible. This has had the result that the employer is liable

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29 See eg Balkin and Davis, *Law of Torts*, 2nd ed (1996) at 745-746; Fleming, *The Law of Torts*, 9th ed (1998) at 413-414. But a contrary view is taken in Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 732-733.

30 See eg *Samson v Aitchison* [1912] AC 844; *Parker v Miller* (1926) 42 TLR 408; *Mortess v Fry* [1928] SASR 60; *Ormrod v Crosville Motor Services Ltd* [1953] 1 WLR 1120; [1953] 2 All ER 753; *Trust Co Ltd v De Silva* [1956] 1 WLR 376; *Soblusky v Egan* (1960) 103 CLR 215; *Gosson Industries Pty Ltd v Jordan* [1964] NSWR 687; *Jennings v Hannan (No 2)* (1969) 89 WN (Pt 2) (NSW) 232. See also *Hewitt v Bonvin* [1940] 1 KB 188; *Christmas v Nicol Bros Pty Ltd* (1941) 41 SR (NSW) 317; *Manawatu County v Rowe* [1956] NZLR 78; *Rambarran v Gurrucharran* [1970] 1 WLR 556; [1970] 1 All ER 749; *Morgans v Launchbury* [1973] AC 127.

for many a wrong that in earlier times would have been classed as the wrong of an independent contractor. Fourth, it seems premised on the view – which I do not accept[31] – that, after the decision in *Quarman v Burnett*[32], a principal was ordinarily liable for an agent's torts only when the agent was a servant. Fifth, in so far as sound legal policy requires that a principal should be liable for the conduct of an agent who is a servant in the common law sense, that policy also requires that the principal should be liable for the conduct of an agent who is not an independent contractor and who acts on behalf of the principal in performing tasks or duties which the principal has delegated to the agent. That policy also requires that the principal should be liable where the agent is acting as the representative of the principal rather than as an independent actor.

A principal is liable for the unauthorised acts of an agent acting as the representative of the principal and within the scope of his authority

36 Servants were, but agents were not, known to the early common law[33], the notion of responsibility for an agent being a comparatively late starter in the common law. From the end of the 17th century, however, some of the greatest common lawyers that the law has known have accepted that a principal may be liable for the unauthorised acts of an agent provided that the agent was acting within the scope of his authority or employment[34]. They have accepted that a principal may be liable for the improper mode of performing acts that are within the authority of the agent, irrespective of whether the principal authorised the improper mode of carrying out the act in question and even if the principal has forbidden the wrongful act. Before 1840, professional opinion may have gone so far as to accept that a principal might be liable for the wrongful conduct of any person when the conduct occurred in the course of doing work for the benefit of the principal. Thus, in *Bush v Steinman*[35], Heath J said "where a person hires a

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31 cf Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 732-733 who state that the "basic rule is that a person is vicariously liable for the torts of an agent" and that an agent "may be a servant or an independent contractor or neither."

32 (1840) 6 M & W 499 [151 ER 509].

33 "As late as Blackstone, agents appear under the general head of servants": Oliver Wendell Holmes Jr, *The Common Law*, (1882) at 228. See also Oliver Wendell Holmes Jr, "Agency", (1891) 5 *Harvard Law Review* 1 at 9.

34 In *Lloyd v Grace, Smith & Co* [1912] AC 716 at 726-727, the Earl of Halsbury was of the view that the law had been clear for more than two centuries and never doubted.

35 (1799) 1 Bos & Pul 404 at 409 [126 ER 978 at 980], a decision which the English Report states was "overruled" by *Reedie v London and North Western Railway Co* (1849) 4 Ex 244 [154 ER 1201].

coach upon a job, and a job-coachman is sent with it, the person who hires the coach is liable for any mischief done by the coachman while in his employ, though he is not his servant". This view of the law was accepted by other common law judges[36].

37 But in 1840 in *Quarman v Burnett*[37], the law was finally settled. Ordinarily, a person is not liable for the negligence of another if the latter was what we now call an independent contractor. In *Quarman*, the defendants, "two old ladies"[38], had been hiring a horse, carriage and driver from a third party for some years. In more recent times, they had supplied their own carriage and provided a coat and hat for the driver. Through the driver's negligence, the plaintiff sustained personal injury. The Court of Exchequer held that the defendants were not liable for the driver's negligence. Mr Baron Parke gave the judgment of the Court. He held that the defendants were not liable for the acts of the driver "on the simple ground, that the servant is the servant of another, and his act the act of another"[39]. Liability was in the master "who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey"[40].

38 The defendants could only be liable, therefore, on the basis of "a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit"[41]. Mr Baron Parke rejected the existence of such a principle.

39 However, nothing in *Quarman* denied that a principal could be liable for the wrongful acts of a person who was a representative or delegate of the principal rather than an independent contractor. And the view that a principal

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36 See, for example, the judgments of Holroyd and Bayley JJ in an equally divided court in *Laugher v Pointer* (1826) 5 B & C 547 [108 ER 204]; *Brady v Giles* (1835) 1 M & Rob 494 [174 ER 170] and *Randleson v Murray* (1838) 8 Ad & E 109 [112 ER 777].

37 (1840) 6 M & W 499 [151 ER 509].

38 (1840) 6 M & W 499 at 505 [151 ER 509 at 512].

39 (1840) 6 M & W 499 at 509 [151 ER 509 at 514].

40 (1840) 6 M & W 499 at 509 [151 ER 509 at 513-514].

41 (1840) 6 M & W 499 at 510 [151 ER 509 at 514].

may be liable for the conduct of an agent who is not a servant has been championed by many distinguished lawyers.

40 In *Barwick v English Joint Stock Bank*[42], Willes J, perhaps the greatest common lawyer of the 19th century[43], in giving the judgment of the Court of Exchequer said[44]:

> "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, though no express command or privity of the master be proved[45]." (emphasis added)

41 Willes J also said[46]:

> "It is true, he has not authorized 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." (emphasis added)

42 But in what sense was Willes J using the term "agent"? Was it a tautologous reference to "servant" or did his Lordship intend to include agents who were not servants? In *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*[47] ("*CML*"), Dixon J noted[48] that "difficulties ... arise from the many senses in which the word 'agent' is employed". His Honour added that[49] "the expressions 'for,' 'on behalf of,' 'for the benefit of' and even 'authorize' are often used in relation to services

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42 (1867) LR 2 Ex 259.

43 In *Mackay v Commercial Bank of New Brunswick* (1874) LR 5 PC 394 at 411, Sir Montague Smith, giving the Advice of the Privy Council, said that Willes J was "one of the most learned Judges who ever sat in *Westminster Hall*."

44 (1867) LR 2 Ex 259 at 265.

45 See *Laugher v Pointer* (1826) 5 B & C 547 at 554 [108 ER 204 at 207].

46 (1867) LR 2 Ex 259 at 266.

47 (1931) 46 CLR 41.

48 (1931) 46 CLR 41 at 50. See also *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644 at 652.

49 (1931) 46 CLR 41 at 50.

which, although done for the advantage of a person who requests them, involve no representation".

43 *Barwick* concerned liability for the conduct of a servant. But it is impossible to think that a judge as great as Willes J would have stated the law as he did if he thought that the principal was only liable for the acts of an agent when the agent was a servant. The distinction between agents for whom the principal was liable and those for whom they were not liable must have been in the forefront of Willes J's mind in *Barwick*. He had cited the judgment of Littledale J in *Laugher v Pointer*[50] to support his general statement of principle. To a large extent, that judgment had formed the basis of the decision in *Quarman*. When Willes J referred to the liability of the principal for the acts of an agent, he must surely have had in mind the distinction between agents who were servants and those who were independent contractors. Yet he went beyond confining the principal's liability to wrongs done by servants.

44 When *Barwick* was decided, the generally accepted test for distinguishing between the servant and the independent contractor was *the right* to control the manner in which the agent did the work. Thus, in *Sadler v Henlock*[51], the King's Bench held an owner of land liable for the nuisance caused by a labourer hired for a fixed sum even though the work had not been the subject of any direction or inspection by the owner. Crompton J said[52] "[t]he test here is, whether the defendant retained the power of controuling the work. No distinction can be drawn from the circumstance of the man being employed at so much a day or by the job. I think that here the relation was that of master and servant, not of contractor and contractee". Three years after the decision in *Barwick*, Willes J himself applied[53] the control test in holding that stevedores were not the servants of the master or owner of a vessel and that the master or owner was not liable for the negligence of the employees of the stevedores. His Lordship said[54] that "[i]n one sense, indeed, they may be said to be agents of the owner; but they are not in any sense his servants". That was because the stevedores were[55] "altogether independent of the master or owner". That is, notwithstanding that the stevedores were "[i]n one sense" agents of the owner, the owner was not liable

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50 (1826) 5 B & C 547 at 554 [108 ER 204 at 207].

51 (1855) 4 El & Bl 570 [119 ER 209].

52 (1855) 4 El & Bl 570 at 578 [119 ER 209 at 212].

53 *Murray v Currie* (1870) LR 6 CP 24.

54 *Murray v Currie* (1870) LR 6 CP 24 at 27.

55 (1870) LR 6 CP 24 at 26-27.

for the negligence which could be imputed to the stevedores. This suggests that, in speaking of liability for the acts of agents as well as servants in *Barwick*, Willes J was referring to agents who, though not servants, were not so independent of the principal that they would be classified as independent contractors.

45 Moreover in *Barwick*, Willes J delivered a written judgment on behalf of the court. The other members of the court were Blackburn, Keating, Mellor, Montague Smith and Lush JJ, each of whom was a recognised master of the common law. If the common law of that time made the principal vicariously liable only for the conduct of an agent who was a servant in the strict sense, it would be surprising if none of these great lawyers had recognised the heresy that Willes J was perpetuating.

46 No doubt it is possible that Willes J was using the term "agent" as a synonym for "servant" and as covering the same factual situation. But this seems unlikely. As Professor Holdsworth has pointed out, "[i]n common speech, no doubt, both in the seventeenth century and in our own day, the terms principal and agent connote commerce, and the terms master and servant domestic service"[56]. Moreover, Willes J made these statements after saying[57] that "the question whether the principal is answerable for the act of an agent in the course of his business … was settled as early as Lord Holt's time[58]".

47 In *Hern v Nichols*[59], to which Willes J referred, Lord Holt had held that a merchant was liable in deceit for the conduct of "his factor beyond sea"[60]. A factor was not a servant[61] although his relationship with the principal had much in common with that of a servant[62]. He was more akin to what we would now call a consignment agent working on commission. Given his reference to *Hern v Nichols*[63], Willes J must at least have intended the liability of the principal to

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56 Holdsworth, *A History of English Law*, 2nd ed (1966 reprint), vol 8 at 227.

57 (1867) LR 2 Ex 259 at 265.

58 *Hern v Nichols* 1 Salk 289 [91 ER 256].

59 1 Salk 289 [91 ER 256].

60 1 Salk 289 at 289 [91 ER 256 at 256].

61 *Bush v Steinman* (1799) 1 Bos & Pul 404 at 409 [126 ER 978 at 980].

62 Holdsworth, *A History of English Law*, 2nd ed (1966 reprint), vol 8 at 225-226.

63 1 Salk 289 [91 ER 256].

cover "the acts of his agents towards third parties in a relation which he (through the agent or otherwise) has invited them to occupy"[64].

48 Furthermore in *Laugher v Pointer*[65], Littledale J had said that the master was liable for the acts of his servants because "such servants *represent* the master himself, and their acts stand upon the same footing as his own". That being so, it would not be surprising if Willes J was using the term "agent" to include a person who acted as the representative of the principal, whether or not the agent was also a servant. That the liability of the principal extended to the conduct of such persons was later confirmed by this Court in *CML*[66].

49 It is very likely therefore that in *Barwick* their Lordships intended to say that the liability of a principal included liability for the wrongful conduct of some agents who were not servants in the employee sense and that it at least included those commercial agents who acted as representatives of their principals in dealings with third parties. And as Dr Baty, who was not in favour of extending the liability of principals, acknowledged, a number of cases supported that view of the law[67]. In *Weir v Bell*[68], in a passage cited with apparent approval by Lord Macnaghten in *Lloyd v Grace, Smith & Co*[69], Bramwell LJ stated:

> "[E]very person who authorizes 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."

50 The reference to "agent" in *Barwick* may also have been intended to cover persons, particularly commercial agents, who were employed for a particular occasion but were subject to direction and control[70] or who were volunteers[71] but

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64 Baty, *Vicarious Liability* (1916) at 12.

65 (1826) 5 B & C 547 at 553 [108 ER 204 at 207] (emphasis added).

66 (1931) 46 CLR 41.

67 Baty, *Vicarious Liability*, (1916) at 12.

68 (1878) 3 Ex D 238 at 245.

69 [1912] AC 716 at 737.

70 *Federal Commissioner of Taxation v J Walter Thompson (Aust) Pty Ltd* (1944) 69 CLR 227.

71 *Johnson v Lindsay & Co* [1891] AC 371 at 377-378.

under the control of the principal – what we would now call an employee *pro hac vice*.

51 In *Mackay v Commercial Bank of New Brunswick*[72], the Judicial Committee of the Privy Council reiterated that a principal was liable for the torts of his servant *or agent* acting within the scope of his or her authority and said that the "best definition"[73] of the principle was that of Willes J in *Barwick*. Similarly, in *Houldsworth v City of Glasgow Bank*[74], Lord Selborne said that a principal was liable for the wrongs of his agent committed in the course of his service and that no exception could be taken to the principle as stated by Willes J in *Barwick*. Lord Selborne said[75] that it "is a principle, not of the law of torts, or of fraud or deceit, but of the law of agency". That his Lordship intended the principle to apply to an agent who was not a servant is clear from his later statement[76]:

> "It is of course assumed in all such cases that the third party who seeks the remedy has been dealing in good faith with the agent in reliance upon the credentials with which he has been entrusted by the principal, and had no notice either of any limitation (material to the question) of the agent's authority, or of any fraud or other wrongdoing on the agent's part at the time when the cause of action arose."

52 In Lloyd v Grace, Smith & Co[77], the principle laid down in Barwick was once again confirmed and, on one view, extended by the House of Lords. The issue in Lloyd was the significance of the phrase "for the master's benefit" in the statement of principle which Willes J had formulated in Barwick. The House of Lords unanimously held that a principal is liable for an agent's acts even if the acts are for the agent's own benefit. Lord Macnaghten gave the leading speech. He referred to the "general rule" articulated by Willes J in Barwick that I have quoted and said that "[t]o that statement of the law no objection of any sort can be taken"[78]. Furthermore, Lord Macnaghten said that the comment of Willes J in Barwick that the question whether a principal is answerable for the acts of his or

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72 (1874) LR 5 PC 394.

73 (1874) LR 5 PC 394 at 411.

74 (1880) 5 App Cas 317 at 326.

75 (1880) 5 App Cas 317 at 326.

76 (1880) 5 App Cas 317 at 327.

77 [1912] AC 716.

78 [1912] AC 716 at 732.

her agent had been settled in Lord Holt's time was "a general observation not confined to the case where the principal is a gainer by the fraud"[79].

53 After noting that "the expressions 'acting within his authority,' 'acting in the course of his employment,' and the expression 'acting within the scope of his agency' (which Story uses) as applied to an agent, speaking broadly, mean one and the same thing"[80], Lord Macnaghten referred to a passage in *Story on Agency*[81]:

> "[N]ot only because it is the considered opinion of a most distinguished lawyer, but also because it is cited apparently with approval in the Court of Queen's Bench, consisting of Cockburn CJ, Blackburn, Mellor, and Lush JJ, by Blackburn J himself in a case which occurred in the interval between the date of *Barwick's Case*[82] and the decision in *Houldsworth v City of Glasgow Bank*[83]. The passage in the judgment of Blackburn J as reported in *McGowan & Co v Dyer*[84] is as follows: 'In Story on Agency, the learned author states, in s 452, the general rule that the principal is liable to third persons in a civil suit "for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent *in the course of his employment*, although the principal did not authorise, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them." He then proceeds, in s 456: "But although the principal is thus liable for the torts and negligences of his agent, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorised them to be done, or he has subsequently adopted them for his own use and benefit."'" (original emphasis)

54 This passage brings out the point that, to make the principal liable, proof of the authority of the agent to commit the wrongful act is needed only when he

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79 [1912] AC 716 at 732.

80 [1912] AC 716 at 736.

81 [1912] AC 716 736-737.

82 (1867) LR 2 Ex 259.

83 (1880) 5 App Cas 317.

84 (1873) LR 8 QB 141 at 145.

or she has acted outside the scope or course of his or her agency. Moreover, although *Lloyd* was concerned with liability for the acts of an employee, it is clear that Lord Macnaghten and the other Law Lords thought that a principal could be liable for the acts of agents who were not servants. So did Sir Frederick Pollock, the Editor of the Authorised Reports. The first statement in the headnote to *Lloyd* is[85]:

> "A principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent."

55 I find it hard to believe that a common lawyer of the eminence of Sir Frederick Pollock, the person who claimed to have invented the term "vicarious liability"[86], would have allowed that headnote to be published if he had thought that a principal could only be liable for the acts of an agent when the agent was a servant.

CML

56 In *CML*[87], this Court held that a principal may be liable for tortious acts of an agent occurring within the scope of the agency if the agent is acting in a representative capacity even though the agent is not an employee. In *CML*, the defendant, a life insurance company, had contracted with one Ridley to solicit insurance business for the defendant. A majority[88], perhaps all[89], of the Justices of this Court thought that Ridley was not an employee of the defendant. The contract contained a term expressly prohibiting Ridley from using language which might reflect upon the character or conduct of any person or institution or which might tend to bring it into disrepute or discredit[90]. Ridley defamed another insurance company which then sued the defendant for damages for the defamation. By majority, this Court held that the defendant was liable, notwithstanding that neither the defamatory statement nor its publication had been authorised by the defendant.

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85 [1912] AC 716 at 716.

86 *Holmes-Pollock Letters – The Correspondence of Mr Justice Holmes and Sir Frederick Pollock 1874-1932*, (1941), vol 1 at 233.

87 (1931) 46 CLR 41.

88 (1931) 46 CLR 41 at 48 per Dixon J (with whom Rich J agreed), 69 per Evatt J, 70 per McTiernan J.

89 cf (1931) 46 CLR 41 at 46 per Gavan Duffy CJ and Starke J.

90 (1931) 46 CLR 41 at 42, 48 and 65-66.

57 Gavan Duffy CJ and Starke J said[91]:

> "The nature of Ridley's employment … gave the defendant a good deal more power of controlling and directing his action than was conceded by the argument addressed to us. Nothing in the agreement or the position of the parties denied the right of the [defendant] to control and direct Ridley when, where and whom he should canvass. In our opinion the judgment of the Judicial Committee in *Citizens' Life Assurance Co v Brown*[92] really concludes the present case."

58 In *Brown*, the defendant insurer was held liable for the defamatory statement of its employee. It may be that Gavan Duffy CJ and Starke J saw no distinction in principle between the liability of a principal for the conduct of its employee and the liability of a principal for the conduct of *other agents* where the principal had the power to control and direct the action of the agent. Their Honours continued[93]:

> "But if it does not, still we apprehend that one is liable for another's tortious act 'if he expressly directs him to do it *or if he employs that other person as his agent and the act complained of is within the scope of the agent's authority*.' It is not necessary that the particular act should have been authorized: it is enough that the agent should have been put in a position to do the class of acts complained of (*Barwick v English Joint Stock Bank*[94]; *Lloyd v Grace, Smith & Co*[95]). And if an unlawful act done by an agent be within the scope of his authority, it is immaterial that the principal directed the agent not to do it." (emphasis added)

59 Two points should be noted about this passage. First, their Honours said that a principal is liable for the acts of his or her agent within the scope of authority. They expressly rejected the requirement that the principal had directly authorised the wrongful act before vicarious liability can be imposed. Second, their Honours spoke in general terms of the liability of the principal for the "tortious act" of its agent. They did not limit the type of tortious act to which liability applies. In particular, they did not confine the liability of the principal to

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91 (1931) 46 CLR 41 at 46.

92 [1904] AC 423.

93 (1931) 46 CLR 41 at 46-47.

94 (1867) LR 2 Ex 259.

95 [1912] AC 716 at 733.

statements made in the course of the agency. Nor did they limit the classes of agency to which vicarious liability may attach.

60 After stating that Ridley was not a servant, Dixon J (with whose judgment Rich J agreed) said that this was not the end of the inquiry as to whether the defendant was liable[96]. In a much quoted passage, his Honour said[97]:

> "In most cases in which a tort is committed in the course of the performance of work for the benefit of another person, he cannot be vicariously responsible if the actual tortfeasor is not his servant *and he has not directly authorized the doing of the act which amounts to a tort.* The work, although done at his request and for his benefit, is considered as the *independent function* of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. *The independent contractor carries out his work, not as a representative but as a principal.*" (emphasis added)

61 This statement should not be read as denying the principles of vicarious liability laid down in *Barwick* and *Lloyd* and which Gavan Duffy CJ and Starke J accepted as correctly stating the law. The statement that, without direct authorisation, there is no vicarious liability for the acts of a "non-servant" was clearly made with respect to independent contractors, and *not* agents per se. That is, Dixon J was saying no more than a principal is not liable for the wrongs of an independent contractor which the principal had not directly authorised[98]. That that was what his Honour had in mind is borne out by the following passage in his judgment[99]:

> "But a difficulty arises when 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."

62 When this difficulty arises, one is dealing with a "true agent"[100] and not an independent contractor. Dixon J held that, in soliciting and obtaining proposals

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96 (1931) 46 CLR 41 at 48.

97 (1931) 46 CLR 41 at 48.

98 See *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 366.

99 (1931) 46 CLR 41 at 48-49.

100 (1931) 46 CLR 41 at 50.

and receiving premiums, Ridley was acting with the authority of the defendant. Moreover, "in performing these services for the Company, he does not act independently, but as a representative of the Company"[101]. But was this enough to make the defendant liable? Dixon J commented[102]:

> "The rule which imposes liability upon a master for the wrongs of his servant committed in the course of his employment is commonly regarded as part of the law of agency: indeed, in our case-law the terms principal and agent are employed more often than not although the matter in hand arises upon the relation of master and servant. But there is, I believe, no case which distinctly decides that a principal is liable *generally* for wrongful acts which he did not *directly authorize*, committed in the course of carrying out his agency by an agent who is not the principal's servant or partner, except, perhaps, in some special relations, such as solicitor and client, and then within limitations." (emphasis added)

63 Nevertheless, his Honour held that the defendant was liable[103]:

> "If the view be right which I have already expressed, that the 'agent' represented the Company in soliciting proposals so that *he was acting in right of the Company with its authority*, it follows that the Company in confiding to his judgment, within the limits of relevance and of reasonableness, the choice of inducements and arguments, authorized him on its behalf to address to prospective proponents such observations as appeared to him appropriate. The undertaking contained in his contract not to disparage other institutions is not a limitation of his authority but a promise as to the manner of its exercise. In these circumstances, I do not think it is any extension of principle to hold the Company liable for the slanders which he thought proper to include in his apparatus of persuasion."

64 Thus, although the defendant did not directly authorise its agent's slander, it was held liable for its publication because[104]:

> "The wrong committed arose from the *mistaken or erroneous manner in which the actual authority committed to him was exercised*

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101 (1931) 46 CLR 41 at 49.

102 (1931) 46 CLR 41 at 49.

103 (1931) 46 CLR 41 at 50.

104 (1931) 46 CLR 41 at 50.

when acting as a true agent representing his principal in dealing with third persons." (emphasis added)

65 The judgment of Dixon J in *CML* does not support the proposition that the principal is liable only for a wrongful act specifically instigated, authorised or ratified by the principal. In his Honour's view, the principal is liable for all those acts of its agent which "arose from the mistaken or erroneous manner in which the actual authority committed to him was exercised" while acting as the principal's representative in dealings with third parties.

66 In *CML*, Evatt and McTiernan JJ dissented on the facts. Nothing in their judgments throws any doubt on the law as laid down in *Barwick* and later cases. Indeed, McTiernan J appears to have accepted[105] that the law was correctly stated by Gavan Duffy CJ and Starke J.

67 In my opinion, the *ratio decidendi* of *CML* is that a principal is liable for the wrongful act of an agent causing damage to a third party when that act occurred while the agent was carrying out some activity as the principal's authorised representative in a dealing with a third party[106]. The judgment of Gavan Duffy CJ and Starke J might support a wider proposition. But, on the facts of the case, the reasoning of Dixon J, with which Rich J agreed, is more consistent with the principles expounded in the earlier cases.

68 Although *CML* was concerned with a statement of an agent, there is no reason in principle or policy for distinguishing between the principal's liability for statements made within the scope of the agent's authority and other wrongful acts or omissions committed or omitted within the scope of that authority. Indeed, early[107] as well as 19th century[108] cases made the principal liable for the agent's frauds. Nor is there any reason in principle or policy why the liability should be confined to harm done in the course of dealing with a third party. It would be illogical and anomalous to hold a principal liable for the intentional torts of an agent, such as fraud, while acting as a representative in the course of dealing with a third party but not liable for the careless conduct of an agent occurring in the course of carrying out a task for the principal as his or her representative.

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105 (1931) 46 CLR 41 at 70-71.

106 cf Baty, *Vicarious Liability*, (1916) at 12.

107 *Hern v Nichols* 1 Salk 289 [91 ER 256].

108 *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317.

69 The rationale for the liability of the employer for an employee's act is equally applicable to an agent who is acting as the representative of the principal in dealing with third parties or carrying out some task or duty for the principal. In *Bayley v Manchester, Sheffield, and Lincolnshire Railway Co*[109], Willes J, who delivered the judgment of the court[110], stated the rationale for the vicarious liability of an employer for an employee's acts as follows[111]:

> "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."

70 Holding a principal liable for the action of its agent occurring within the scope of authority while acting as the principal's representative is not inconsistent with the long standing rule that a person is not generally liable for the negligence of an independent contractor. To suggest that it is ignores the elements of representation, the authority of the principal to state in detail the parameters of the agent's authority and to control the conduct of the agent in so far as there is scope for it.

71 Moreover, a principal is now liable for the conduct of many persons who are classified as employees but who in earlier times would have been classified as independent contractors. This historical development makes it difficult to justify confining the principal's liability to persons who were servants as that term was understood in 1840 when *Quarman* was decided. Physical capacity to control the manner in which a person performs work for the employer is no longer necessary. A person may be an employee for whose conduct the employer is responsible even though the employer does not have the capacity or skill to control the manner of the work. In *Zuijs v Wirth Brothers Pty Ltd*[112], where this Court held that a trapeze artist was an employee, Dixon CJ, Williams, Webb and Taylor JJ said[113]:

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109 (1872) LR 7 CP 415.

110 Willes, Keating and Byles JJ.

111 (1872) LR 7 CP 415 at 420.

112 (1955) 93 CLR 561.

113 (1955) 93 CLR 561 at 571.

> "The duties to be performed may depend so much on special skill or knowledge or they may be so clearly identified or the necessity of the employee acting on his own responsibility may be so evident, that little room for direction or command in detail may exist. But that is not the point. What matters is lawful authority to command so far as there is scope for it."

72 Agency cases of the kind with which *CML* is an example are far removed from the case of independent contractors. Although the principal in such cases may not be in a position to control the manner in which the agent carries out his work, the principal retains control over many matters, permits the agent to represent him and invites third parties (directly or through the agent) to deal with the agent within the scope of the agency. This is equivalent to the general authority which the employee has to conduct his or her employer's business while acting within the course of employment. It is difficult to justify holding the principal liable for the conduct of a trapeze artist or a surgeon who is classified as an employee but not liable for the conduct of an agent who is a representative of the principal.

The motor car cases

73 Once it is accepted that, for the purpose of the law of agency, there are persons for whom the principal is liable although they are not employees in the strict sense, the decisions in the "motor car" cases[114] – holding an owner liable for the conduct of some drivers who are not servants – should occasion no surprise. They would be surprising only if liability for the tortious conduct of an agent was confined to the conduct of an agent who had the legal right to create or alter a legal relationship between the principal and a third party. But servants are agents, and not all of them have the right to change the legal relationships of their principals. Yet a principal may be vicariously liable for the wrongs of such a servant.

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114 See eg *Samson v Aitchison* [1912] AC 844; *Parker v Miller* (1926) 42 TLR 408; *Mortess v Fry* [1928] SASR 60; *Ormrod v Crosville Motor Services Ltd* [1953] 1 WLR 1120; [1953] 2 All ER 753; *Trust Co Ltd v De Silva* [1956] 1 WLR 376; *Soblusky v Egan* (1960) 103 CLR 215; *Gosson Industries Pty Ltd v Jordan* [1964] NSWR 687; *Jennings v Hannan (No 2)* (1969) 89 WN (Pt 2) (NSW) 232. See also *Hewitt v Bonvin* [1940] 1 KB 188; *Christmas v Nicol Bros Pty Ltd* (1941) 41 SR (NSW) 317; *Manawatu County v Rowe* [1956] NZLR 78; *Rambarran v Gurrucharran* [1970] 1 WLR 556; [1970] 1 All ER 749; *Morgans v Launchbury* [1973] AC 127.

74 The categories of liability for the acts of agents are no more closed than the categories of negligence. If the motor car cases have extended the law of vicarious liability as it was perceived in 1840 when *Quarman* was decided, it is no more than another example of the capacity of the common law to adapt itself to new and analogous situations in the light of changing circumstances. Properly understood, I would regard the decisions in these cases as simply applying the basic principles of agency law as it has developed in the law of torts although no doubt a number of them were incorrectly decided having regard to the principles to which I will refer.

75 The first of the "motor car" cases is *Samson v Aitchison*[115] where the Privy Council upheld a decision of the New Zealand Court of Appeal holding the owner of a motor vehicle, in which he was present, liable for the negligence of the driver who was not the owner's employee. Lord Atkinson said[116]:

> "[I]f the control of the car [by the defendant owner] was not abandoned, then it is a matter of indifference whether [the driver], while driving the car, *be styled the agent or the servant* of the [defendant] in performing that particular act, since it is the retention of the control which the [defendant] would have *in either case* that makes him responsible for the negligence which caused the injury." (emphasis added)

76 This was not a new development. In *Booth v Mister*[117] and *Wheatley v Patrick*[118], common law courts had taken the view that the owner or hirer of a carriage, sitting next to the driver, was responsible for any negligent driving although the driver was not a servant. Indeed in *Du Cros v Lambourne*[119], the English Court of Appeal had upheld a conviction for dangerous driving on the ground that the defendant was owner of the vehicle being driven and was sitting beside the driver.

77 However, *Hewitt v Bonvin*[120], the seminal motor car case in the modern law, made it clear that merely giving a person permission to use a car did not make the owner responsible for the conduct of the driver. In *Hewitt*, a son had

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115 [1912] AC 844.

116 [1912] AC 844 at 850.

117 (1835) 7 Car & P 66 [173 ER 30].

118 (1837) 2 M & W 650 [150 ER 917].

119 [1907] 1 KB 40.

120 [1940] 1 KB 188.

used his father's car to drive two friends to their homes. On the way back to the son's home, the car crashed, killing another passenger. The deceased person's estate sued the driver's father, alleging that he was vicariously liable for his son's negligent driving. The Court of Appeal unanimously held that the father was not liable.

78 MacKinnon LJ said[121]:

> "If A suffers damage by *the wrongful act* of B, and seeks to say that C is liable for that damage he must establish that in doing the act B acted as the agent or servant of C. If he says that he was C's agent he must further show that C *authorized the act*. If he can establish that B was the servant of C the question of authority need not arise." (emphasis added)

79 It would seem that "the act" that must be authorised by C is "the wrongful act of B". That is, MacKinnon LJ apparently held the view that a principal must have directly authorised the tort committed by the agent for liability to be imposed. His Lordship asked only whether the son was the servant of his father and did not examine whether the son could be his father's agent. In his Lordship's view, in order to establish liability the plaintiff had to prove (1) that the son was employed to drive the car as his father's servant and (2) that, when the accident happened, the son was driving the car for his father, and not merely for his own benefit and for his own concerns[122]. MacKinnon LJ held[123] that the plaintiff failed to establish either (1) or (2).

80 In relation to (1), MacKinnon LJ quoted with approval the following definition of a servant from *Salmond on Torts*[124]:

> "A servant may be defined as any person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done."

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121 [1940] 1 KB 188 at 191.

122 [1940] 1 KB 188 at 192-193.

123 [1940] 1 KB 188 at 193.

124 [1940] 1 KB 188 at 191-192.

81 MacKinnon LJ noted that a person may be temporarily employed as a servant without remuneration[125] and gave the following example[126]:

> "If I say to a friend, or to my son, 'The chauffeur is ill and cannot come. Will you drive me in my car to the station,' he is no doubt pro tempore my servant, and he is doing my work for me."

82 Lord Justice du Parcq, however, focused on the question of whether the son was his father's agent because "proof of agency is all that is required in order that the judgment which the [plaintiff] has secured may be retained"[127]. His Lordship said[128]:

> "The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty."

Lord Justice du Parcq held that the son was not an agent of his father because the plaintiff had failed to show more than a bailment of the car[129].

83 Notwithstanding the marked difference in the judgments of MacKinnon and du Parcq LJJ, Bennett J said[130] that he entirely agreed with both of them.

84 If the agent's act is within the scope of his or her authority, the principle formulated by du Parcq LJ does not require direct authorisation of the wrongful act by the principal for vicarious liability to ensue. On the other hand, the principle formulated by MacKinnon LJ requires direct authorisation in all circumstances. Thus, their Lordships appear to answer the question "for which acts of its agent is the principal liable?" differently. However, while the formulation is different, the substance is much closer than at first appears. MacKinnon LJ defined "servant" in a much broader way than that implicit in du Parcq LJ's judgment. Many individuals that MacKinnon LJ would have

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125 [1940] 1 KB 188 at 192.

126 [1940] 1 KB 188 at 192.

127 [1940] 1 KB 188 at 194.

128 [1940] 1 KB 188 at 194-195.

129 [1940] 1 KB 188 at 196-197.

130 [1940] 1 KB 188 at 197.

classified as pro tempore servants without remuneration would be classified by du Parcq LJ as agents to whom tasks or duties have been delegated. The friend who acted as a chauffeur in the example given by MacKinnon LJ was (on his Lordship's test) a servant for whose acts within employment the master would be vicariously liable. However, on du Parcq LJ's test, the friend would have been an agent, as the task or duty of driving had been delegated to him, and so the owner of the car would be vicariously liable as principal for all acts done within the scope of authority.

Morgans v Launchbury

85 The approach of du Parcq LJ in *Hewitt* was substantially followed by the House of Lords in *Morgans v Launchbury*[131] where the plaintiffs sued Mrs Morgans in her capacity as administratrix of her husband's estate, and in her personal capacity, for damages resulting from the negligent driving of a car owned by Mrs Morgans but which she and her husband regarded as "our car"[132]. After drinking at several hotels with friends, Mr Morgans asked an acquaintance to drive for the rest of the evening[133]. Later that night, the car crashed as a result of the driver's negligence[134]. Mr Morgans and the driver were killed, and the other occupants of the car were injured[135]. Mrs Morgans, who had stayed at home, had given the acquaintance no authority to drive.

86 The appeal before the House of Lords concerned only the personal liability of Mrs Morgans[136]. Lord Wilberforce said that the issue was "whether as owner of the car, and in the circumstances in which it came to be used and driven, [Mrs Morgans] can be held vicariously liable for the negligence of the driver"[137]. Their Lordships unanimously answered this question, "no".

87 Lord Wilberforce said that their Lordships had been invited to "depart from accepted principle and introduce a new rule, or set of rules, applicable to the

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131 [1973] AC 127.

132 [1973] AC 127 at 133, 138, 141, 143 and 146.

133 [1973] AC 127 at 133.

134 [1973] AC 127 at 134.

135 [1973] AC 127 at 133.

136 [1973] AC 127 at 133.

137 [1973] AC 127 at 133.

use of motor vehicles"[138]. The House of Lords rejected this invitation and the attempt by Lord Denning MR in the Court of Appeal to introduce a car-specific principle[139]. On "accepted principle"[140], the House of Lords held that Mrs Morgans was not vicariously liable for the negligence of the driver.

88 In *Morgans*, their Lordships delivered five speeches. They indicate that the decision turned on a principle of vicarious liability based on the law of agency, rather than a principle about chattels or a *sui generis* principle of vicarious liability[141]. Lord Salmon expressly approved du Parcq LJ's formulation of principle in *Hewitt*[142], and Lord Pearson cited it with approval[143], while Lord Wilberforce said[144] that he agreed with Megaw LJ "both on the law and on the facts" and Megaw LJ had approved[145] du Parcq LJ's formulation of principle.

89 All of their Lordships held that mere permission to use a chattel is insufficient to establish agency and thereby attract vicarious liability[146]. According to Lords Wilberforce, Pearson and Salmon, agency is established when the agent acts for the principal's purposes as the result of the delegation of a task or duty with the act of delegation requiring an instruction or request by the principal to the agent.

90 According to all of their Lordships except Viscount Dilhorne, who approved the statement of principle by MacKinnon LJ in *Hewitt*, if the driver is

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138 [1973] AC 127 at 136.

139 [1973] AC 127 at 136-137 per Lord Wilberforce, 138 per Viscount Dilhorne, 141-143 per Lord Pearson, 144-146 per Lord Cross of Chelsea, 151 per Lord Salmon.

140 [1973] AC 127 at 136.

141 cf [1973] AC 127 at 135 per Lord Wilberforce, 144 per Lord Cross of Chelsea; Reynolds, *Bowstead and Reynolds on Agency*, 16th ed (1996) at 501-502, 508-510; Fleming, *The Law of Torts*, 9th ed (1998) at 429-432.

142 [1973] AC 127 at 148 and 149.

143 [1973] AC 127 at 140.

144 [1973] AC 127 at 135.

145 See [1971] 2 QB 245 at 264-265.

146 [1973] AC 127 at 135 per Lord Wilberforce, 138 per Viscount Dilhorne, 140, 142 per Lord Pearson, 144 per Lord Cross of Chelsea, 148 per Lord Salmon.

the agent of the owner acting within the scope of the agency, the owner, as principal, is vicariously liable. Lord Wilberforce said[147]:

> "[I]n order to fix vicarious liability upon the owner of a car in such a case as the present it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty."

91 His Lordship said[148]:

> "I accept entirely that 'agency' in contexts such as these is merely a concept, the meaning and purpose of which is to say 'is vicariously liable,' and that either expression reflects a judgment of value – respondeat superior is the law saying that the owner ought to pay. It is this imperative which the common law has endeavoured to work out through the cases. The owner ought to pay, it says, because he has authorised the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct. He ought not to pay (on accepted rules) if he has no control over the actor, has not authorised or requested the act, or if the actor is acting wholly for his own purposes."

92 Lord Wilberforce held that, as the car was being used for Mr Morgans' purposes, and not Mrs Morgans' purposes[149], at the time of the accident, Mr Morgans' undertaking to Mrs Morgans to delegate his right to drive to another if he became intoxicated did not make the driver Mrs Morgans' "agent in any sense of the word"[150].

93 The House of Lords' decision in *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union*[151] supports the view that *Morgans* was decided upon the principles of agency and was not confined to motor vehicles. *Heatons Transport* was not concerned with a motor vehicle but with whether a union was liable for the "unfair industrial practices" of its shop stewards, who were the agents but not the servants of the union. Their Lordships held that the test for whether a master or principal is responsible for the act of a servant or agent is the same – "was the servant or agent acting on behalf of, and within the

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147 [1973] AC 127 at 135.

148 [1973] AC 127 at 135.

149 [1973] AC 127 at 134.

150 [1973] AC 127 at 135.

151 [1973] AC 15.

scope of the authority conferred by, the master or principal?"[152]. They cited[153] only *Hewitt* and *Morgans* in support of this proposition. Moreover, this statement of the relevant test did not, in their Lordships' opinion, involve a new development in the law[154]. It is true that these comments must be read subject to the limitation placed upon them by their Lordships that[155]:

> "Liability for tortious acts is outside the scope of this appeal: it may be a closely connected subject, but what is said here does not necessarily apply to it, because it is not under consideration."

94 Nevertheless, these two decisions of the House of Lords show that, so far as the common law of the United Kingdom is concerned, the vicarious liability of a principal is not confined to the conduct of a person who is a servant in the strict sense.

Soblusky v Egan

95 In *Soblusky v Egan*[156], this Court held that Soblusky, the "owner"[157] of a car, was liable for the negligence of the driver which occurred while Soblusky, a passenger in the car, was asleep. Soblusky, being "not young" and having "a stiff neck", "preferred not to drive long distances"[158]. Sometimes he asked a Mr Lewis to drive for him[159]. On the night in question, Lewis was driving

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152 [1973] AC 15 at 99 per Lords Wilberforce, Pearson, Diplock, Cross of Chelsea, and Salmon.

153 [1973] AC 15 at 99.

154 [1973] AC 15 at 99.

155 [1973] AC 15 at 100.

156 (1960) 103 CLR 215.

157 Soblusky was the *de facto* owner, but in law no more than the bailee, of a car which had originally been obtained under a hire purchase agreement by another man, Behrendorff. Several payments were outstanding when Behrendorff "sold" the car to Soblusky. Although Soblusky took over the payments, he was not in law the hire purchaser of the car because the "sale" was not recorded in writing as required by the relevant legislation.

158 (1960) 103 CLR 215 at 225.

159 (1960) 103 CLR 215 at 225.

Soblusky, and others (including the respondent, Egan), to a meeting of the Buffalo Lodge when the car crashed and Egan was injured[160].

96 Dixon CJ, Kitto and Windeyer JJ held that Soblusky was liable. However, their Honours did not apply the English line of authority existing in 1960 concerning vicarious liability for the driving of motor vehicles. Instead, they applied principles[161] that were "settled" in "horse and buggy days"[162]:

> "[T]he owner or bailee being in possession of the vehicle and with full legal authority to direct what is done with it appoints another to do the manual work of managing it and to do this on his behalf in circumstances where he can always assert his power of control. *Thus it means in point of law that he is driving by his agent*. It appears quite immaterial that Soblusky went to sleep. That meant no more than a complete delegation to his agent during his unconsciousness. The principle of the cases cited [*Chandler v Broughton*[163], *Booth v Mister*[164], and *Wheatley v Patrick*[165]] is simply that the management of the vehicle is done by the hands of another and is in fact and law subject to direction and control. This therefore must be regarded as an obvious case." (emphasis added)

97 Thus, an "agency" relationship existed between the owner and driver because the "principal" had the legal authority to direct how and when the car was driven, had directed Lewis to drive it on his behalf and had retained his power of control in the circumstances, notwithstanding that he was asleep[166]. Presumably, this authority or control derived exclusively from Soblusky's status

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160 (1960) 103 CLR 215 at 225.

161 (1960) 103 CLR 215 at 229.

162 (1960) 103 CLR 215 at 231.

163 (1832) 1 C & M 29 [149 ER 301].

164 (1835) 7 Car & P 66 [173 ER 30].

165 (1837) 2 M & W 650 [150 ER 917]. Their Honours said at 231 that "[i]t is from this line of authority that *Samson v Aitchison* proceeded".

166 In *Kondis v State Transport Authority* (1984) 154 CLR 672 at 692, Brennan J, obiter, summarised the principle in *Soblusky* as follows:

> "A defendant is liable if he is the owner or bailee of the vehicle, if he appoints the driver to drive it on his behalf and if he is in the vehicle or is otherwise able to assert control over the driver: see *Soblusky v Egan*."

as bailee of the car (there being no mention of any legal relationship between Soblusky and Lewis in the judgment)[167].

98 It does not appear that the Court in *Soblusky* was intending to use the term "agent" in the sense of the term "true agent" used by Dixon J in *CML*. Moreover, it is hard to say that in driving the car Lewis was representing Soblusky in his relationship 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"[168]. However, the case would seem to fall within the principles of liability later formulated by Lord Wilberforce in *Morgans*, although their Honours did not rely on the modern English cases.

99 In *Soblusky*, Dixon CJ, Kitto and Windeyer JJ made obiter criticisms of the English authorities decided before 1960. But their criticism is not necessarily applicable to the principle as enunciated in *Morgans*. Indeed, *Soblusky* can fairly be seen as a case of the "owner" of a vehicle delegating a task to the driver for the owner's purposes. But it is unnecessary to so classify it. Like the great judges who decided *Soblusky*, I think that it was an "obvious case" and merely an application of principles which were settled in the 19th century.

100 That said, once it is accepted that the liability of a principal for the wrongs of another extends beyond the wrongs of a servant or the wrongful acts specifically instigated, authorised or ratified by the principal, there is no reason in principle or policy why the owner of a vehicle should not be held liable for wrongful conduct according to the principles enunciated in *Morgans* and *Soblusky*. At all events, I think that is so if the driver has been delegated to perform a duty of the principal or a task which the principal has undertaken to perform and the agent is not acting in an independent capacity. Like the agent who represents the principal in dealings with third parties, the driver to whom a task or duty of the principal has been delegated has been entrusted to do an act or class of acts on behalf of the principal and is subject to direction, if not control, by the principal. In such a case, the driver is not like an independent contractor, employed simply to produce a result. By reason of the ownership of the motor

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167 In *Ricketts v Laws* (1988) 14 NSWLR 311 at 319, Kirby P (as he then was), with whom Clarke JA agreed, stated that:

> "It has long been established at common law that, although not actually driving, a person is liable for the negligence of a driver of a motor vehicle over which that person had a right to exercise control: see *Trust Co Ltd v De Silva* [1956] 1 WLR 376 [at 380] and *Soblusky* (at 231)."

168 *CML* (1931) 46 CLR 41 at 48-49; cf *Nottingham v Aldridge* [1971] 2 QB 739 at 752.

vehicle, the principal has the legal right to direct and control much of the manner in which the driver performs the task or duty delegated.

101 I do not think that there is any injustice in holding a principal vicariously liable for the tortious acts of his or her agent occurring within the scope of the authority when the agent has acted as the principal's representative or delegate. First, imposing liability on the principal is likely to assist in avoiding tortious acts. Because the principal will be liable for those acts, he or she has an incentive to exercise care in selecting, training and defining the scope of the authority of the agent. This is particularly important at the present time where the contracting out of work – "outsourcing" – has become common place. Agents in such situations often operate in very competitive markets and work on small margins. Many of them are likely to be tempted to take risks and thereby avoid the inconvenience and expense of procedures that would avoid the occurrence of tortious conduct. Second, the principal has a right of indemnity against the agent[169]. If the agent does not have the means to indemnify the principal, the agent will not have the means to indemnify the injured person. If that is the case, it seems fairer that the person who engaged the wrongdoer as his or her representative or delegate should bear the loss than that it should fall on the innocent third party. Third, traditionally an agent is armed with the authority to contract on the principal's behalf[170]. If the acts of the agent within the scope of authority can have legal consequences in contract, it does not seem an outrageous extension of a principal's liability that such acts can have consequences in tort. Finally, liability does not become indeterminate if a principal is liable for the torts of an agent to whom the principal has delegated a task or duty and who is not acting as an independent contractor or who acts as the principal's representative in some activity. Criteria such as "delegation", "task", "duty" and "representation" are far more determinate than many other criteria of liability, such as "reasonableness", "unconscionability" and "fairness of procedure".

102 I also think that it is a mistake to judge the correctness of *Morgans* by reference to decisions concerning the liability of a master for the acts of a driver which were decided in the period between 1800, when *M'Manus v Crickett*[171] was decided, and 1840, when *Quarman* was decided, decisions which were principally concerned with pleading issues. To do so assumes that the law concerning the liability of a principal for the acts of his or her servants and agents was settled in that period when in fact it was still developing. Moreover, some of

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169 See eg *Gosson Industries Pty Ltd v Jordan* [1964] NSWR 687 at 688.

170 *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644 at 652.

171 (1800) 1 East 106 [102 ER 43].

the statements made in cases during that period reflect ideas that belonged to an earlier period of the law when the received doctrine was that the master could only be liable for the express commands given to his or her servant.

103 In examining the cases on the liability of principals in the period 1794 - 1852, several matters must be borne in mind. During that period and indeed for some time after, negligence was not regarded as an independent tort. Liability for negligence might arise because it involved a breach of duty by such persons as common innkeepers or because it involved a breach of an undertaking given by the defendant. But ordinarily it did not found a cause of action.

104 If the negligence of the defendant resulted in the application of direct force, trespass was the form of action required[172]. So most of the actions of the kind that would now be brought against a driver for negligent driving had to be brought in trespass. Before 1800, trespass was also the proper form of action if the plaintiff wished to sue the driver's master in respect of the direct application of force by the driver[173]. This was because the master could only be liable if the act of the servant was the act of the master. If the driver's act caused consequential damage, however, the action against him or her had to be brought in case[174]. In 1800, however, *M'Manus v Crickett*[175] held that the master could only be sued in case and that trespass was not the correct form of action against the master unless he had in fact ordered the trespass. This change was justified on the ground that the master's liability arose from the breach of duty involved in employing an unskilful servant[176]. It might also have appeared to change the theoretical basis of the master's liability, but it had not. The change was based on a fiction, because the plaintiff did not have to aver a breach of the duty to employ a careful servant, and the master was not permitted to show that he had used all care in employing the servant[177]. Although the form of action was case and not trespass, the master's liability was direct. The pleadings continued to allege that the master by his servant had so negligently, carelessly and unskilfully drove,

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172 *Day v Edwards* (1794) 5 TR 648 [101 ER 361].

173 *Savignac v Roome* (1794) 6 TR 125 [101 ER 470].

174 *Turner v Hawkins* (1796) 1 Bos & Pul 472 [126 ER 1016]. See also *Brucker v Fromont* (1796) 6 TR 659 [101 ER 758].

175 (1800) 1 East 106 [102 ER 43].

176 *Sharrod v The London and North Western Railway Company* (1849) 4 Ex 580 at 585-586 [154 ER 1345 at 1347-1348].

177 Gow, "The Nature of the Liability of an Employer", (1958) 32 *Australian Law Journal* 183.

managed and controlled the carriage. They did not allege that he had negligently employed the driver. Furthermore, the plaintiff might wish to sue the driver as well as the master, and actions for trespass and case could not be joined in the one action. It was not until *Williams v Holland*[178] in 1833 that a plaintiff became able to waive the application of force and sue in case. The last step in this saga was taken when it was held that the master could be sued in case even for the intentional and unauthorised act of his servant[179].

105 Cases concerning negligent driving decided in the period 1800 - 1840 were decided in a legal environment very different from that which has existed during the last 150 years. Negligence is now an independent action, and courts eschew the use of fictions. The forms of action were effectively abolished in 1832 and 1833, and after 1852 it was no longer necessary to identify the form of action in the writ[180]. While the forms of action existed, the received theory was that the master was liable because the acts of the servant were the acts of the master. Traces of that doctrine can be found in modern cases. Indeed, the judgments of Kitto and Taylor JJ in *Darling Island Stevedoring and Lighterage Co Ltd v Long*[181] are based on that theory of the employer's liability. But for more than a century that has not been the orthodox view. As Dr Gow has pointed out[182]:

> "Tacitly and imperceptibly it came to be understood that the wrong of the employee was the wrong of the employer, it being forgotten that 'the act of the servant is the act of the master' was both literally and legally correct. Liability now became properly vicarious."

106 While I agree that the liability of an employer for the wrongful acts of the employee has evolved in the last 150 years to a vicarious liability, it does not necessarily follow that the liability of a principal for the wrongful acts of an agent who is not a servant is vicarious. Perhaps it should rather be seen as a direct liability of the principal. But in any event, the law concerning a principal's liability has changed so much since the period 1800 - 1840, that cases decided in

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178 (1833) 10 Bing 112 [131 ER 848].

179 *Seymour v Greenwood* (1861) 6 H & N 359 [158 ER 148]; (1861) 7 H & N 355 [158 ER 511].

180 See eg Baker, *An Introduction to English Legal History*, 3rd ed (1990) at 80.

181 (1957) 97 CLR 36.

182 Gow, "The Nature of the Liability of an Employer", (1958) 32 *Australian Law Journal* 183 at 183.

that period are of little assistance in determining today questions of the principal's liability for the acts of an agent.

Does the principle formulated in *Morgans* apply generally in agency situations?

107 Both logic and the terms of their Lordships' speeches require that the principle of *Morgans* be applied generally. *Morgans* does not stand for a separate principle in relation to cars, chattels of conveyance, or chattels generally. Rather, it illustrates the general principles of agency law in the United Kingdom. In *Morgans* their Lordships specifically rejected Lord Denning MR's car-specific principle. They expressed themselves in the general terms of principal and agent, as did du Parcq LJ in *Hewitt*. Moreover, the citation of *Morgans* in *Heatons Transport*, a decision involving agency issues but not involving cars (and also, it must be conceded, not involving tortious liability), supports the agency interpretation of *Morgans*. That being so, the principle of that case is applicable generally and to the acts of agents flying aeroplanes in particular. Canadian courts have already applied the principle to boats[183] and to aeroplanes[184].

108 For the purpose of this case, it is unnecessary to determine whether the terms of Lord Wilberforce's speech in *Morgans* should be literally applied to cases in Australia. It is the general principle of the case which must be taken into account, and it may be that, given this Court's decisions in *CML* and *Soblusky*, it needs some qualification. In *Broome v Cassell & Co*[185], Lord Reid pointed out that judgments should not be read "as if they were provisions in an Act of Parliament" or that it was a function of judges "to frame definitions or to lay down hard and fast rules". His Lordship continued[186]:

> "It is their function to enunciate principles and much that they say is intended to be illustrative or explanatory and not to be definitive."

109 Further, as I pointed out in *Burnie Port Authority v General Jones Pty Ltd*[187], the genius of the common law is that the first statement of a common law rule or principle is not its final statement. The contours of rules and principles expand and contract with experience and changes in social conditions.

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183 *Pawlak v Doucette* [1985] 2 WWR 588 at 601.

184 *Rand v Bomac Construction Ltd* (1988) 55 DLR (4th) 467 (where the claim failed on the facts).

185 [1972] AC 1027 at 1085.

186 [1972] AC 1027 at 1085.

187 (1994) 179 CLR 520 at 585.

110 Given the decision and the reasoning of Dixon J in *CML*, the decision and reasoning of this Court in *Soblusky* and the facts of this case, it is enough to say that a principal who has delegated a task or duty will be liable where two conditions exist. First, where a duty has been delegated, it must be owed to a third person and where a task has been delegated, it must be one which the principal has undertaken to a third person to perform. It is not a necessary condition of liability that the duty or undertaking is legally enforceable. Second, by reason of the principal's ownership or possession of a chattel or otherwise, the agent must be under the general control of the principal and not an independent functionary. By saying that the agent must be under the general control of the principal, I mean that the principal must have a right to exercise control, although that right (a) need not be actually exercised; and (b) need not extend to every detail of the manner in which the task or duty is carried out. The right of the principal to exercise general control is what distinguishes an "agent" from an independent contractor. When these two conditions exist, the delegate stands in the shoes of the principal and is within the principle of this Court's decision in *CML*[188].

Mr Bradford was the agent of the respondent who is liable for his agent's negligence

111 The critical matters in the present case are that the fathers of the boys asked whether they might be taken for a ride in the plane and the respondent agreed to do so and that the respondent retained general control of the activity. His Honour found that the respondent was not acting as a mere conduit of the request from the second appellant to Mr Bradford:

> "[The respondent] clearly exercised his own powers of decision making to grant permission for the boys to fly and in implementing that decision by arranging for his wife to ask Mr Bradford to do it. He was not merely a conduit."

112 That being so, in my view the task or duty to be delegated was the respondent's. The fact that he may not have received a significant or any benefit from the task is not relevant. The respondent could have refused the request to "take the boys up", but he did not. Once he acceded to that request, it became his

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188 cf the formulation in *Christmas v Nicol Bros Pty Ltd* (1941) 41 SR (NSW) 317 at 320 (a decision prior to *Soblusky*) where Sir Frederick Jordan said:

> "[I]n order to fix with vicarious liability a person other than the negligent driver himself, it is necessary to show that the driver was at the time an agent of his, acting for him and with his authority in some matter in respect of which he had the right to direct and control his course of action."

task to perform, notwithstanding the fact that, at any time prior to the plane taking off, he could have changed his mind and refused to allow the first appellant and Mr Bradford to fly in the plane.

113 No doubt the issue of delegation is complicated by the fact that the respondent did not ask Mr Bradford to take the boys up, but rather asked Mrs Davis to ask Mr Bradford to take the boys up. Mrs Davis was originally a defendant in the proceedings, but the claim against her was dismissed by the trial judge:

> "[T]here is no evidence that Mrs Davis exercised any separate discretion from [the respondent], or that she should have. There is no evidence that she believed, or should have believed Mr Bradford to be untrustworthy as a pilot. She did not own the plane, or have control over it. I can see no basis for her to be liable."

114 However, the fact that the respondent asked Mrs Davis to ask Mr Bradford to take the boys up does not prevent a finding that the respondent delegated his task to Mr Bradford, as I think he did.

115 As the respondent was the owner of the plane, he had the legal right to control the use of the plane. This was not a case where the pilot was employed merely to carry out a task by whatever means he chose. It was not a case where the principal had no right to give any directions to the agent as to how that task should be performed. The respondent, as owner of the plane, had the right to direct and control much of the manner in which the pilot carried out the delegated task. He owned the plane and the airstrip and was entitled, *inter alia*, to give directions as to the duration, speed and direction of the flight.

116 I do not think that it is decisive that he was not present in the plane and could not communicate with the pilot after take-off. The United Kingdom cases do not require actual physical presence for agency liability. Nor does *CML*[189]. I see no reason why physical presence should be a necessary requirement of liability. As du Parcq LJ said in *Hewitt*[190]:

> "It is, I think, plain both on principle and on authority, that the owner, or other person having the control of a vehicle may be responsible for the acts of the person driving it, on the ground of agency, even though he was not present in or near the vehicle so as to be able to exercise control over the driver."

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189 (1931) 46 CLR 41; cf *Samson v Aitchison* [1912] AC 844.

190 [1940] 1 KB 188 at 195.

117 Moreover, their Lordships were engaged in a completely futile exercise in *Morgans* when they inquired into the purpose for which the driver was driving if physical presence is required: Mrs Morgans was at home at the time of the accident.

118 Finally, Mr Bradford's flying was done on behalf of and in discharge of the undertaking of the respondent and within the scope of his authority.

Conclusion

119 The categories of vicarious liability did not close in 1840 when *Quarman* was decided. That case established only that a person employing another could not be liable for the latter's wrongful conduct if the person employed was an independent contractor. The common law continued to hold a master liable for the torts of a servant and a principal liable for the torts of agents who acted in a representative capacity. Moreover, not only did the categories of vicarious liability remain open, but the principles of vicarious liability themselves underwent significant change after 1840.

120 Not all the "motor car" cases have been correctly decided. But, properly understood, they do not depart from the basic principles of vicarious liability, as they have evolved, in holding an owner liable where negligent driving has occurred in the course of performing a task or duty which the owner has asked the driver to perform as the owner's representative or delegate. The "motor car" cases are not the product of unprincipled, social engineering on the part of the common law judges. No doubt the true basis of those decisions has emerged only slowly. But that is often the way of the common law. As Judge Cardozo once said[191]:

> "Cases do not unfold their principles for the asking. They yield up their kernel slowly and painfully. The instance cannot lead to a generalization till we know it as it is. That in itself is no easy task. For the thing adjudged comes to us oftentimes swathed in obscuring dicta, which must be stripped off and cast aside."

121 Once it is accepted that the owner of a motor car may be liable for negligent conduct of a driver who is not an employee and whose conduct was neither authorised, instigated nor ratified, that principle must also apply to planes and boats. Nothing about planes or boats provides any logical reason for pushing them outside the scope of the principle. It is no doubt true, as Holmes famously said, that the "life of the law has not been logic" but experience[192]. Still "no

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191 *The Nature of the Judicial Process*, (1921) at 29.

192 *The Common Law*, (1882) at 1.

system of law can be workable if it has not got logic at the root of it"[193]. That being so, the appellants must succeed.

Order

122 I would allow the appeal.

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193 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 516 per Lord Devlin.

GUMMOW J.

A. THE NATURE OF THE CASE

123 This is an appeal from the Full Court of the Supreme Court of South Australia. The Full Court (Doyle CJ and Nyland J; Millhouse J dissenting) allowed an appeal from the District Court, set aside a judgment awarding damages to the present appellants and substituted a judgment dismissing their actions[194]. The actions had been tried by Bright DCJ sitting alone. In this Court the appellants seek orders which would restore their success at the trial. The circumstances giving rise to the action arose from the crash of an aeroplane privately owned and operated by the respondent but not flown by him on the occasion in question.

124 The issues which arise on the appeal require an examination of the foundation in principle of the proposition for which a passage in the joint judgment in *Soblusky v Egan*[195] is authority. In that passage, their Honours (Dixon CJ, Kitto and Windeyer JJ) referred[196] to what they took as having been decided in three decisions of the Court of Exchequer, *Chandler v Broughton*[197], *Booth v Mister*[198] and *Wheatley v Patrick*[199]. They then said that it was "from this line of authority" that the decision of the Privy Council in *Samson v Aitchison*[200] had proceeded, and continued[201]:

> "It means that the owner or bailee being in possession of the vehicle and with full legal authority to direct what is done with it appoints another to do the manual work of managing it and to do this on his behalf in circumstances where he can always assert his power of control. Thus it means in point of law that he is driving by his agent. It appears quite immaterial that Soblusky went to sleep. That meant no more than a

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194 *Davis v Scott* (1998) 71 SASR 361 at 383.

195 (1960) 103 CLR 215.

196 (1960) 103 CLR 215 at 229-230.

197 (1832) 1 C & M 29 [149 ER 301]; (1832) 2 LJ Ex 25.

198 (1835) 7 Car & P 66 [173 ER 30].

199 (1837) 2 M & W 650 [150 ER 917]; (1837) 6 LJ Ex 193.

200 [1912] AC 844.

201 (1960) 103 CLR 215 at 231.

> complete delegation to his agent during his unconsciousness. The principle of the cases cited is simply that the management of the vehicle is done by the hands of another and is in fact and law subject to direction and control. This therefore must be regarded as an obvious case."

125 It is important for an appreciation of *Soblusky* today that, at the time it was decided (in 1960), this Court regarded itself as bound by decisions of the Privy Council even in appeals to that body from other countries[202]. Thus, the Court was foreclosed from pursuing any line of inquiry as to the correctness of *Samson v Aitchison*, and was limited to seeking some basis upon which that case might be rationalised.

126 *Soblusky* decided that the appellant, who had assumed liability under a hire-purchase agreement in respect of a motor vehicle and who was a passenger at the relevant time, was liable at common law for the negligence of the driver. Subsequently, in *Launchbury v Morgans*[203], the House of Lords rejected the proposition which had been accepted by the Court of Appeal[204] that, in the case of a "family car", the owner was responsible, as a matter of vicarious liability, for the use of it by other family members. This "doctrine" had its origin in certain jurisdictions in the United States and, in argument before the House of Lords, reference was made[205] to the statement by Dean Prosser that there was an element of "unblushing fiction" in it[206]. Lord Wilberforce said that, whilst such a suggested innovation "has its attraction[s]", the House should not embark upon it[207]. However, their Lordships did accept that liability might be incurred by the owner of a motor vehicle if it could be shown (and it was not shown on the facts of *Launchbury v Morgans*) that the driver was using it for the owner's purposes under delegation of a task or duty.

127 In Australia, authorities such as *Soblusky* and *Launchbury* still have significance for property damage cases, but retain little vitality in their

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202 *Morris v The English, Scottish and Australian Bank Ltd* (1957) 97 CLR 624 at 629-630. See also *Viro v The Queen* (1978) 141 CLR 88 at 118-119, 137, 174.

203 [1973] AC 127.

204 [1971] 2 QB 245.

205 [1973] AC 127 at 133.

206 *Handbook on the Law of Torts*, 3rd ed (1964) at 494. See now *Prosser and Keeton on The Law of Torts*, 5th ed (1984) at 524.

207 [1973] AC 127 at 136.

application to personal injury caused by the negligent use of motor vehicles. The reasons for this state of affairs have been summarised as follows[208]:

> "In most Australian jurisdictions the owner of a car must, as a prerequisite of registration, take out a policy of insurance covering the liability of the owner and the driver (whether the latter is driving with the authority of the owner or not)[209] for personal injury or death caused by or arising out of the use of the motor-vehicle. This provision by itself is wide enough to impose liability on the owner (and thus tap the owner's insurance) whether or not the driver was the owner's common law agent. But in some jurisdictions there is a provision that deems the driver of a motor vehicle (whether with or without the authority of the owner) to be the agent of the owner for the purposes of the legislation.[210] Where insurance is not taken out by the owner, the injured person has recourse against a statutory fund. So there are very few cases in which a plaintiff will need to appeal to common law principles to establish the liability of the owner of a car for the negligence of the driver. The common law principles may be relevant where the plaintiff seeks to recover for damage to property[211] or in the rare case where [the plaintiff] wishes to sue someone other than the statutory principal (that is, the registered owner).[212]"

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208 Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 733-734.

209 An unauthorised driver may be a thief: *Marsh v Absolum* [1940] NZLR 448; or an authorised driver who, at the time of the accident, is exceeding their authority.

210 As to cars owned by the Commonwealth see *Commonwealth Motor Vehicles (Liability) Act 1959*, s 5.

211 For example *Emjay Motors Pty Ltd v Armstrong* (1995) 22 MVR 193.

212 For an example of the latter see *Soblusky v Egan* (1960) 103 CLR 215 [and *Behrendorff v Soblusky* (1957) 98 CLR 619. These two appeals arose out of actions brought in respect of the one motor vehicle collision. In *Egan*, Egan sued Lewis (the driver), Soblusky and Behrendorff for his personal injuries. The trial judge found that the accident was due to the negligence of Lewis, that Behrendorff as "statutory owner" was liable for the negligence of Lewis as statutory "agent", and that, at common law, Lewis was the "agent" for Soblusky who was in "control" of the car so that Soblusky was liable to Egan for his negligence. In *Behrendorff*, Soblusky sued Behrendorff and Lewis for his injuries and property damage. This Court rejected the submission that Behrendorff could not be liable as "statutory owner" because concurrently Lewis may have been Behrendorff's "agent" at common law under the authority of *Samson v Aitchison* [1912] AC 844].

128 *Jennings v Hannan (No 2)*[213] was decided by the New South Wales Court of Appeal after *Soblusky* and before *Launchbury v Morgans*. The judgment of the Court (Walsh, Jacobs and Holmes JJA) was delivered by Walsh JA. His Honour referred to *Soblusky* as having given "some attention" to problems which he identified as follows[214]:

> "It is to be seen that the problem is one of evidence. The question is whether upon proof of the defendant's ownership of what I might call the offending vehicle, an inference may be drawn that it was being driven in circumstances which imposed liability on the owner for the negligence which was found to have occurred. If the matter had to rest on a strict theory of vicarious liability, which limited the responsibility of the owner to cases in which the driver was his servant in the ordinary sense of that term, I think it would be difficult indeed to say that an inference could be drawn that that was the fact. But the basis of liability of an owner of a motor car, which by being driven negligently causes damage, has been extended. *There are some uncertainties and difficulties as to the exact legal basis of this extended liability and perhaps as to whether the decisions which have extended it are in conformity with established traditional principles as to vicarious liability for tort.* But however that may be, it seems to be clear that the extension has occurred and that liability is no longer confined to cases where the driver is a servant in the ordinary sense of the term, nor is it any longer confined to cases in which it can be seen that there is actually a retention by the owner of the right and duty to control the method of driving the vehicle." (emphasis added)

Walsh JA went on to describe the notion of control here as "fictitious"[215]. The spirit of the times is unfavourable to the preservation of existing legal fictions and hostile to the creation of new ones[216].

129 The litigation in *Jennings v Hannan (No 2)* concerned property damage, not personal injury. Walsh JA distinguished the New South Wales statutory scheme with respect to personal injury from the common law fiction, saying that the statute[217]:

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213 (1969) 71 SR (NSW) 226.

214 (1969) 71 SR (NSW) 226 at 229. See also the discussion of principle by Hart J in *Kirth v Tyrrell* [1971] Qd R 453 at 459-461 and by Fox J in *Milkovits v Federal Capital Press of Australia Pty Ltd* (1972) 20 FLR 311 at 314-315.

215 (1969) 71 SR (NSW) 226 at 230.

216 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 387 [163].

217 (1969) 71 SR (NSW) 226 at 235.

> "sets up in effect a conclusive rule of liability on the owner of the car, whether or not it was being driven by somebody who had his authority to drive it or whether the circumstances were or were not such that under the general law vicarious liability would attach".

130 In the United States, the use of motor vehicles continues to give rise to issues respecting the imposition of liability upon owners who themselves are free from negligence. In addition to the "family car" doctrine, various other measures have been adopted in the case law. These are summarised in the current edition of *Prosser and Keeton on the Law of Torts* in a passage which it is useful to set out as it assists an understanding of the issues which arise on this appeal[218]:

> "This quest for a financially responsible defendant has led, in the automobile cases, to a variety of measures. Where the owner of the car entrusts it to an unsuitable driver, he is held liable for the negligence of the driver, upon the basis of his own negligence in not preventing it. But even where the owner has exercised all due care of his own, vicarious responsibility has been imposed. When the owner is present as a passenger in his own car, a number of courts have held that he retains such a 'right of control' over the operation of the vehicle that the driver is to be regarded as his agent or servant. In many of these cases, it is not clear that anything more is meant than that the owner has failed, when he had the opportunity, to interfere with the negligent driving, and so has been negligent himself. In others, special circumstances have indicated that the owner in fact retained the authority to give directions as to the operation of the car. But some courts clearly have gone further, and have held that the right of control, sufficient to impose responsibility, is established by the mere presence of the owner in the car. Most jurisdictions have rejected such an arbitrary rule, and have held that the owner may surrender his right to give directions, and become a guest in his own car. It is generally agreed that the plaintiff may be aided by a presumption that the driver is an agent or servant, but the owner may prove the contrary."

131 It will be apparent when the facts of the present case are more fully related in Section B that none of this reasoning would apply, if only because the owner was not in the aircraft in question when it crashed. Significantly, Dean Prosser and Professor Keeton continue[219]:

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218 5th ed (1984) at 523 (footnotes omitted).

219 *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 523-524 (footnotes omitted).

> "If the owner is not present in the car, but has entrusted it to a driver who is not his servant, there is merely a bailment, and there is usually no basis for imputing the driver's negligence to the owner. It is here that the owner's liability to the injured plaintiff stops at common law. Only the courts of Florida have gone the length of saying that an automobile is a 'dangerous instrumentality,' for which the owner remains responsible when it is negligently driven by another. Courts in other states have refused to accept this simple but sweeping approach, and have instead struggled hard to find some foundation for vicarious liability in the circumstances of the particular case."

132 In the present case, the majority in the Full Court held that the rationale for vicarious liability in relation to the use of motor vehicles did not extend to the use of other forms of conveyance such as privately owned aircraft not used for commercial purposes. Doyle CJ and Nyland J said[220]:

> "If the wider approach is applied to other forms of conveyance, there seems to be no reason why it should not be applied to chattels generally, and we consider that that development would have an unsettling effect on the law. For those reasons, we consider that the wider approach should not be extended to a new area, even though we acknowledge that as a matter of logic it is capable of extension. Accordingly, we decline to do so."

Their Honours also decided that, in any event, the proposition in *Soblusky*, which has been set out earlier in these reasons, could not be applicable. This was because, at the relevant time, the piloting of the aeroplane was not under the control of the owner, nor did he have the ability to assert control[221]. In this Court, the appellants challenge all of these holdings on questions of law.

B. THE FACTS

133 The respondent in this appeal, Mr Davis, is an owner and occupier of a property at Rowland Flat on Jacobs Creek in the Barossa Valley of the State of South Australia. An aircraft hangar and runway are located on the property. Mr Davis is a vintage aeroplane enthusiast and licensed pilot and he owns several light aeroplanes for his private use. One of these was an Aeronca 65 HP high wing monoplane ("the Aeronca"). On 29 July 1990, Mr and Mrs Davis held a party at their property for their daughter's 21st birthday. The appellants attended. The second appellant, Mr Scott, is the brother of Mrs Davis. The third appellant,

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220 (1998) 71 SASR 361 at 377.

221 (1998) 71 SASR 361 at 377.

Mrs Scott, is his wife and the first appellant, Travis Scott ("Travis"), is their son. He was then 11 years of age.

134 Several other guests at the social occasion were pilots. One, Mr Michael Bradford, was a Licensed Aircraft Mechanical Engineer. He held a pilot's licence but one that was not endorsed to permit the performance of aerobatics. There were findings by the trial judge that there was no contract between Mr Bradford and Mr Davis; neither the relationship of master and servant nor that of principal and agent on contractually agreed terms existed between them. These matters are important for all that follows in these reasons.

135 There were three boys present at the function in addition to Travis: his younger brother, Tyson, and two brothers, the Beechings. After lunch, their fathers, Mr Scott and Mr Beeching, approached Mr Davis. The trial judge found that they jointly requested of Mr Davis "whether there would be a chance of the boys having a ride" in an aeroplane. Mr Davis replied that he would think about it, and later asked Mrs Davis to arrange for Mr Bradford to take the boys for a flight in an aeroplane. The trial judge found that she had made this request and that Mr Bradford had acceded to it.

136 Mr Bradford took Travis flying in the Aeronca. It was a fine day, with some cloud and a light tailwind. Mr Bradford was sitting in the front, pilot's seat, and Travis was sitting behind him in the passenger seat. The trial judge found:

> "The Aeronca continued until it passed over Jacobs Creek, when it began to turn to the west. Watchers from near the hangar saw nothing remarkable to this stage. The preponderance of evidence does not suggest that the turn was particularly steep. Part way through that turn, the left wing dropped, the nose swung down and the plane almost instantaneously headed down in a vertical, anti clockwise spiral. It vanished behind the trees on the creek line. On the way down, its wings (or one of them) and/or the undercarriage appear to have brushed tree branches."

The plane hit the ground nose-first, in an almost vertical position. Mr Bradford was killed instantly. Travis was seriously injured. Several of those who witnessed the accident rushed to the scene and extricated Travis. Mr and Mrs Scott saw the plane go down and arrived at the scene after Travis had been pulled free. Both suffered nervous shock upon seeing him injured, Mrs Scott suffering rather more acutely than her husband.

C. THE PLEADINGS

137 The notion of "control" is significant in several respects for the law of tort and an attempt to expand it lies behind the contentions in this case.

138 In *Perre v Apand Pty Ltd*[222], one strand in the reasoning of a number of the members of this Court was that the respondent had been in effective control of the particular operation which led ultimately to the imposition of the embargo upon the appellants' properties[223]. Similar reasoning respecting the powers of the appellant in *Pyrenees Shire Council v Day*[224] appears in the majority judgments[225]. In *Hill v Van Erp*[226], both Gaudron J and I saw the control by the appellant solicitor over the realisation of the testamentary intentions of the testatrix as a significant matter for the imposition upon the appellant of a duty of care.

139 Further, the existence of control has been a significant criterion by which to gauge whether a relationship is one of employment, with concomitant vicarious liability, or of independent contract[227].

140 A notion of "direction and control" played a part in the reasoning in *Soblusky* and has been significant in some United States jurisdictions. This is apparent respectively in the extracts from the judgment in *Soblusky* and from *Prosser and Keeton on the Law of Torts* which are set out in Section A of these reasons. To a significant degree, the appellants in the present case frame their allegations, particularly those by which they seek to impose vicarious liability upon the respondent in circumstances where the negligence which caused the accident was that of a third party not employed by the respondent, by reference to a notion of "control" of that third party by the respondent.

141 The appellants each commenced an action alleging negligence on the part of Mr and Mrs Davis[228]. The appellants did not join the estate of the pilot as a

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222 (1999) 198 CLR 180.

223 (1999) 198 CLR 180 at 195 [15], 200-202 [34]-[42], 226 [120], 259-260 [216]-[217], 325-326 [405].

224 (1998) 192 CLR 330.

225 (1998) 192 CLR 330 at 347-348 [24]-[27], 388-391 [166]-[173], 427-428 [254]-[256].

226 (1997) 188 CLR 159 at 198-199, 234. See also the judgment of Dawson J (with whom Toohey J agreed) at 186.

227 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24, 35, 49-50.

228 The action by Travis (by his father as next friend) was instituted in the District Court. Those by his parents were commenced in the Magistrates' Court. They appear to have been transferred to the District Court. The three actions were heard together and the one set of orders was made by the District Court.

defendant, although, as will appear, the trial judge was to hold that the accident had been caused by his negligence and, plainly, the estate would have been a proper party to sue. There was no allegation against Mr and Mrs Davis of failure to maintain the Aeronca in good condition and an inspection of the aeroplane conducted after the accident by specialist officers of the Bureau of Air Safety found that it had contained no mechanical defects. The allegations of negligence were, effectively, put on two broad bases. The first was that Mr Bradford was a pilot known to fly planes to the limit of their safe performance; that this was known to Mr and Mrs Davis; and hence that it was a breach of a duty owed directly to the appellants to permit such a pilot to fly Travis. The second basis was an allegation that Mr and Mrs Davis were "vicariously" liable for the negligence of Mr Bradford; that is, liable despite Mr and Mrs Davis not being personally at fault.

142 The allegations respecting the respondent's failure to protect Travis from the known unsafe nature of Mr Bradford's flying were as follows. All three appellants pleaded that Mr and Mrs Davis had invited and encouraged Travis to fly with Mr Bradford; that they had impliedly warranted the safety of the flight to Travis; that neither Mr Bradford nor the plane was licensed to perform aerobatic manoeuvres; but that the Davises had seen Mr Bradford perform aerobatic manoeuvres on the day of and the day before the crash. Travis charged that Mr and Mrs Davis knew that Mr Bradford had a "reputation" for performing "risky manoeuvres while flying", having seen Mr Bradford perform such manoeuvres on the day of the crash and on the day before it. This flying by Mr Bradford was said to have been in breach of ss 20A and 29 of the *Civil Aviation Act* 1988 (Cth) ("the Act"); in breach of regs 79, 155, 172 and 282 of the Civil Aviation Regulations; contrary to Mr Bradford's licence conditions; and contrary to the limits set out in the Aeronca's certificate of airworthiness. In this context, it was pleaded that neither Mr nor Mrs Davis had specifically prohibited Mr Bradford to perform aerobatic manoeuvres, even though they knew that he had done so and had a propensity to do so.

143 Allegations also were founded on a basis in federal statute law[229]. Travis claimed that both Mr and Mrs Davis, as owners and operators of the Aeronca, were in breach of s 20A of the Act in that they permitted the flying of the aeroplane in a reckless or negligent manner so as to endanger life. He also asserted a breach of s 29 in permitting a breach of s 20A[230]. Travis further

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229 The result was the attraction of federal jurisdiction under s 76(ii) and s 77(iii) of the Constitution, with which the District Court was invested by s 39(2) of the *Judiciary Act* 1903 (Cth): *Felton v Mulligan* (1971) 124 CLR 367 at 374.

230 Both ss 20A and 29 are found in Pt III of the Act, which is headed "Regulation of civil aviation". Section 20A is found in Div 1 of this Part, entitled "General regulatory provisions". It reads:

(Footnote continues on next page)

alleged that Mr Davis, as owner of the Aeronca, breached his duty of care to ensure that any person using the Aeronca "was not exposed to risk or danger in breach of his obligations pursuant to Section 29 and Section 20A of the [Act]". There was no finding on these allegations and, it would appear, no agitation of the matter in the Full Court. They did not arise on the appeal to this Court.

144 The allegations respecting "vicarious" liability for Mr Bradford's negligence were as follows. All three appellants claimed that Mr and Mrs Davis had failed properly and adequately to supervise and instruct Mr Bradford and that they were vicariously liable for the negligence of Mr Bradford in his management and control of the said aeroplane. Travis pleaded that Mr and Mrs Davis were to be considered:

> "as the employers of [Mr Bradford], or in the alternative being persons with ostensible and/or actual authority over [Mr Bradford] and being persons who had asked [Mr Bradford] to conduct the joy flight and had provided the aircraft to [Mr Bradford] for that purpose".

His parents identified Mr and Mrs Davis:

> "as the employer[s] of [Mr Bradford] or in the alternative being [persons] who had asked [Mr Bradford] to conduct a joy flight".

145 There was a further allegation of negligence, founded on the proposition that Mr and Mrs Davis were owners and occupiers of the property and airstrip from which the flight had originated and had failed to "exercise their duty of care to persons using [these] facilities" or to protect Travis from "the risk that

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> "(1) No person may operate an aircraft in a careless or reckless manner so as to endanger the life of another person.
>
> (2) No person may operate an aircraft in a careless or reckless manner so as to endanger the person or property of another person."

Section 29 is the first section in Div 3, headed "General offences in relation to aircraft". Sub-section 29(1) relevantly reads:

> "(1) No owner, operator, hirer (not being the Crown) or pilot of an aircraft shall operate the aircraft or permit the aircraft to be operated so as to:
>
> …
>
> (b) fly or be operated in contravention of a provision of this Part or a direction given, or condition imposed, under such a provision."

Sub-sections 29(1A), (1B) and (2) provide the penalties for contravention of sub-s 29(1).

occurred [of] which they knew or reasonably ought to have known". The trial judge rejected the imposition of any liability on this ground.

146 At some stage, Mr and Mrs Davis had joined The Australian Aviation Underwriting Pool Pty Ltd as a third party to the proceedings. The third party proceedings were settled and discontinued at the trial, with Mr and Mrs Davis being ordered to pay the third party $10,000 in costs. No other insurer appears to have been involved and the action proceeded as one of family against family.

D. THE FINDINGS

147 The trial judge entered judgment against Mr Davis. All three claims against Mrs Davis were dismissed. The only respondent in this Court is Mr Davis.

148 The starting point for the finding against Mr Davis was the holdings in respect of the pilot, Mr Bradford. The trial judge found that the accident had been caused by Mr Bradford's negligence on either of two bases. The more likely basis for this was that Mr Bradford was "flying too slowly which caused the plane to stall on the turn". The other basis was that Mr Bradford had been negligent in failing to take account of possible windshear in the area in which he was making his turn. This was a phenomenon – likened in argument to driving on an oily or icy road surface – which subjected aeroplanes flying through it to sudden forces which made it more difficult for a competent pilot to manage safely. In respect of this basis, the trial judge found Mr Bradford had been negligent in starting his turn in an area that a competent pilot could see would be prone to windshear, and in flying too low and too slow to recover should the aeroplane experience it.

149 The trial judge rejected any submission that the crash was deliberately caused or that it resulted from a "dangerous, aerobatically steep turn", and found that Mr Bradford "embarked on an unremarkable turn to the left and … lost control unintentionally". The trial judge rejected any contention that Mr Bradford had performed manoeuvres on the day of the crash "which, if they had been seen by Mr Davis, should have suggested to him that Mr Bradford was not a pilot to trust". He also found that Mr Davis had no prior knowledge of Mr Bradford being an untrustworthy pilot. As a result, his Honour held that the appellants had "not established that Mr Davis knowingly entrusted his nephew to an untrustworthy pilot – and [had] not come anywhere near establishing that nasty allegation".

150 As has been indicated earlier in these reasons, the trial judge also rejected the imposition of any liability on Mr and Mrs Davis on the ground merely that they were owners and occupiers of the airstrip. He considered the fact of ownership or occupation gave rise to no independent liability, although those facts may have been relevant as part of the matrix of facts to be considered in

respect of the other heads of liability. As a result, those parts of the cause of action relying on the exposure by Mr and Mrs Davis of Travis to a known risk in Mr Bradford's flying fell away and the appellants could only succeed on those particulars of negligence respecting vicarious liability.

151 On these issues, his Honour found for the appellants against Mr Davis. He found that there was no relationship of master and servant, nor one of principal and agent "on contractually agreed terms". However, the trial judge went on to decide the case on the footing that the relationship between the appellants and Mr Davis was within the principle of "vicarious liability for acts of others to whom a chattel has been loaned".

152 The trial judge took the cases of *Hewitt v Bonvin*[231], *Ormrod v Crosville Motor Services Ltd*[232] and *Launchbury v Morgans* to stand for the proposition that the owner of a chattel will vicariously be liable for the damage caused by the acts of another person, "if the user of it was using it as his servant or his agent"[233]. None of these was the decision of an Australian court. The first two were decided by the English Court of Appeal before *Soblusky* and were cited in argument but not referred to in the judgment of this Court. *Launchbury v Morgans* was decided subsequently to *Soblusky* and, although *Soblusky* was cited to the House of Lords in argument[234], it was not referred to in any of the speeches of their Lordships. The proper starting point for the District Court (and the Full Court) was not with English decisions but with binding Australian authority. That authority was *Soblusky*.

153 The trial judge referred to *Clerk & Lindsell on Torts*[235] for the proposition that "[t]o be liable, the defendant must retain both a right to control the use of the chattel and must have an interest in the purpose for which it is being used." Further, his Honour said that "permission to use is not, alone, enough to found liability. There must also be a request by the owner to the driver and some benefit to the owner, though it need not be pursuant to any arrangement so specific as to amount to a contract." He saw no reason that the principle could not apply to cases involving aircraft as well as applying to motor cars.

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231 [1940] 1 KB 188.

232 [1953] 1 WLR 1120; [1953] 2 All ER 753.

233 *Launchbury v Morgans* [1973] AC 127 at 144.

234 [1973] AC 127 at 130. It had been cited to the Court of Appeal *Launchbury v Morgans* [1971] 2 QB 245 at 248.

235 16th ed (1989) at §3-50. This is a section entitled "Loan of Chattel" in the chapter dealing with vicarious liability. The paragraph is retained, and renumbered as §5-66, in the 17th edition of this work published in 1995.

154 In respect of the element of "control", the trial judge noted that Mr Davis owned the aeroplane and the airstrip, and could have "grounded" Mr Bradford if he had wanted. Indeed, Mr Bradford could not have used the aeroplane or airstrip without Mr Davis' permission, lest his conduct constitute a trespass to the aeroplane and conversion of its fuel. The trial judge thus found that Mr Davis retained "general control", in that "[h]e had control over the use, in general terms, to which the plane would be put, and where it would be used." Mr Davis did not have total control, in that he did not have a radio or other means of communicating with Mr Bradford while he was flying, nor was Mr Davis able to take control of the Aeronca himself. Neither did he seek to dictate Mr Bradford's every move.

155 In respect of the element of "interest", the trial judge held that:

> "[w]hether or not the joyrides occurred was of small moment to [Mr Davis]. He organised them as a favour to the boys and to their families. It was part of providing a good day for guests at the party he and Mrs Davis were giving their daughter. If one searches for benefit to him, it goes no further than giving himself the satisfaction of being a kind host in giving pleasure to his guests. There was no obligation or profit motive on his part."

His Honour concluded that the elements of "control" and "interest" were established so that Mr Davis came within the principle of vicarious liability that he had outlined. Mr Davis had, through Mrs Davis, asked Mr Bradford to fly Travis; he had retained general control of the flight; and had obtained some interest in it being done. The trial judge added:

> "It does not appear that Mr Bradford went beyond the scope of the request – so as, arguably, to exceed his authority, or to embark on a frolic of his own. While I have found he was negligent, that fact does not, without more, indicate that he exceeded his authority."

No plea of contributory negligence had been pursued.

156 In the Full Court, Millhouse J dissented. His Honour would have upheld the decision of the trial judge. The majority, in the manner outlined in Section A of these reasons, reached the opposite conclusion.

E. DISENTANGLING *SOBLUSKY*

157 On its face, the statement of principle in *Soblusky*, set out in Section A, turns upon the proposition that there had been a principal driving by his agent. Their Honours had begun their inquiry which ended in the formulation of principle by speaking of "the main trunk of traditional doctrine governing

vicarious responsibility" and treating as a branch of it the law in England "relating to the responsibility of the owner of a motor vehicle for the negligence of a person driving under his authority or consent"[236].

158 In this Court, no application was made to re-open *Soblusky*. However, there was debate as to the proposition for which it is authority, and the doctrinal basis and scope of that proposition. Argument ranged over various issues. A significant concern here is the place of agency in the law of torts, particularly as a legitimate source of vicarious liability. Given the possibility of vicarious liability, the submissions were directed to such issues as the degree required of control by the bailor of a chattel; whether the vicarious liability was based on ownership, or right to possession, or something else; the nature of the interest for or purpose of the bailor required to make the bailor liable; whether the principle was confined to motor cars, or extended to chattels of mobile conveyance; and, finally, whether it should be extended to aircraft, as in England and British Columbia it appears already to apply to boats[237].

159 These latter submissions suffer from the one vice: all start too far forward in the chain of reasoning. It is not a choice of applying or not applying a principle such as that apparently stated in *Soblusky* (or in *Launchbury v Morgans*) by choosing whether or not to extend the scope of its operation to aircraft. That presupposes that the principle to be extended is itself soundly based. Rather, to resolve this case, the proposition stated in *Soblusky* and the authorities apparently underlying it must be examined. On closer reading it becomes apparent that any general principle respecting "agency" and "vicarious liability" derived from those cases cannot have a sound foundation. The question then arises whether, if the present case does not fall within the statement of particular principle in *Soblusky*, the case should be brought within it by some process of extension.

160 The treatment in the twentieth century cases of the authorities said to support the imposition of "vicarious" liability for the use of chattels by another is to an extent indicative of a declining appreciation of legal history, particularly the history of common law procedure. Without such an understanding, the development of the common law from one decision to the next may miscarry. This appeal illustrates the proposition that, while the old forms of action may not rule us from their graves, they cannot readily be ignored when seeking to locate a root for common law substantive principle.

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236 (1960) 103 CLR 215 at 229.

237 *"Thelma" (Owners) v University College School* [1953] 2 Lloyd's Rep 613; *Pawlak v Doucette* [1985] 2 WWR 588 at 597-601.

161 The development of much of the relevant case law has involved the shifting meaning of "control" in the law respecting vicarious liability, and particularly the notion that it is the retention of control that makes the defendant liable in these cases. There has been entanglement in it of the relationships of master and servant, and principal and agent, with the law relating to negligent driving, further confused by the tendency of the common law to embrace fictions and by the technicalities of the common law system of pleading as it operated before the introduction of the Judicature system. In this appeal, an effort to disentangle the confusion and to clear a path for the principled development of the common law requires consideration of several matters. The first is the scope of the tort of trespass with respect to negligent driving. The second is the evolution of the tortious liability of a master for the wrongs of a servant. The third is the liability in case for the negligent driving of a servant. The fourth is the distinction between pleading in trespass and case. The fifth is the meaning of "agency" in this area. The first four of these will now be considered in turn. The fifth, agency, is treated in Section H, after dealing in Section G with the modern authorities.

1. Trespass and negligent driving

162 The common law came to the conclusion two centuries ago that trespass was the appropriate form of action to be laid by a plaintiff against the driver of a conveyance that struck and injured the plaintiff or his chattel. In *Day v Edwards*[238], Lord Kenyon CJ held that this was a consequence of the distinction that trespass lay for acts immediately causing injury to the plaintiff while case lay for acts which injured the plaintiff only consequentially. The plaintiff had brought his action in case and had pleaded that the defendant had driven his cart into the plaintiff's carriage. The defendant demurred. The Court of King's Bench upheld the demurrer. Lord Kenyon held that the act pleaded was an "immediate act" and that trespass was the appropriate remedy; judgment was entered for the defendant[239].

163 In *Leame v Bray*[240], the plaintiff had been non-suited. The plaintiff's case at trial had been that he was injured when his carriage was struck by the defendant's chaise owing to the negligence of the defendant in driving upon the wrong side of the road on a dark night. He had sued in trespass but the defendant obtained a non-suit on the ground that the action should have been brought in case. The plaintiff's application for a rule setting aside the non-suit was allowed.

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238 (1794) 5 TR 648 [101 ER 361].

239 (1794) 5 TR 648 at 649 [101 ER 361 at 362].

240 (1803) 3 East 593 [102 ER 724].

The Court of King's Bench (Lord Ellenborough CJ, Grose, Lawrence and Le Blanc JJ) considered that the injury resulted from the defendant's immediate act of driving his chaise. This supported an action in trespass. Le Blanc J distinguished between the situation at hand, where the defendant "was driving the carriage at the time with the force necessary to move it along, and the injury to the plaintiff happened from that immediate act" from that where he had "simply placed his chaise in the road, and the plaintiff had run against it in the dark"[241]. In the former case, he considered that "the remedy must be trespass: and all the cases will support that principle", while in the latter "the injury would not have been direct, but in consequence only of the defendant's previous improper act", so that the proper action was in case[242].

164 In *M'Manus v Crickett*[243], Lord Kenyon CJ had been at pains to emphasise that not every action brought against a negligent driver lay in trespass. He noted other examples of non-immediate injury properly answerable in case. One was the negligence in bringing unmanageable horses to be broken in a public place, whereby they ran amok and injured the plaintiff[244]; another was the negligence in steering and positioning a boat such that it ran afoul of the plaintiff by means of the "wind and tide"[245]. In those cases, the immediate acts were the bringing of the horses into the public place and the positioning of the vessel upon the river; the consequences of those acts, which caused the damage, were the bolting of the horses and the action of the elements in pushing the ship about.

165 Hence the statement by Kitto J in *Darling Island Stevedoring and Lighterage Co Ltd v Long*[246]:

> "The old action of trespass was confined to instances of the direct application of force. An indirect application of force would support only an action of trespass on the case."

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241 (1803) 3 East 593 at 602-603 [102 ER 724 at 728].

242 (1803) 3 East 593 at 602-603 [102 ER 724 at 728].

243 (1800) 1 East 106 at 107-109 [102 ER 43 at 44].

244 *Michael v Alestree* (1676) 2 Lev 172 [83 ER 504]; rep sub nom *Michell v Allestry* (1676) 3 Keb 650 [84 ER 932] and *Mitchil v Alestree* (1676) 1 Vent 295 [86 ER 190].

245 *Ogle v Barnes* (1799) 8 TR 188 at 192 [101 ER 1338 at 1340].

246 (1957) 97 CLR 36 at 64.

2. Liability of a master for acts of the servant

166 The next step is to consider the evolution of tortious liability at common law of a master for the acts of his servant. The appropriate form of action to be laid against the master was case and not trespass. Kitto J explained in *Darling Island Stevedoring*[247] that this was so whether the servant's actions injured the plaintiff immediately or consequentially; for although the plaintiff's action against the *servant* would have been, respectively, in trespass or case, that against the *master* could be in case alone, for his negligence in employing an unskilful or negligent servant.

167 The classical statement of this principle is to be found in the aggregate of two authorities at the turn of the nineteenth century. The first, to which reference already has been made, was *M'Manus v Crickett*, in which the Court of King's Bench entered a non-suit setting aside a verdict for the plaintiff. In giving the opinion of the Court, the Lord Chief Justice held that a servant's trespass (committed by negligent driving) could not be attributed to his master. But, although trespass would not lie against the master, the master was "liable to make a compensation for the damage consequential from his employing of an unskilful or negligent servant"[248], that is, in case. This was because "[t]he act of the master is the employment of the servant; but from that no immediate prejudice arises to those who may suffer from some subsequent act of the servant"[249].

168 In the second, *Morley v Gaisford*[250], an exception had been allowed in the case where the commission of the trespass by the servant was done "at [the master's] command". This and later authorities, including *Chandler v Broughton*[251] are best understood not as cases of vicarious liability, but of direct liability. The servant here is but an instrument for the implementation of the will of the master. *M'Laughlin v Pryor*[252] appears to have been treated as such a case, although one party was described as "co-trespasser" with the other.

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247 (1957) 97 CLR 36 at 64.

248 (1800) 1 East 106 at 108 [102 ER 43 at 44].

249 (1800) 1 East 106 at 108 [102 ER 43 at 44].

250 (1795) 2 H Bl 441 at 443 [126 ER 639 at 641].

251 (1832) 1 C & M 29 [149 ER 301]. See also *Gregory v Piper* (1829) 9 B & C 591 [109 ER 220]; *Doolan v Hill* (1879) 5 VLR(L) 290; Holmes, "Agency", (1891) 4 *Harvard Law Review* 345 at 348.

252 (1842) 4 M & G 48 [134 ER 21].

169 A somewhat different situation occurs where, by reason of the close connection of the parties with the concerted act which constituted the wrong, each is treated as a joint tortfeasor, as if they were co-conspirators[253]. Hence the statement by Brennan CJ, Dawson and Toohey JJ in *Thompson v Australian Capital Television Pty Ltd*[254]:

> "Principal and agent may be joint tortfeasors where the agent commits a tort on behalf of the principal, as master and servant may be where the servant commits a tort in the course of employment. Persons who breach a joint duty may also be joint tortfeasors. Otherwise, to constitute joint tortfeasors two or more persons must act in concert in committing the tort."

170 In 1849, Parke B, when delivering the judgment of the Court of Exchequer in *Sharrod v The London and North Western Railway Company*[255], neatly encapsulated the relevant law respecting trespass, and master and servant as then understood. His Lordship said[256]:

> "Now, the law is well established, on the one hand, that, whenever the injury done to the plaintiff results from the immediate force of the defendant himself, whether intentionally or not, the plaintiff may bring an action of trespass; on the other, that if the act be that of the servant, and be negligent, not wilful, case is the only remedy against the master. The maxim 'Qui facit per alium facit per se' renders the master liable for all the negligent acts of the servant in the course of his employment; but that liability does not make the direct act of the servant the direct act of the master. Trespass will not lie against him; case will, in effect, for employing a careless servant, but not trespass, unless, as was said by the Court in *Morley v Gaisford*[257], the act was done 'by his command;' that is, unless either the particular act which constitutes the trespass is ordered to be done by the principal, or some act which comprises it; or some act which leads by a physical necessity to the act complained of. …

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253 *The Koursk* [1924] P 140 at 155; *Brooke v Bool* [1928] 2 KB 578 at 585; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 580-581, 600, 602.

254 (1996) 186 CLR 574 at 580-581.

255 (1849) 4 Ex 580 [154 ER 1345].

256 (1849) 4 Ex 580 at 585-586 [154 ER 1345 at 1347-1348].

257 (1795) 2 H Bl 441 at 442 [126 ER 639 at 640].

> [I]n all cases where a master gives the direction and control over a carriage, or animal, or chattel, to another rational agent, the master is only responsible in an action on the case, for want of skill or care of the agent – no more".

Thus, where there had been no "command" in the sense described above, the appropriate form of action to sheet home vicarious liability to a master was case.

3. Liability of a master for the negligent driving of a servant

171 Litigation in which a plaintiff sought to make a master liable for the negligent driving of his servant involved not only the principles of master-servant liability, but the distinction between trespass and case. Where the plaintiff was injured immediately from the actions of a servant who drove, his action against the servant would be in trespass. But where the plaintiff sought to sue that servant's master, the action would properly be in case. Such was *Morley v Gaisford*, where the plaintiff had brought an action in case against the master for the servant's negligence. The defendant had sought a rule in arrest of judgment on the ground that the action ought properly to have been in trespass; but, as noted above, the Court held that, except where the servant's trespass had been at "the command of the master", the proper action against the master was one in case. Accordingly, the rule was discharged.

172 *Chandler v Broughton* is one of the nineteenth century cases discussed in *Soblusky*[258] as part of the line of authority from which the Privy Council decision in *Samson v Aitchison* proceeded. The Court of Exchequer there was considering whether an action in trespass lay where the master had been sitting by his servant who negligently drove a gig "against the church in Langham Place". There was a verdict for the plaintiff and the Court of Exchequer refused a motion for a non-suit. Bayley B is reported by Crompton and Meeson as having said that the rule was[259]:

> "[I]f master and servant are sitting together, and the servant is driving the master, the act of the servant is the act of the master, and the trespass of the servant is the trespass of the master.
>
> Here the act is immediately injurious to the plaintiff, and the master was present.

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258 (1960) 103 CLR 215 at 229-230.

259 (1832) 1 C & M 29 at 30 [149 ER 301 at 301].

> I think that where the master is sitting by the side of his servant, and the servant does an act immediately injurious to the plaintiff, an action of trespass is the proper remedy."

173 That this is an instance of the principle, noted above, whereby an act done by the servant "at the command of the master" implicates the master directly and not on the basis of vicarious liability is clear from the report in the Law Journal[260]. There, Bayley B is reported as saying[261]:

> "There is no case militating against the position, that where the owner of a carriage is sitting by the side of his servant, the act of the servant in driving is the act of the master, and the trespass of the servant is the trespass of the master. *The reason is, that the master has the immediate control over the servant*, for the act here done was immediately injurious to the plaintiff, and it was the defendant's act; consequently, an action of trespass is the proper remedy."

4. <u>The distinction between pleading in trespass and case</u>

174 The result was that in this area of the law outcomes turned upon criteria which fixed upon the means by which the injury was caused, the identity of the party who caused it and the identity of the party sued. If the defendant were the driver (whether a servant or not) and the driver had injured the plaintiff by his immediate action, the proper action would be in trespass; if the driver had injured the plaintiff by his consequential acts, the proper action was in case. If the defendant were not the driver but the driver's master, then the proper action was in case. This was so unless the servant driver's acts amounted to a trespass and the defendant master had "commanded" the commission of that trespass.

175 The evolution of the common law itself further complicated this picture. After *Williams v Holland*[262] in 1833, it was no longer necessary for a plaintiff alleging injury from the immediate act of the defendant to bring his action in trespass. From that date, he could "waive" the trespass and bring case instead.

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260 (1832) 2 LJ Ex 25 (the reference to 3 LJ Ex in the headnote to the English Reports is incorrect).

261 (1832) 2 LJ Ex 25 at 25 (emphasis added).

262 (1833) 10 Bing 112 [131 ER 848]; (1833) 2 LJ CP 190. See Prichard, "Trespass, Case and the Rule in *Williams v Holland*", (1964) *Cambridge Law Journal* 234.

176 Writing in 1885, in the first article in the first issue of the *Law Quarterly Review*[263], Sir James Stephen said of Parke B:

> "The late Lord Wensleydale, whilst pitying the hard lot of a man who was ruined because his pleader had supposed his remedy to be trespass instead of case, added: 'No doubt it is hard on him. The declaration ought to have been in case. If it had been, he would have won; but if the distinction between trespass and case is removed, law, as a science, is gone – gone.'"

177 This distinction between trespass and case which suffused the thinking of the common lawyers had practical consequences. Before the *Common Law Procedure Act* 1852 (UK) ("the 1852 Act")[264], a count in trespass could not be joined in the one declaration with a count brought in case; this was because the pleas to both were not the same[265]. In *Leame v Bray*[266], Lawrence J noted one procedural advantage in bringing the action in trespass rather than in case, saying that:

> "if it be laid in trespass, no nice points can arise upon the evidence by which the plaintiff may be turned round upon the form of the action, as there may in many instances if case be brought; for there if any of the witnesses should say that in his belief the defendant did the injury wilfully, the plaintiff will run the risk of being nonsuited".

178 In *Savignac v Roome*[267], Lord Kenyon noted an additional distinction, that "if in an action of trespass the plaintiff recover less than 40s, he is entitled to no more costs than damages; whereas a verdict with nominal damages only in an action on the case carries all the costs".

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263 "Section Seventeen of the Statute of Frauds", (1885) 1 *Law Quarterly Review* 1 at 1. Parke B had not been alone. In 1823 Graham B had said of the distinctions between trespass and case that he was "fully convinced of [the] utility" of "these nice distinctions": *Lloyd v Needham* (1823) 11 Price 608 at 620 [147 ER 579 at 583].

264 15 & 16 Vict c 76, s 3.

265 *Dalston v Janson* (1696) 1 Salkeld 10 [91 ER 9 at 10]; *Haward v Bankes* (1760) 2 Burr 1113 [97 ER 740].

266 (1803) 3 East 593 at 600-601 [102 ER 724 at 727]. See also Winfield and Goodhart, "Trespass and Negligence", (1933) 49 *Law Quarterly Review* 359 at 365-366.

267 (1794) 6 TR 125 at 129-130 [101 ER 470 at 472-473]. This was provided by the statute 22 & 23 Car II c 9 (1670); it was repealed in 1863 by the *Statute Law Revision Act* (26 & 27 Vict c 125).

179 An important result of the distinction, adverted to by Sir James Stephen in the passage cited above, was that a plaintiff was in jeopardy of a non-suit if he wrongly framed his action. If the defendant demurred upon the basis of the form of action which had been relied upon in the declaration and did not plead the merits, the plaintiff was able to bring a fresh action[268]. However, if the defendant pleaded, the plaintiff joined issue, and a verdict was found for the defendant on the merits, the plaintiff would be estopped from bringing a fresh action if the defendant pleaded that verdict specially as an estoppel to the later action[269]. It did not result in the plaintiff automatically losing his action[270]. This lasted in England until the final abolition of the forms of action by the 1852 Act, and later in the century non-suits became regarded as irreconcilable with the Judicature system[271]. In New South Wales, the learning with respect to non-suits in common law actions remained of importance until 1972, as is testified by the judgment of Windeyer J in *Jones v Dunkel*[272].

F. THE MEANING OF THE OLDER CASES

180 It is against this background that the principle of "vicarious" liability expressed in *Soblusky* and *Launchbury v Morgans* is to be understood. The language used in *Wheatley v Patrick*, *Booth v Mister* and *Chandler v Broughton* seems to support – and indeed in *Soblusky* was used directly to support – a test based on the owner of a vehicle being "in possession of" it and "with full legal authority to direct what is done with it", of which the essence was his "control"[273]. Whilst at first blush these cases and the language they employed may appear to support those notions, a proper consideration of these cases is to the opposite effect.

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268 *Jones v Dunkel* (1959) 101 CLR 298 at 323.

269 See, eg, *Chitty's Treatise on Pleading and Parties to Actions*, 7th ed (1844), vol 1 at 220-221.

270 The contrary view, expressed in Atiyah, *Vicarious Liability in the Law of Torts*, (1967) at 126 is not well founded. Atiyah also cited *Chandler v Broughton*, *Wheatley v Patrick* and *M'Laughlin v Pryor* for the proposition that a plaintiff might lose his action if he sued in case a master who had temporarily taken the reins from his servant. As noted earlier, the action in *Chandler v Broughton* was in trespass, while there was no master-servant relationship in *Wheatley v Patrick*. The plaintiff's action in *M'Laughlin v Pryor*, too, was in trespass.

271 *Jones v Dunkel* (1959) 101 CLR 298 at 330.

272 (1959) 101 CLR 298 at 323-332.

273 (1960) 103 CLR 215 at 231.

1. Pleading the general issue

181 Both *Wheatley v Patrick* and *Booth v Mister* essentially turned upon pleading points which arose under the Hilary Term Rules of 1834, and particularly upon what was involved in pleading the general issue; that is to say, in tort, a plea of "not guilty". Previously the defendant had been allowed under the general issue to set up "almost any defence he chose", whereby "the object of having pleadings at all was to some extent defeated"[274]. The Hilary Term Rules of 1834 sought to make the pleading system more efficient upon its own premises. They represented "a new drive", under the influence of Baron Parke, "for scientific accuracy"[275]. Thereafter, his Lordship "devoted himself to the perfection of the formal procedure"[276].

182 In *Taverner v Little*, Tindal CJ said that[277]:

> "the rule of pleading laid down by all the courts in Hilary term, 4 W 4 … applies to and governs the plea of not guilty in actions on the case. …
>
> The rule … runs thus: 'In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act, alleged to have been committed by the Defendant, and not of the facts stated in the inducement.'
>
> … The rule then proceeds further to state explicitly, that 'no other defence than the denial of the wrongful act, shall be admissible under the plea of not guilty. All other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.'"

The effect was to curtail[278]:

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274 *Pleading*, (1915) at 27. See also *Young v Queensland Trustees Ltd* (1956) 99 CLR 560 at 563-565.

275 Cornish and Clark, *Law and Society in England 1750-1950*, (1989) at 41.

276 Fifoot, *English Law and its Background*, (1932) at 154. We have it on the authority of Sir Frank Kitto, writing extrajudicially (Meagher, Gummow and Lehane, *Equity Doctrines and Remedies*, "Foreword", (1975) at vii), that the Hilary Term Rules established a system "that shines in the third edition of Bullen and Leake as a refined and polished instrument for arriving at the issues between parties".

277 (1839) 5 Bing (NC) 678 at 684-686 [132 ER 1261 at 1264].

278 Cornish and Clark, *Law and Society in England 1750-1950*, (1989) at 41.

> "the ability of the defendant to defeat the true purpose of pleading by hiding behind the General Issue – that blanket denial ('Not guilty') of all the plaintiff's allegations, which gave nothing in advance away. Instead, specific excuses (in the form of confession and avoidance) had to be specially pleaded."

183 A defendant's plea of not guilty to an action in case now operated as a denial of the allegations of negligence but not of the facts as stated in the inducement in the plaintiff's declaration[279]. The inducement was the statement of facts showing the plaintiff's right and preceded the allegation of violation of that right[280]; the allegation of facts constituting a duty of care would be for the inducement[281]. While the Hilary Term Rules or their counterparts were in operation and the defendant wished to put in issue the facts from which the duty of care was said to arise, the defendant was obliged to traverse the allegations in the inducement or to confess and avoid them, rather than to rely upon a plea of not guilty. *Wheatley v Patrick* and *Booth v Mister*, together with other contemporary decisions[282], illustrate the somewhat painful adjustment in the

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279 *Chitty's Treatise on Pleading and Parties to Actions*, 7th ed (1844), vol 1 at 528. See also *Pleading*, (1915) at 28-29; Rath, *Principles and Precedents of Pleading*, (1961) at §§86-89. Examples of pleas of "not guilty" which did not put in issue a fact the defendant needed to prove to make out his defence are: *Hart v Crowley* (1840) 12 Ad & E 378 [113 ER 856]; *Hall v Fearnley* (1842) 3 QB 919 [114 ER 761]; *Torrence v Gibbins* (1843) 5 QB 297 [114 ER 1261]; *Dunford v Trattles* (1844) 12 M & W 529 [152 ER 1308]; (1844) 13 LJ Ex 124; *Grew v Hill* (1849) 18 LJ Ex 317; *Mitchell v Crassweller* (1853) 22 LJ CP 100; *Salter v Walker* (1869) 21 LT 360. See also *White v Teal* (1840) 12 Ad & E 106 [113 ER 751], where evidence tendered by the defendant was inadmissible as contrary to an admission he had made by pleading not guilty to an action in trover; and *Emery v Clark* (1839) 2 M & Rob 260 [174 ER 282], where the plaintiff properly closed his case without having given evidence in respect of a matter admitted by the defendant's plea of "not guilty".

280 An example is the declaration set out and discussed by Tindal CJ in *Taverner v Little* (1839) 5 Bing (NC) 678 at 685-686 [132 ER 1261 at 1264] and the declaration in *Wheatley v Patrick* (1837) 6 LJ Ex 193 at 193, which is set out later in these reasons.

281 Rath, *Principles and Precedents of Pleading*, (1961) at §36. See also *Mummery v Paul* (1844) 14 LJ CP 9.

282 See, for example, the cases in fn 279. Similar problems were encountered in actions other than trespass and case: see, eg, *Watkins v Lee* (1839) 5 M & W 270 [151 ER 115] (malicious arrest); *White v Teal* (1840) 12 Ad & E 106 [113 ER 751] (trover).

1830s of pleaders to the new Hilary Term Rules. They are not authorities for the propositions of substantive law later attributed to them.

2. *Wheatley v Patrick*[283]

184 In *Wheatley*, the defendant had borrowed a horse and chaise from Delafosse & Co for an excursion into the country. He was accompanied by a friend, Nicholls, whom he allowed to drive. As a result of Nicholls' negligent driving, the chaise ran down the plaintiff's horse and killed it. The action was brought in case. The trial judge directed a verdict for the plaintiff, subject to the defendant having leave to enter a non-suit.

185 The defendant moved accordingly in the Court of Exchequer (Lord Abinger CB, Bolland, Alderson and Gurney BB) but the non-suit was refused. The Law Journal report sets out the text of the declaration as follows[284]:

> "[T]hat the plaintiff was possessed of a horse, at that time drawing in an omnibus, and that the defendant was possessed of a chaise and a horse, then harnessed to and drawing the chaise, and which chaise and horse were under the care, management, government, and direction of the defendant, who was driving the same; *yet that the defendant so negligently and improperly drove and directed his chaise and horse, that by the negligence and improper conduct of the defendant, the defendant's chaise ran and struck against the plaintiff's horse, and killed it*". (emphasis added)

The defendant pleaded not guilty but did not put on any special plea[285]. This meant that he put in issue that portion of the declaration which is emphasised above, concerning breach and damage. He did not put in issue the allegations in the inducement respecting duty. These included the allegation (contrary to which was the fact) that the defendant was driving. Having pleaded thus, at trial the defendant was unable to deny the effect of his plea of not guilty by adducing evidence to show that Nicholls was in fact driving. He had to fight the case on the basis that he himself was driving. Thus, the pleadings were in such a form as not to tender for trial the range of issues which otherwise might have been involved in a dispute as to all the merits. The question before the Court of Exchequer was whether the plaintiff should be non-suited because of the failure of the evidence on the live issue of negligent driving by the defendant. The Court held that the evidence showing that the defendant had put the reins into the

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283 (1837) 2 M & W 650 [150 ER 917]; (1837) 6 LJ Ex 193.

284 (1837) 6 LJ Ex 193 at 193.

285 (1837) 2 M & W 650 at 650 [150 ER 917 at 917]; (1837) 6 LJ Ex 193 at 194.

hands of Nicholls was sufficient to support a finding on this issue of negligent driving in favour of the plaintiff.

186 The effect of the plea of not guilty in a case such as *Wheatley v Patrick* was summarised as follows by Joseph Chitty[286]:

> "In an action against a person for negligently driving his cart and horse against the plaintiff's horse, the declaration being framed in the usual form, it was held that the defendant under the plea of not guilty could not show that he was not the person driving, and that the cart did not belong to him."

One of the two authorities cited for this proposition was *Wheatley v Patrick*. The other was *Taverner v Little*, cited earlier in these reasons. Another case falling in the same category, and decided in the same period after the introduction of the new pleading rules, was *Woolf v Beard*[287].

187 The limited issue tendered on the plea of not guilty in *Wheatley v Patrick* appears most clearly in the judgment of Alderson B. In the report in Meeson and Welsby his Lordship is reported as saying[288]:

> "The only plea here is not guilty; *the possession by the defendant is therefore admitted on the record, and the only question is, whether there was negligent driving by the defendant,* which I think is made out by the proof that he allowed Nicholls to drive, and that the injury was occasioned by his mismanagement." (emphasis added)

The report in the Law Journal is as follows[289]:

> "The only plea is, not guilty, *by which the inducement in the declaration is admitted, and the only fact put in issue is, whether there*

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286 *Chitty's Treatise on Pleading and Parties to Actions*, 7th ed (1844), vol 1 at 528. Similarly, it was said in Bullen and Leake, *Precedents of Pleadings in Personal Actions in The Superior Courts of Common Law*, 3rd ed (1868) at 753:

> "In actions for negligent driving, where the declaration states by way of inducement that the defendant was possessed of a carriage, or that a carriage was under his management or that of his servant at the time of the injury, the defendant cannot dispute these facts under the plea of not guilty."

287 (1838) 8 Car & P 373 [173 ER 538].

288 (1837) 2 M & W 650 at 652 [150 ER 917 at 918].

289 (1837) 6 LJ Ex 193 at 194.

> *was negligent driving by the defendant*; I think there was, as he put the reins into the hands of Nicholls." (emphasis added)

188 However, Lord Abinger CB's references to the defendant being in possession and having "control" have given rise to confusion. His Lordship said[290]:

> "The declaration charges that the defendant was possessed of the horse and chaise, and that they were under his direction. The defendant having borrowed them for his own enjoyment, and not to use them for the service of the owner, is very properly charged as in the possession and control of them."

The evidence at trial had shown that the defendant had borrowed the horse and chaise for his own purposes and not for the service of the owner. In this passage, Alderson B was volunteering the observation that, as it had happened, the allegation of possession and control had been made good at the trial, even though, as his Lordship pointed out, this was not an issue at the trial. Thus, the above observations of Lord Abinger CB were obiter. In any event, they do not support any special principle of substantive law based on ownership, possession or control. The subsequent error has been in the assumption that there was propounded such a principle.

189 Lord Abinger CB went on to deal with the actual issue to which Alderson B adverted. He said[291]:

> "Then the question is, whether, being so in possession of them, and sitting with the driver of them, he may not be charged as actually driving? I think he may. As against all the world but Delafosse & Co, he is the party in possession: he is present, he has the actual control, and he permits another person to drive. I think an action might have lain against him, alleging that Nicholls, by his consent, had driven improperly, and thereby occasioned the injury."

The report in the Law Journal is to the same effect[292]:

> "I think there is no ground for the objection. The declaration charges, that the defendant was himself possessed of a chaise and horse, and that it was under his direction, and that he was driving. Now, having

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290 (1837) 2 M & W 650 at 652 [150 ER 917 at 918].

291 (1837) 2 M & W 650 at 652 [150 ER 917 at 918].

292 (1837) 6 LJ Ex 193 at 194.

> borrowed the chaise and horse, under these circumstances he may be treated as the person possessed. Then, being so possessed *suo jure, may he not in the declaration be charged as having the controul [sic] over the chaise, and as driving at the time?* I think he may be so charged".

190 Bolland B said that "the defendant having suffered Nicholls to drive, [he] must be taken to have had the management of the chaise, and to be liable for Nicholls' act"[293].

191 These were not statements imputing liability under any principle of "agency" or "vicarious" liability to the defendant. The case did not decide, as one author has put it[294] that "the borrower of a gig who allows a friend to drive him in it, if that friend drives it improperly, allows him to do so by consent, and may be charged as actually driving it himself".

3. *Booth v Mister*[295]

192 A similar pleading point respecting the operation of the Hilary Term Rules had arisen in *Booth v Mister*, decided some two years before *Wheatley v Patrick*. There, the plaintiff had declared – in case – and alleged breach and damage by stating that "the cart of the defendant was so negligently driven by the defendant's servant that it struck against a cabriolet in which the plaintiff was riding, whereby the plaintiff was injured"[296]. The inducement alleged that the cart was being driven by the servant of the defendant. The defendant's plea was not guilty. No special plea was entered as to the identity of the driver, with the result that the defendant accepted by his plea that the servant was driving. On the evidence, a stranger to whom the defendant's servant had handed the reins was driving[297]. There was a verdict for the plaintiff.

193 Counsel for the defendant was reported as having argued that "the defendant was not liable, on the ground that, as a person, not in the defendant's service, was driving at the time of the accident, *the allegation that the cart was*

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293 (1837) 2 M & W 650 at 652 [150 ER 917 at 918].

294 Brooke-Smith, "Liability for the Negligence of Another – Servant or Agent?", (1954) 70 *Law Quarterly Review* 253 at 258. See also to the same effect the treatment of *Wheatley v Patrick* by North and Cleary JJ in *Union Steam Ship Company of New Zealand Limited v Colville* [1960] NZLR 100 at 107.

295 (1835) 7 Car & P 66 [173 ER 30].

296 (1835) 7 Car & P 66 at 66 [173 ER 30 at 30].

297 (1835) 7 Car & P 66 at 66 [173 ER 30 at 30].

driven by the defendant's servant was not sustained by the evidence"[298]. In this context, the question was not whether a master could be liable, in the abstract, for the acts of a non-driving servant. It was whether there remained an issue at the trial whereby the defendant could deny the effect of the plea of not guilty by relying upon the evidence which showed that the servant was not driving.

194 On this basis, the inadequately reported judgment becomes intelligible. Lord Abinger CB said[299]:

> "I will reserve the point, *but I think that the evidence is sufficient to support the allegation*. As the defendant's servant was in the cart, I think that the reins being held by another man makes no difference. It was the same as if the servant had held them himself." (emphasis added)

This is authority for the proposition that the evidence could not be used by the defendant to deny the issue joined by the plea of not guilty so that the allegation in the declaration was made good. A relevantly identical situation later arose on the pleadings in *Woolf v Beard*[300] and with the same result as in *Booth v Mister*. These cases are not authority for any general proposition of substantive law that A may be liable for the acts of his servant B where a stranger C turns out to be driving but where there is "no difference" between treating B or C as driving.

4. *Chandler v Broughton*[301]

195 The facts in *Chandler v Broughton* were outlined in Section E of these reasons when describing the situation where an action in trespass lay against a master who had "immediate control" of the servant and so became directly liable in trespass for "commanding" the wrongful act. By this means the plaintiff escaped the consequences of having wrongly framed the action against the master as one in trespass rather than case. The judgment decided nothing with respect to vicarious liability. *Chandler v Broughton* was concerned with a defendant who commanded the wrongful act or, as Parke B put it in *Sharrod v The London and North Western Railway Company*[302], "some act which leads by a physical necessity to the act complained of". Yet in *Soblusky* it was treated as bearing upon the vicarious liability of a principal for the tort of an agent.

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298 (1835) 7 Car & P 66 at 66 [173 ER 30 at 30] (emphasis added).

299 (1835) 7 Car & P 66 at 66-67 [173 ER 30 at 30].

300 (1838) 8 Car & P 373 [173 ER 538].

301 (1832) 1 C & M 29 [149 ER 301].

302 (1849) 4 Ex 580 at 586 [154 ER 1345 at 1348].

G. THE MODERN AUTHORITIES

1. The English and New Zealand decisions

196 The work of Sir John Salmond, *Law of Torts*, the first edition of which appeared in 1907, appears to have played a significant role in later misunderstanding of the nineteenth century authorities. In the first edition under the heading "Masters and Servants" and next to the side heading "Temporary or gratuitous service sufficient", the learned author put the following proposition[303]:

> "5. One person may be the servant of another, although employed, not continuously, but for a single transaction only, and even if his service is gratuitous or *de facto* merely. The relationship of master and servant is commonly a continuing engagement in consideration of wages paid; but this is not essential. One person may be the servant of another on a single occasion and for an individual transaction, provided that the element of control and supervision is present. *Moreover the service may be merely gratuitous, as when the owner of a carriage asks a friend to drive it for him*… On the same principle, a father may be responsible for the torts of his children, provided that they are acting *de facto* as his servants." (emphasis added)

The footnote to the sentence I have emphasised cited *Wheatley v Patrick* and continued, "*Aliter* if he *lent* the carriage to a friend" (original emphasis).

197 Two points should be noted. The first is that, even as stated in Salmond, the principle would not extend to the bailment of a chattel but only to requests by the owner to another to drive him in his carriage – that is, where the owner is present to control and supervise. The second is that even such a principle rests upon a misconception of what was decided in *Wheatley v Patrick*.

198 There was no reference in either report of *Wheatley* to the principle governing the master-servant relationship, other than in the argument of counsel for the defendant, Sir William Follett. That reference was by way of comparison and was to the opposite effect of Salmond's contention. Follett argued that there would be at least two situations in which a person in his client's position could have been liable: "[a] master is liable for the wrongful act of his servant, but then he would have an action over against him"[304]; and also that a coachman might be liable if he "permits a passenger to drive … because he commits a breach of

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303 *The Law of Torts*, (1907) at 80 (footnote omitted).

304 (1837) 2 M & W 650 at 651 [150 ER 917 at 918].

duty"[305]. In contradistinction, he argued that a person who merely let his friend drive ought *not* be liable, and continued "[w]hy should not the plaintiff have sued the party who actually did the injury?"[306]

199 However, as has been explained in Section F of these reasons, this argument did not prevail. The defendant could not succeed in shifting liability to the true driver once he had failed to plead specially to the allegation in the declaration that the defendant was driving. Salmond appears to have conflated the element of "control" referred to by Lord Abinger CB in *Wheatley v Patrick* with the element of control existing in the master-servant relationship. He then appears to have seized upon the master-servant relationship with its (by then) familiar process of imputation of liability by means of the doctrine of vicarious liability to explain a result otherwise not readily apparent to readers no longer versed in the pre-Judicature pleading system. Salmond was adopted uncritically by the New Zealand Supreme Court in *Aitchison v Samson*[307]. This litigation, which ended in the Privy Council, was significant for the Court in *Soblusky*, as the joint judgment indicated by its reference[308] to the Privy Council decision.

200 In *Aitchison v Samson*, a widow, accompanied by her son, inspected a motor car which was offered for sale by the defendant. The defendant remained the owner of the car. An oral agreement alleged by the defendant that the widow buy the car, so that it was her property at the time of the injury to the plaintiff, was rejected at the trial as "an utterly false and dishonest case"[309]. The son, who worked as a chauffeur, wished to drive the car himself and arranged to do so the next day. The defendant sat next to the son and gave directions as to how and where he should drive, the rate at which he should proceed, and the course he should take. While the son was driving, the car struck and injured the plaintiff, who was riding on a bicycle. The jury found that the son had been negligent. The question whether the defendant was liable for the negligence of the son was reserved for the judge, Williams J, alone. His Honour acceded to a motion by the plaintiff for judgment and dismissed a motion by the defendant for a new trial.

201 Williams J reasoned as follows[310]:

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305 (1837) 6 LJ Ex 193 at 193.

306 (1837) 2 M & W 650 at 651 [150 ER 917 at 918].

307 (1910) 30 NZLR 160.

308 (1960) 103 CLR 215 at 231.

309 *Samson v Aitchison* [1912] AC 844 at 848.

310 (1910) 30 NZLR 160 at 164.

> "[W]here the owner of an equipage, whether a carriage and horses or a motor, is riding in it while it is being driven, and has thus not only the right to possession but the actual possession of it, he necessarily retains the power and the right of controlling the manner in which it is to be driven, unless he has in some way contracted himself out of his right or is shown by conclusive evidence to have in some way abandoned his right. *If any injury happen to the equipage while it is being driven the owner is the sufferer*. In order to protect his own property, if in his opinion the necessity arises, he must be able to say to the driver 'do this' or 'don't do that.' The driver would have to obey; and if he did not, the owner in possession could compel him to give up the reins or the steering-wheel." (emphasis added)

202 This reasoning is concerned with the position between the driver and the owner, inter se, regarding damage caused to the vehicle by the negligent driving of the owner. It also suggests that the driver would be liable for trespass to goods or their conversion, were he to continue to use the vehicle contrary to the directions of the owner, or at least after having been directed to stop driving. However, these matters do not determine the criteria for the liability of the owner or the driver to a third party in respect of a damage done to that third party by the negligent driving.

203 The trial judge continued, however, as follows[311]:

> "The owner, indeed, has a duty to control the driver. If the driver is driving at a speed known to the owner to be dangerous, and the owner does not interfere to prevent him, the owner may become responsible criminally."

204 For this proposition, Williams J cited the decision of the Divisional Court in *Du Cros v Lambourne*[312]. His Honour then went on to introduce the elements which are now commonly seen as part of the principles later adopted by the House of Lords in *Launchbury v Morgans*[313]:

> "The duty to control postulates the existence of the right to control. If there was no right to control there could be no duty to control. No doubt, if the actual possession of the equipage has been given by the owner to a third person – that is to say, if there has been a bailment by the owner to a

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311 (1910) 30 NZLR 160 at 164.

312 [1907] 1 KB 40.

313 (1910) 30 NZLR 160 at 164.

> third person – the owner has given up his right of control. When, however, as in the present case, the owner, being himself in actual possession of the equipage, simply hands over the reins or the wheel, he does not by so doing give up the possession of the equipage or his right of control of the way in which it is to be driven. [The son] when he took the wheel came under the control of the defendant. It was in the interest of the defendant that [the son] should drive in order that he might make a trial of the car. If [the son] drove in the ordinary way the defendant in his own interest would not interfere with the driving, but there is nothing to show or to suggest that the defendant had given up the right to control the way in which the car was to be driven if an occasion arose on which in his opinion it became necessary to exercise that control or if for any other reason he desired to exercise it."

205 One difficulty with this reasoning is that, from the reliance upon *Du Cros*, it applies the elements involved in a criminal offence in respect of aiding and abetting another to drive at a dangerous speed to principles governing liability to a third party who is struck by a car being driven at whatever speed. The issue in *Du Cros* had been whether a person who aided and abetted the commission of the offence of driving a motor car at a speed dangerous to the public[314] might be convicted upon an information which charged him as a principal offender. There was an issue as to whether the accused, or another passenger in the car, was the person driving. The police evidence was that the accused was driving, while all in the car, including the accused, averred that one of their number other than the accused was driving. The accused was charged as the driver and was convicted. Lord Alverstone CJ, with whom Ridley and Darling JJ agreed, affirmed the accused's conviction on the ground that under s 5 of the *Summary Jurisdiction Act* 1848 (UK) there was no relevant distinction between a principal offender and aiders and abettors in respect of misdemeanours. There was sufficient evidence "on which the appellant could be convicted of aiding and abetting"[315].

206 *Du Cros* thus was not a case of an owner, present in a car, failing to prevent the driver from speeding. However, in *Aitchison v Samson* Williams J equated that "control" over the driver which was sufficient for the imposition of criminal liability with that existing in a master-servant relationship. His Honour referred to the works of Pollock[316], and Clerk and Lindsell to the effect that control is an essential element of the course of employment, and then to the passage from Salmond set out above. He considered *Wheatley v Patrick* to be

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314 Contrary to the *Motor Car Act* 1903 (UK), s 1.

315 [1907] 1 KB 40 at 46.

316 It should be noted that in the then current edition of Pollock, *The Law of Torts*, 8th ed (1908), *Wheatley v Patrick* was not mentioned.

"almost identical with the present" case[317]. Moreover, equating the differing elements of "control" in *Wheatley* with that in an employment relationship, liability was imposed on the defendant on the footing that the son "was in the position of a servant of the defendant"[318].

207 The issue had mutated somewhat when the case went on an unsuccessful appeal by the defendant to the New Zealand Court of Appeal. What is significant is that at no stage in this litigation was reliance placed upon *Booth v Mister*[319] or *Chandler v Broughton*[320], yet in *Soblusky* they, with *Wheatley v Patrick*, were taken to be the line of authority from which the Privy Council decision proceeded.

208 In the New Zealand Court of Appeal, Stout CJ stated that the appeal turned "on one question only – namely, whether when the accident happened the driver was acting as servant or agent or in some capacity for the appellant"[321]. The Chief Justice, dissenting as to the result, adopted a characterisation of *Wheatley* which nevertheless seems to have accorded with that of the other members of the Court. He said[322]:

> "The ground of Lord Abinger's decision was that the defendant was in possession, for the horse and chaise had been got by him for his own purpose, that he had the actual control, and permitted another person to drive."

However, in the result, his Honour stated that[323]:

> "to hold that [the son] was acting as a servant or an agent or under the control of the [defendant] would be going beyond what has been decided in any of the cases referred to or that may be referred to, or what is laid down in the various treatises on torts or negligence".

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317 (1910) 30 NZLR 160 at 166.

318 (1910) 30 NZLR 160 at 167.

319 (1835) 7 Car & P 66 [173 ER 30].

320 (1832) 1 C & M 29 [149 ER 301].

321 *Samson v Aitchison* (1911) 30 NZLR 838 at 842.

322 (1911) 30 NZLR 838 at 843.

323 (1911) 30 NZLR 838 at 848.

209 Denniston J put the point as being "[w]ho was at the time of the collision in control of the car?"[324] He held that, as the defendant was the owner of the car and one of its occupants, he had failed to meet the "onus … to disprove … the presumption created by these facts"[325] which, it seems, was that the defendant retained the right of control in the car. Edwards J decided the case on the grounds that, although "[i]n one sense [the son] may be said to have had the control of the car"[326]:

> "he had not the possession of the car, nor had he the control of the car in any other sense than has any person who controls the movements of a vehicle with the consent of the owner, that owner being present in the vehicle, having the right and the power to direct the action of the person actually exercising the physical control, and, if he pleases, to resume the physical control at any moment".

210 Chapman J specifically based his conclusion on *Wheatley v Patrick* and said[327]:

> "The effect of that case is to show that if a man travelling in his own conveyance is found to have handed over the actual physical management of the vehicle to another person while himself remaining in it, and injury is done to a third person by the negligence of the driver, the owner is *prima facie* responsible."

It will be apparent that *Wheatley* or, more accurately, an imperfect understanding of what it had decided, exercised a baleful influence in the courts of New Zealand.

211 A further appeal to the Privy Council was dismissed. Lord Atkinson, delivering the judgment of the Judicial Committee, cited with approval the passage of the trial judge set out and discussed above. He stated that the facts as found amounted to a finding "that the [defendant] had not abandoned the control which … prima facie belonged to him"[328]. Critically, he stated[329]:

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324 (1911) 30 NZLR 838 at 848-849.

325 (1911) 30 NZLR 838 at 849.

326 (1911) 30 NZLR 838 at 854.

327 (1911) 30 NZLR 838 at 855.

328 [1912] AC 844 at 850.

329 [1912] AC 844 at 850.

> "And if the control of the car was not abandoned, then it is a matter of indifference whether [the son], while driving the car, be styled the agent or the servant of the appellant in performing that particular act, since it is the retention of the control which the appellant would have in either case that makes him responsible for the negligence which caused the injury."

This passage anticipated the references in *Soblusky* and other decisions, particularly *Hewitt v Bonvin*[330], to the driver being the "agent" of the owner.

212 The remarkable result was that the notion of "control" – used on a pleading point to show that uncontroverted evidence could support a controverted, but unassailable, allegation – had become sufficient to impute prima facie liability to the owner of a vehicle that was present in it. Thereafter, *Samson v Aitchison* was added to the footnote supporting the passage in successive editions of Salmond – an instance of self-referential amplification of a point of law[331].

213 Sir Frederick Pollock reacted more circumspectly to *Samson v Aitchison*. In earlier editions of his work on torts[332], he had referred to authorities which indicated that those assuming specific control as "*dominus pro tempore*" might render themselves liable as principals for acts of rash or careless driving. He cited *M'Laughlin v Pryor*[333], where such a defendant was said to be a "co-trespasser" with the postillions driving the carriage and post horses which had overturned a gig and thereby injured the plaintiff. This was a case of direct liability or liability of persons acting in concert. It was not a case of vicarious liability.

214 After *Samson v Aitchison*, Pollock followed this discussion by the enigmatic statement[334]:

> "Conversely an owner who has not formally deprived himself of possession or control, and who continues in fact in a position to exercise it, will not easily escape being answerable for the acts of a temporary

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330 [1940] 1 KB 188.

331 The last edition edited by Sir John Salmond himself was the 6th edition, published in 1924.

332 For example, *The Law of Torts*, 9th ed (1912) at 82-83.

333 (1842) 4 Man & G 48 [134 ER 21].

334 *The Law of Torts*, 10th ed (1916) at 86.

delegate or volunteer (such as a companion on a drive whom the owner of the vehicle allows to take charge, himself being present)[335]."

215 In *Reichardt v Shard*[336], the English Court of Appeal (Buckley, Phillimore and Pickford LJJ) applied the notion of "giving up the control of the car" in dismissing an appeal from the Divisional Court by the defendant, the owner of a car. At a jury trial, the defendant had been held liable for damage caused to the plaintiff's car by the negligent driving of the defendant's son, next to whom had sat the defendant's chauffeur. The Divisional Court dismissed an appeal[337]. The defendant had not been in the car, but Buckley LJ said that "[i]t appeared to him … to be a reasonable view … that the learned County Court Judge was entitled to say that having regard to the person who accompanied the son there was no evidence to go to the jury that the defendant had given up control of the car"[338].

216 Later, in *Pratt v Patrick*[339], an action under Lord Campbell's Act tried by Acton J, his Lordship applied *Samson v Aitchison* and noted, with approval, the cases of *Booth v Mister*, *Chandler v Broughton*, *Wheatley v Patrick* and *Reichardt v Shand*. The defendant was being driven in his own car by a friend, Essex, and was accompanied by the plaintiff's husband. Both were in the car by the defendant's invitation as his acquaintances. By reason of the friend's negligent driving, the car collided with a lorry, killing the plaintiff's husband. Acton J found for the plaintiff and applied *Samson v Aitchison*. He said that it stood for the proposition that "as the defendant Patrick was in the car and in control of it, he is no less liable, because by what has been termed a 'casual delegation,' he had entrusted the actual physical management of the car and its mechanical control to Essex, whose negligence it was that caused the collision"[340].

217 Thereafter, in the inadequately reported decision of the English Court of Appeal in *Parker v Miller*[341], Lord Hanworth MR declared that the approach employed by the Privy Council and lower courts in *Samson v Aitchison* went "on

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335 *Samson v Aitchison* [1912] AC 844.

336 (1914) 31 TLR 24.

337 *Reichardt v Shard* (1913) 30 TLR 81.

338 (1914) 31 TLR 24 at 25.

339 [1924] 1 KB 488 at 492-493.

340 [1924] 1 KB 488 at 493.

341 (1926) 42 TLR 408 at 409.

the ground that the driver was acting at the time as the agent of the defendant, who had surrendered the control of the car". Scrutton LJ's judgment cemented the classification in England and New Zealand of this principle as being one of agency, rather than master and servant. His Lordship "observed that the test of agency in cases of negligence had ever since *Quarman v Burnett*[342] been, not physical control, but right to control"[343].

218 The judgment of Parke B, delivering the judgment of the Court of Exchequer in *Quarman*, is treated in this Court as the classic authority that at common law a person generally is not liable for the negligence of an independent contractor[344]. In *Parker v Miller*, Scrutton LJ appears to have overlooked the circumstance that in *Quarman* the plaintiff was non-suited because there was no master-servant relationship, despite there having been a right to "control" (in the sense used in *Samson v Aitchison*) retained by the defendants[345].

219 In 1937 the first edition of Winfield appeared and introduced *Booth v Mister* as having supplied the germ of a doctrine of "casual delegation" which the author said had so developed as to mean[346]:

> "Where A, while still retaining control of his chattel, allows B to use it, and B negligently injures C with it, A is liable to C."

220 Two years later, *Hewitt v Bonvin*[347] was decided. The plaintiff was the administrator of the estate of his son who had been killed as a result of the negligent driving by John Bonvin of his father's car. The plaintiff recovered a verdict against Bonvin Snr but the Court of Appeal allowed an appeal. However, the judgments gave heart to plaintiffs in later cases. As in *Samson v Aitchison*, there was no reference to *Booth v Mister* or *Chandler v Broughton*.

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342 (1840) 6 M & W 499 [151 ER 509].

343 (1926) 42 TLR 408 at 409.

344 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 43; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 577; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 366.

345 A verdict for the defendant in similar circumstances was upheld in *Milligan v Wedge* (1840) 12 Ad & E 737 [113 ER 993].

346 Winfield, *A Text-Book of the Law of Tort*, (1937) at 129.

347 [1940] 1 KB 188.

221 MacKinnon LJ said that[348]:

> "the plaintiff, to make the [owner] liable must establish (1) that the son was employed to drive the car as his father's servant, and (2) that he was, when the accident happened, driving the car for the father, and not merely for his own benefit and for his own concerns".

No authority was given for that proposition. However, earlier in his judgment, his Lordship had said that if A suffered damage by the wrongful act of B, the agent of C, and seeks to make C liable for it, A must show "that C authorized the act"[349]. This may have been designed to invoke not any principle of vicarious liability, but a direct liability imposed on C as in *Chandler v Broughton* and *Morley v Gaisford,* authorities considered in Section E[350].

222 Du Parcq LJ said that he "understood the [plaintiff's] counsel to rely on the allegation of agency rather than on the alternative allegation that the … son was, at any rate for the time being, his servant"[351]. He asserted that[352]:

> "[t]he driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty."

His Lordship explained *Wheatley v Patrick* thus[353]:

> "The friend's negligent driving caused damage to the plaintiff. The declaration alleged that the defendant had himself driven negligently, and the Court of Exchequer held that this allegation was supported by the evidence. The reason is plain. The defendant had delegated to his friend the duty of driving and was personally responsible for his acts as the acts, not of a servant, but of an agent. There could hardly be a better

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348 [1940] 1 KB 188 at 192-193.

349 [1940] 1 KB 188 at 191.

350 See also Hill, "Vicarious Liability of the Car-Owner", (1954) 1 *Sydney Law Review* 242 at 242-243.

351 [1940] 1 KB 188 at 194.

352 [1940] 1 KB 188 at 195.

353 [1940] 1 KB 188 at 195.

illustration of the maxim qui facit per alium facit per se. The decision of the Privy Council in *Samson v Aitchison* was founded on the same principle." (footnote omitted)

223 This has led to "agency" since being the preferred basis for this principle of "vicarious" liability in this field. In *Soblusky* itself, the statement of principle is expressed in terms that the owner or bailee in possession "is driving by his agent"[354].

224 Finally, in 1956, Lord Tucker, delivering the opinion of the Privy Council in *Trust Co Ltd v De Silva*[355], cited *Wheatley v Patrick*, *Samson v Aitchison* and *Reichardt v Shard* as authority for the proposition "now well settled that the person in control of a carriage or motor-vehicle – though not actually driving – is liable for the negligence of the driver over whom he has the right to exercise control". This was but three years before this Court heard the appeal in *Soblusky*.

2. Australian authorities

225 There is a line of Australian authorities antedating *Soblusky*. In *Mortess v Fry*[356], Richards J of the Supreme Court of South Australia applied *Parker v Miller* to support, on an alternative ground, the liability of a defendant motor car owner via a principle of "agency". *Christmas v Nicol Bros Pty Ltd*[357] was an action for negligence against a company and its employee arising out of the negligent driving of the employee. Jordan CJ, delivering the opinion of the Full Court, cited *Hewitt v Bonvin* for the proposition that "ownership is of itself irrelevant to [a defendant's] liability, which is vicarious and arises out of the relationship of master and servant"[358]. At that time, the practice was to regard English Court of Appeal decisions which appeared to have settled the common law as binding upon a State Full Court[359].

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354 (1960) 103 CLR 215 at 231.

355 [1956] 1 WLR 376 at 380.

356 [1928] SASR 60 at 64.

357 (1941) 41 SR (NSW) 317.

358 (1941) 41 SR (NSW) 317 at 319. See also, in New Zealand, *Union Steam Ship Company of New Zealand Limited v Colville* [1960] NZLR 100.

359 See *Commissioner of Stamp Duties of New South Wales v Pearse* [1954] AC 91 at 112; *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336 at 349; but cf *Dickson v McWhinnie* (1958) 58 SR (NSW) 179 at 197.

226 Earlier, in *Ferguson v Wagner*[360], the New South Wales Full Court had declined to apply *Parker v Miller*. Street CJ regarded *Parker v Miller* as "so shortly and insufficiently reported that we cannot feel confident that we have before us sufficient knowledge of the reasons upon which the judgment proceeded" and which he thought was "an extension of the principle laid down by the Privy Council" in *Samson v Aitchison*[361]. The Chief Justice added[362]:

> "To hold that [the owner] was liable for what happened … upon the ground either that he was in control of the car at the time, or that [the driver] was acting as his servant or agent, would be to go far beyond any decided case so far as I know, and would in my opinion be inconsistent with sound principle."

H. AGENCY

227 The reliance by the present appellants upon agency affirms the force in Lord Herschell's observation in *Kennedy v De Trafford*[363] (repeated by Dixon J in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*[364]) that "[n]o word is more commonly and constantly abused than the word 'agent.'" There is considerable terminological confusion in this area. The term "agency" is best used, in the words of the joint judgment of this Court in *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co*[365], "to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties".

228 Usually the legal relations so created will be contractual in nature. In all these cases, the principal's liability will not be vicarious. The resultant contract is formed directly between the principal and the third party and there is no contract between the agent and the third party which is attributed to the principal. This

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360 (1927) 27 SR (NSW) 9.

361 (1927) 27 SR (NSW) 9 at 10.

362 (1927) 27 SR (NSW) 9 at 11.

363 [1897] AC 180 at 188.

364 (1931) 46 CLR 41 at 50.

365 (1958) 100 CLR 644 at 652.

may be contrasted to a contract between a trustee and a third party, the parties to which do not include the beneficiary under the trust[366].

229 A claim by the principal for moneys had and received by the agent to the use of the principal may be made in cases such as those where the principal has entrusted money to the agent for a particular purpose which the agent has not carried out[367]. Likewise where the agent has received money on behalf of the principal[368]. Equity supplements the common law respecting principal and agent and adds a further dimension to their relationship by treating the agent as a fiduciary who is disqualified from asserting against the principal rights unconscientiously acquired[369], and who also is bound to account for profits improperly made[370] and, in some circumstances, to answer as a constructive trustee[371]; further, the principal may have tracing remedies in respect of abuse by the agent of the fiduciary relationship[372]. On the other hand, a trustee of a settlement *inter vivos*, whilst a fiduciary to the beneficiaries, ordinarily will not be an agent. This is because the legal title to property is vested in the trustee and, in the absence of an express provision in the settlement, the trustee is not subject to the exercise of "control" by the settlor or beneficiaries in the same way as an agent is controlled by the principal.

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366 See *Astley v Austrust Ltd* (1999) 197 CLR 1.

367 *Parry v Roberts* (1835) 3 Ad & E 118 [111 ER 358], 5 Neville & Manning 669; *Martin v Pont* [1993] 3 NZLR 25. These cases illustrate, as the New Zealand Court of Appeal pointed out in the second of them ([1993] 3 NZLR 25 at 30), that unjust enrichment is not a prerequisite of the action for money had and received.

368 *T Mahesan S/O Thambiah v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] AC 374 at 380.

369 See *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 13-14.

370 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 556-562.

371 *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342 at 350; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 67-68, 96-97, 107-110.

372 *In re Hallett's Estate. Knatchbull v Hallett* (1879) 13 Ch D 696 at 709; *Stephens Travel Service International Pty Ltd v Qantas Airways Ltd* (1988) 13 NSWLR 331 at 340-341.

230 The common law derived the notion of vicarious liability, as Holmes[373] and Wigmore[374] explained, from mediaeval notions of headship of a household, including wives and servants, whereby their legal standing was absorbed into that of the master. The liability of the master for the wrongs of his servants thereafter became limited to acts he had commanded or later ratified, then was supplemented by the notions of "the course of employment" and of "control"[375].

231 Writing at the time of *Soblusky*, Professor Fleming referred to the difficulty arising from the variety of meanings attached to the term "agent", saying[376]:

> "It is frequently used either in the sense of a comprehensive category encompassing the two species of servant and independent contractor or to describe servants, properly so-called, whose employment is casual rather than more or less continuous."

He went on[377] to refer to the decision in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* as an exceptional case where an "agent" was not subject to controlled employment yet the principal incurred vicarious liability. The insurance agent in that case who solicited proposals acted in a genuinely representative capacity for the insurer which was treated as if it were conducting the transaction and as if it were the insurer's voice with which the agent defamed the competitor.

232 Another view was that, as regards tort law, "[a]ll agents are either servants or independent contractors"[378]. Members of the family of the owner of a chattel and their friends are, one should have thought, no more independent contractors than they are employees.

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373 "Agency", (1891) 4 *Harvard Law Review* 345 at 364.

374 "Responsibility for Tortious Acts: Its History", (1894) 7 *Harvard Law Review* 315 (Pt 1), 383 (Pt 2).

375 See *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462 at 471-472.

376 *The Law of Torts*, 2nd ed (1961) at 325.

377 *The Law of Torts*, 2nd ed (1961) at 326.

378 Dr Stallybrass as editor, Salmond, *The Law of Tort*, 10th ed (1945) at 83 (fn (y)).

233 In his work, *The Law of Agency*, Professor Stoljar asked whether there could be any relationship between tort and agency and continued[379]:

> "Admittedly, P is liable for torts committed by A in his course of employment, as where A (*eg*, a waiter, or steward, or shop assistant) physically injures a customer by way of a trespass or (more usually) through some negligent act. But (as we have seen) where P is thus liable, his liability is that of any master for his servant's wrongs. The tort, in other words, is here the result of A acting in his employment *qua* servant, not while exercising his contractual agency. In the second place, P also is liable where A commits not a physical but an economic wrong, the main instance of this being where A perpetrates a fraud upon P's client or customer.[380] In this situation, it certainly is true to say that A acts as an agent as distinct from a servant, the reason for this distinction being simply this: that A would have no opportunity of committing the fraud, unless he is in a position of agent and thus able to deal contractually with the third party."

The result then is that there can be a relationship between tort and agency, but that the extent thereof remains a matter of debate[381]. The significance to be attached to the judgments in *Hewitt v Bonvin*[382] is one subject of such contention.

234 In *Hewitt v Bonvin*, du Parcq LJ held that "agency" was not proved, so that the owner was not, in the result, held liable[383]. Nonetheless, in *Ormrod v Crosville Motor Services Ltd*[384], Devlin J applied that judgment and held that it was not necessary "to show a legal contract of agency". This judgment was unanimously affirmed by the Court of Appeal[385]. Denning LJ added[386]:

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379 (1961) at 8.

380 For examples, see *Barwick v English Joint Stock Bank* (1867) LR 2 Ex 259; *Lloyd v Grace, Smith & Co* [1912] AC 716.

381 See *Bowstead and Reynolds on Agency*, 16th ed (1996), §§8-174–8-180.

382 [1940] 1 KB 188.

383 [1940] 1 KB 188 at 196.

384 [1953] 1 WLR 409 at 410; [1953] 1 All ER 711 at 712.

385 [1953] 1 WLR 1120; [1953] 2 All ER 753.

386 [1953] 1 WLR 1120 at 1122-1123; [1953] 2 All ER 753 at 754-755.

> "It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. But that is not correct. The owner is also liable if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes. … If it is being used wholly or partly on the owner's business or for the owner's purposes, then the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it out or hires it out to a third person to be used for purposes in which the owner has no interest or concern: see *Hewitt v Bonvin*."

235 After *Soblusky*, these threads were drawn together for the purposes of English law by the House of Lords in *Launchbury v Morgans*. Lord Wilberforce considered that the owner could be made liable "upon the normal principle of the law of agency"[387], although in this context "agency" is to be seen as "merely a concept, the meaning and purpose of which is to say 'is vicariously liable'"[388]. Viscount Dilhorne and Lords Pearson, Cross of Chelsea and Salmon approved and applied *Hewitt v Bonvin* and *Ormrod v Crosville Motor Services Ltd*, although each expressed slightly differently the conclusion to be drawn from them. Viscount Dilhorne said that "the phrase qui facit per alium, facit per se correctly expresses the principle on which vicarious liability is based"[389]. Lord Pearson considered that *Hewitt v Bonvin* and *Ormrod v Crosville Motor Services Ltd*, as well as other cases applying them, stood for the proposition that "there has to be an acceptance by the agent of a mandate from the principal, though neither the acceptance nor the mandate has to be formally expressed or legally binding"[390].

236 Lord Cross said[391]:

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387 [1973] AC 127 at 134.

388 [1973] AC 127 at 135; cf Lord Wilberforce's remarks shortly thereafter in *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] AC 15 at 99-100.

389 [1973] AC 127 at 140. The phrase, which is taken from *Coke on Littleton*, 17th ed (1817), vol 2, §258a, means "[h]e who does an act through another is deemed in law to do it himself" (Broom, *A Selection of Legal Maxims*, 10th ed (1939) at 558). But it was used by Coke there to express the proposition that "where the servant doth all that which he is commanded, and which his master ought to doe, there it is as sufficient as if his master did it himselfe".

390 [1973] AC 127 at 140-141.

391 [1973] AC 127 at 144.

> "Before this case the law as to the vicarious liability of the owner of a chattel for damage caused by its use by another person was, I think, well settled. The owner of the chattel will be liable if the user of it was using it as his servant or agent: *Hewitt v Bonvin*… As *Ormrod v Crosville Motor Services Ltd*… show[s], the user need not be in pursuance of a contract. It is enough if the chattel is being used at the relevant time in pursuance of a request made by the owner to which the user has acceded."

Lord Salmon considered that "du Parcq LJ's statement of the law in *Hewitt v Bonvin*… has never been questioned"[392].

237 These English authorities appear to introduce a new type of agent, who is not an employee, nor an independent contractor; rather, it is "one whose job is not to make contracts but to do such favours as driving cars for his temporary principal"[393]. It would seem that the term "agent" will cease to apply where the driver uses the car "for purposes of his own"[394], but otherwise is introduced here as a basis for extending the tort law doctrine of vicarious liability beyond its usual reach.

238 In their work on the law of agency, Professor Markesinis and Dr Munday say of the English cases[395]:

> "First, it should be clear that the law of agency does not come into play every time one person represents another. For example, no rules of agency apply when a husband sends his wife to a wedding to congratulate the newly-weds, for in such cases the representation only serves a social purpose. For the rules of agency to come into play the representation of one person by another must be meant to affect the principal's *legal* position though, of course, this does not mean that the legal purpose intended to be achieved by the use of an agent need be a complex one. A father who sends his son to the nearby shop to buy him a newspaper is

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392 [1973] AC 127 at 149. See also the judgment of Brooke LJ in *Candler v Thomas (t/a London Leisure Lines)* [1998] RTR 214 at 217-218.

393 Stoljar, *The Law of Agency*, (1961) at 10. See also Keeler, "Driving Agents: to vicarious liability for (some) family and friendly assistance?", (2000) 8 *Torts Law Journal* 41 at 72.

394 *Pratt v Connolly* (1994) 19 MVR 331 at 335.

395 *An outline of the Law of Agency*, 2nd ed (1986) at 10 (footnotes omitted).

> making an agent of him and will be liable to the shopkeeper for the price of the newspaper.
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> Secondly, for an agency relationship to arise, one person must intend to act on behalf of another. This is a question of fact. But, it is submitted, such an intention is not, in itself, enough; the purpose of the relationship must be for the agent to enter into a contract on behalf of his principal (or to dispose of his principal's property). If this approach is adopted, cases like *Ormrod v Crosville Motors Ltd* should be excluded from the ambit of agency textbooks. Since between A and B there is no master-servant relationship (in the traditional sense of the term), it is difficult to bring this factual situation under the heading of vicarious liability. The tendency has thus grown to use agency terminology and to describe B as A's agent. But since B's aim is not to enter into any contract on behalf of A, and since B cannot normally incur any expenses on behalf of A (eg, pledge A's credit to purchase petrol for the journey), it proves equally difficult to describe their relationship as one of true agency."

There is implicit in what is said here a denial that all master-servant relationships are also relationships of principal and agent.

239 The principle of "vicarious" liability does not rest upon "agency", in its proper sense, nor simply upon the employment relationship. References to "authority" or the "scope of the request" in the passage in the judgment of the trial judge set out in Section D of these reasons, which considered whether the pilot, Mr Bradford, had "exceeded his authority" or had "embark[ed] on a frolic of his own", were somewhat incongruous. The former is part of the doctrine of agency; the latter is part of the doctrine of vicarious liability in an employment relationship[396]. Neither has a part to play in the circumstances of this case.

I. *SOBLUSKY v EGAN*[397]

240 The sole decision of this Court upon the matter, *Soblusky*, is so expressed as to rest to a significant degree upon three cases discussed above, *Chandler v Broughton*, *Booth v Mister* and *Wheatley v Patrick*. Their Honours referred to these decisions as providing the "line of authority" from which *Samson v Aitchison* had "proceeded"[398]. They then made in the paragraph set out in

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396 See eg *Morrison v Joel* (1834) 6 C & P 501 [172 ER 1338].

397 (1960) 103 CLR 215.

398 (1960) 103 CLR 215 at 231.

Section A of these reasons a statement of principle, introduced by the words "[i]t means that"[399].

241 The preceding paragraphs in which the "line of authority" was discussed should be set out. The Court said[400]:

> "Motor cars from their very nature do not lend themselves in point of fact to analogies to the horse and buggy but it was in horse and buggy days that the law governing such a case as this was settled. In *Chandler v Broughton*[401] the defendant's gig was driven against 'the church in Langham Place' doubtless All Souls, built by Nash. The defendant was sued in trespass. His servant was driving and that meant that if the action was to be supported upon the ordinary doctrine denoted by the maxim *respondeat superior* the action should have been in case. But the master had been sitting in the gig beside his servant. It was objected at the trial that trespass would not lie. There was a verdict for the plaintiff but leave was reserved to move for a nonsuit. On a motion to the Court of Exchequer for a nonsuit *Bayley* B said: 'Is there any case which militates against this position; that if the owner is in the carriage, sitting by the driver, the act of driving by the servant is the act of the master? The reason is that the master has the immediate control over the servant.'[402] The judgment of the Court which was given by the learned Baron reiterated the doctrine defined in the question. It will be seen that the point lay in the immediate capacity to direct and control and not in the status of the driver as a servant. In *Booth v Mister*[403] the action was in case; the defendant had not been present; the difficulty however was that the defendant's vehicle which did the damage had been driven not by the defendant's servant but by a third person to whom he had given the reins. Lord *Abinger* CB overruled the point. He said: 'As the defendant's servant was in the cart, I think that the reins being held by another man makes no difference. It was the same as if the servant had held them himself.'[404] (It is true that in *Harris v Fiat Motors Ltd*[405], *Ridley* J treats

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399 (1960) 103 CLR 215 at 231.

400 (1960) 103 CLR 215 at 229-231.

401 (1832) 1 C & M 29 [149 ER 301].

402 (1832) 1 C & M 29 [149 ER 301].

403 (1835) 7 Car & P 66 [173 ER 30].

404 (1835) 7 Car & P 66 [173 ER 30].

405 (1906) 22 TLR 556.

> the case as wrong in so far as it means that the servant could delegate his authority but that is another matter and in any case seems to misunderstand the decision.) In the same year in *Wheatley v Patrick*[406] the question was whether an allegation that the defendant drove a gig was made out by proof that he had hired the gig and sat in it beside a friend, one Nicholls, who was actually driving it. The action was brought in case but the allegation in the declaration was that the defendant was possessed of the horse and chaise which horse and chaise was under the care, management, government and direction of the defendant who was driving the same; yet that the defendant negligently and improperly drove and directed the said chaise etc. Lord *Abinger* said: 'As against all the world but' (the owner hiring out the horse and chaise) 'he is the party in possession: he is present, he has the actual control and he permits another person to drive. I think an action might have lain against him, alleging that Nicholls, by his consent, had driven improperly and thereby occasioned the injury.'[407] *Alderson* B said: '… the only question is, whether there was negligent driving by the defendant, which I think is made out by the proof that he allowed Nicholls to drive, and that the injury was occasioned by his mismanagement. He is liable under the circumstances, for the act of Nicholls.'[408] It is from this line of authority that *Samson v Aitchison*[409] proceeded."

242 Enough has been said earlier in these reasons to indicate the considerable obstacles in the path of any treatment of these three cases as providing the basis for a principle respecting agency and power of control, or, indeed, any principle at all. The significance of the decision in *Chandler v Broughton* was that the plaintiff would not be non-suited by reason of framing his action in trespass instead of case; the defendant was unquestionably vicariously liable in case for his servant's negligent driving. None of this supports the existence of a "principle" of "immediate control" by which liability is imposed upon a defendant who is not the employer (in its proper sense) of the driver, so that a party is made liable in negligence where otherwise there would be no such responsibility.

243 *Soblusky* treats *Booth v Mister* as authority for the imputation of liability to the servant (rather than the driver) and thence vicariously to the master. The absence of reference to the pleading point upon which the case was decided

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406 (1837) 2 M & W 650 [150 ER 917].

407 (1837) 2 M & W 650 at 652 [150 ER 917 at 918].

408 (1837) 2 M & W 650 at 652 [150 ER 917 at 198].

409 [1912] AC 844.

meant that the case was taken as authority for the point that a defendant may be liable vicariously where the defendant has authority and possession and retains the power to control the vehicle. For the reasons developed in Section F of this judgment, this reasoning is unsound. The reliance on *Wheatley v Patrick* was also misplaced, and for similar reasons which also have been developed in Section F.

244 The criterion of liability which postulated an agency and required retained control, coupled with possession and authority, which was fashioned in *Soblusky*, was not supported by the nineteenth century authorities. However, it may well have been supported by the Privy Council decision in the New Zealand litigation. *Samson v Aitchison* was seen at the time as binding the Court in *Soblusky*. So also was the then recent decision of the Privy Council in *Trust Co Ltd v De Silva*[410], an appeal from Ceylon, which had been cited in argument[411].

J. NON-DELEGABLE DUTY OF CARE

245 The appellants did not allege any breach by the respondent of any duty to ensure that the plane was safely maintained. They did allege a duty of care owed by the respondent directly to Travis and founded upon an obligation to protect Travis from the known unsafe nature of Mr Bradford's flying. However, the necessary factual foundation for the existence of such a duty, knowledge of the unsafe flying, was not established at the trial.

246 Nor was this a case in the category identified in the joint judgment in *Burnie Port Authority v General Jones Pty Ltd*[412] where a defendant is held liable for breach of a non-delegable, personal duty which could not be discharged by having it performed by a skilled person. The effect would be to substitute for the duty to take care "a more stringent duty, a duty to ensure that reasonable care is taken". That is how Mason J put it in *Kondis v State Transport Authority*[413]. It has been suggested by the learned editor of *Bowstead*[414] that "the best explanation" of the line of cases which includes *Booth v Mister* and *Wheatley v Patrick*, of which *Soblusky* and *Launchbury v Morgans* are the culminations, "may in fact be simply that there is a breach of a duty personal to the owner of taking care in managing the car when it is being used for his own purposes,

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410 [1956] 1 WLR 376.

411 (1960) 103 CLR 215 at 219.

412 (1994) 179 CLR 520 at 550-552.

413 (1984) 154 CLR 672 at 686.

414 *Bowstead and Reynolds on Agency*, 16th ed (1996) at §8-182.

which duty he cannot avoid by delegating the task of driving to another". That, as has been indicated, is not the best explanation of those cases.

247 Here, the appellants did not plead a "non-delegable" duty, no doubt for the good reason that a case put on that foundation had no prospect of success. In *Kondis v State Transport Authority*, Deane J emphasised[415], as had Windeyer J in *Voli v Inglewood Shire Council*[416], that the first question in such cases remains whether the duty of care rested on the defendant. In the present case, no such duty was established.

248 Further, with respect to any doctrine of "non-delegability", there is a difficulty in identifying any principle which dictates an expansion of liability such that the defendant becomes, in effect, the insurer of some activity even when it is performed by another. The explanation of the cases given by Mason J in *Kondis* was accepted in *Burnie Port Authority v General Jones Pty Ltd*[417]. In *Kondis*, Mason J identified (i) cases where the defendant "has undertaken the care, supervision or control of the person or property of another" and (ii) cases where the defendant is so placed in relation to the person or property of the plaintiff as "to assume a particular responsibility" for the plaintiff's safety, in each case where the plaintiff might reasonably expect the exercise of due care[418]. Such an approach requires some caution in its general application. It may explain the cases on "non-delegability"; but many other cases not decided on that basis also may have answered the criteria stated by Mason J[419]. How then does the court decide a fresh case where the preferred criteria are historically descriptive but not normatively predictive? Some caution is required because the characterisation of a duty as non-delegable involves, in effect, the imposition of strict liability upon the defendant who owes that duty.

249 Further, the relationship between Mr Davis and his guests was distinctly unlike those in situations in which non-delegable duties have been imposed. The flight was arranged to satisfy a request made on a social occasion. There was no

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415 (1984) 154 CLR 672 at 694.

416 (1963) 110 CLR 74 at 95.

417 (1994) 179 CLR 520 at 550-552. It also was accepted by the Supreme Court of Canada in *Lewis v British Columbia* [1997] 3 SCR 1145 at 1165-1166, 1174-1175.

418 (1984) 154 CLR 672 at 687.

419 An example may be the line of cases applied in *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 which holds that a port authority is not vicariously liable for the negligence of qualified and skilled pilots engaged by it.

scope for one party to bargain with the other for a contracted exclusion or limitation upon any non-delegable duties[420]. Mr Bradford was neither an employee nor an independent contractor of Mr Davis. There is an obvious incongruity in treating Mr Davis as occupying a position analogous to that of a hospital or school authority. The relationship between Mr Davis and his guests was not comparable with that where an employee must "put up with"[421] the system of work which an employer provides, so that the employer comes under non-delegable duties in that respect. Nor was the relationship one in which there was "control" in the defendant and the absence of it in the plaintiff. Even if this be the touchstone, both the owner and any passengers were equally dependent upon the pilot to exercise skill and care so that the plane was not damaged and passengers were not injured. Nor did any other compelling factor justifying the imposition of strict liability exist in this case.

K. CONCLUSIONS

250 *Burnie Port Authority v General Jones Pty Ltd*, in its treatment of the rule in *Rylands v Fletcher*, shows the disfavour with which strict liability is viewed. The nature of the "vicarious liability" asserted by the appellants and found in their favour at the trial is open to criticism of a similar nature to that respecting non-delegable duties. Both would involve a species of strict liability by holding Mr Davis responsible for the wrongful act or omission of the pilot, where Mr Davis himself was not negligent.

251 In the present case, Doyle CJ and Nyland J observed that, while the modern decisions appear to be confined to the use of motor vehicles[422]:

> "[t]he underlying principle appears to be that if an owner requests another to use the owner's chattel, and the other agrees, and the task is one in which the owner has an interest, the owner will be responsible for damage caused by the negligence of the person using the chattel."

However, correctly in my view, their Honours saw that if such a principle were to be applied generally to chattels it would have the potential of unsettling the law. In argument in this Court, various examples were suggested of the extreme consequences which might flow from the adoption of a broad principle such as that urged by Winfield[423]. This, it will be recalled, suggested the principle was

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420 cf *Lewis v British Columbia* [1997] 3 SCR 1145 at 1167-1168.

421 The phrase used by Dawson J in *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 345.

422 (1998) 71 SASR 361 at 376.

423 *A Text-Book of The Law of Tort*, (1937) at 129.

that where A, whilst still retaining control of any chattel, allowed B to use it, and B negligently injured C with the chattel, A was liable to C.

252 Doyle CJ and Nyland J concluded that the better approach was to confine *Soblusky* and the vicarious liability principle stated there to cases involving motor vehicles. Their Honours acknowledged that aircraft and motor vehicles were forms of conveyance in regular use but continued[424]:

> "However, accidents involving the use of aircraft have not caused damage on the scale of the damage caused by the use of motor vehicles. The problem of providing compensation for those suffering injury as a result of the use of an aircraft is not as acute. The flying of aircraft is, in contrast to the driving of a motor car, not something able to be done by most members of the community with relatively little training. In our opinion there is not the same pressing need to extend vicarious liability that has presented itself in relation to the use of motor cars."

253 The doctrine of vicarious liability in modern times derives support from the notion that a party who engages others to advance that party's economic interests should be placed under a liability for losses incurred by third parties in the course of the enterprise[425]. Further, the employer is seen as a suitable means for the passing on of those losses through such means as liability insurance and higher prices for the goods and services supplied by the enterprise. Such notions of economic efficiency[426] have little part to play in supporting any broad principle respecting the bailment of chattels or in supporting the imposition of liability upon a party in the position of Mr Davis. Where the supposed principle by which it is submitted a case ought to be decided has no doctrinal content, the invitation is to enter a legal category of meaningless reference[427], and the real determinant of a decision expressed to be reliant upon it would lie elsewhere.

254 Here, one is left with the suggestion that Mr Davis may have or should have, by the means of insurance, a deeper pocket than the estate of Mr Bradford. However, the Court was told that, at the time of the accident which injured Travis in 1990, there was no statutory requirement for compulsory third party insurance by owners in respect of non-commercial flights, and that the

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424 (1998) 71 SASR 361 at 376-377.

425 See *Bugge v Brown* (1919) 26 CLR 110 at 117.

426 See Sykes, "The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines", (1988) 101 *Harvard Law Review* 563 at 569-570.

427 Stone, *Legal System and Lawyers' Reasonings*, (1964) at 241-246.

registration system of private aircraft did not require evidence of such insurance[428]. In the absence of such a requirement, it is difficult to impose an absolute liability upon a person such as Mr Davis in respect of non-commercial activities. In the United States, it has been suggested that the vicarious liability of motor vehicle owners should be supported as an "efficient" rule of law which best promotes economic welfare from the perspective of society as a whole[429]. This thesis involves various imponderables, including generalised predictions of human behaviour; in any event, it was not urged by the appellants in this case.

255 I agree with the approach taken by Doyle CJ and Nyland J. I would go on to dispose of the present appeal on an additional footing. This concerns the status to be accorded *Soblusky*.

256 In this Court, the appellants did not seek leave to re-open *Soblusky*. For that reason, it must be taken to stand as authority for the propositions in the paragraph from the joint judgment set out in Section A of these reasons. *Soblusky* may well continue to have a significant field of operation in respect of motor vehicle property claims. Nothing said in these reasons should be taken to deny that proposition. However, like Hayne J and Callinan J, I would not extend the operation of *Soblusky* beyond its application to the vicarious liability of the owner of a motor vehicle.

257 I accept (with a qualification) the position stated by Brennan J in the following passage from *Kondis v State Transport Authority*[430]:

> "In some circumstances, a defendant may also be vicariously liable for a negligent act or omission done or made by the driver of a vehicle who is not his servant and who has not been directly authorized to do the act or make the omission. A defendant is liable if he is the owner or bailee of the vehicle, if he appoints the driver to drive it on his behalf and if he is in

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428 Keeler, "Driving agents: to vicarious liability for (some) family and friendly assistance?", (2000) 8 *Torts Law Journal* 41 at 87. See now the amendments made by the *Civil Aviation Amendment Act* 2000 (Cth) with respect to the criteria for the grant of air operator's certificates to non-commercial operators.

429 Sykes, "The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines", (1988) 101 *Harvard Law Review* 563 at 564, 594-597. See also Posner, *Economic Analysis of Law*, 5th ed (1998) at 294-295; Cane, *Tort Law and Economic Interests*, 2nd ed (1996) at 470-473; and cf *Campomar Sociedad, Limitada v Nike International* (2000) 74 ALJR 573 at 582 [45]; 169 ALR 677 at 689-690.

430 (1984) 154 CLR 672 at 692.

> the vehicle or is otherwise able to assert control over the driver: see *Soblusky v Egan*[431]. It is unnecessary to consider whether an owner's or bailee's liability is more extensive than the liability considered in that case: cf *Launchbury v Morgans*[432]."

The qualification is that I would not take the step mentioned with respect to the establishment of a more extensive liability.

258 In any event, even if the aircraft here be considered as if it were a motor vehicle, the respondent was not in the aircraft or otherwise able to assert control over the pilot. As it happened, Mr Davis was a licensed pilot. However, to say as was found by the trial judge that Mr Davis retained a "general control" because he could determine the use to which the plane would be put and where it would be used is to attenuate any notion of "control" and probably to leave it as meaning no more than ownership. What was important in the present case were the findings that Mr Davis did not have radio or other means of communicating with Mr Bradford whilst he was flying, nor was Mr Davis able to take control of the plane himself.

259 It may be said that this situation was an example of those "highly specialized functions in modern life that must as a matter of practical necessity and sometimes even as a matter of law be performed on the responsibility of [qualified] persons"[433]. Where the issue is whether there was an employment relationship then, in such a case, other indicia may go to show that the functions nevertheless were performed under a contract of service[434]. However, here there was a finding that no master-servant relationship existed between Mr Davis and Mr Bradford.

260 There are three further points respecting *Soblusky*. The first is that to ask whether the driver of a vehicle was the "representative" or "delegate" of the defendant to perform a "task" entrusted by the defendant may be to ask no more than whether the driver was a servant or an agent for whose act or omission the defendant bears vicarious liability. If the use of these terms is designed to indicate some other form of assigning or entrusting authority with legal

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431 (1960) 103 CLR 215 at 229-231.

432 [1973] AC 127.

433 *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 at 571-572. See also *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 at 638, 663, 683.

434 *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 at 572.

consequences for the defendant, then it will be ineffective to do so without further explanation to identify the operative legal doctrine.

261 The second is that *Soblusky* derives no support from the pilotage cases decided in Admiralty and referred to in *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd*[435]. These decided that, legislation apart, the shipowner was liable for the negligence of a pilot who had been voluntarily engaged, because the pilot thereby became the servant of the shipowner, but the shipowner was not liable where the engagement of the pilot had been compulsory.

262 The third is that *Soblusky* is not supported by cases such as *Christmas v Nicol Bros Pty Ltd*[436] and *Jennings v Hannan (No 2)*[437], to the judgment of Walsh JA in which reference was made in Section A. The essential point in those cases was one of evidence sufficient to found a finding of what was perceived as the fact in issue.

263 A more fundamental reason for denying any extension of *Soblusky* is that, for the reasons detailed earlier in this judgment, it rests upon insecure and unsatisfactory foundations in principle.

264 The issues arising on this appeal have illustrated the risks to judicial method and the maintenance of the continuity and preservation of the coherence of the law, from the development of the modern law of negligence by recourse to a combination of exhausted or exiguous principle and obscured pragmatism[438]. The development of the modern law of negligence with its notions of "loss distribution" is impeded by the difficulty in applying that judicial method of reasoning which facilitates movement from the more fundamental of settled principles to new conclusions.

265 To a degree, the endemic difficulties in the development of the tort of negligence lie in its antecedents. The organisational method of the common law, in particular its pleading system, emphasised procedure rather than substance, and rules rather than principles. By the nineteenth century, "a system which postponed a discussion of the merits of a case to an examination of the form in which it was presented was not best adapted to satisfy the needs of an expanding

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435 (1986) 160 CLR 626 at 640, 643-644, 660-661, 675, 683.

436 (1941) 41 SR (NSW) 317.

437 (1969) 71 SR (NSW) 226.

438 *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 297-299.

society"[439]. The harsh outcomes of such a system were, to some extent, tempered by the use of legal fictions. These still appear. The most recent of them may be the doctrine of "general reliance"[440]. But these fictions conceal unexpressed considerations of social or economic policy, including the quest for a well-funded defendant. Judge Posner described the present as "an age when tort law is dominated by the search for the deep pocket", and instanced attempts to render defendants liable for the torts of their independent contractors[441]. Such matters contribute to the "inherent indeterminacy" of the modern tort of negligence[442].

266 The appellants rely upon decisions of this Court and the Privy Council which were avowedly based upon the reasoning and outcome in cases decided in England after the Hilary Term Rules of 1834. This was before the adoption of the modern system of what Barwick CJ called "fact pleading" in which there is no necessity to identify a legal category of action which the facts asserted may illustrate[443]. However, the distinctions drawn in the older cases remain important for an understanding of the present law of negligence. *Astley v Austrust Ltd*[444] is a recent example. That contributory negligence could be raised under the general issue (by a plea of not guilty) to an action on the case, but could not be raised under the general issue in contract, was a vital element in the reasoning of the majority in *Astley*[445] respecting the construction of the modern apportionment legislation.

267 Analysis demonstrates that the nineteenth century cases relied upon here do not support the principles said by the appellants to be derived from them.

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439 Fifoot, *English Law and its Background*, (1932) at 155.

440 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 385-388 [157]-[164].

441 *Hixon v Sherwin-Williams Co* 671 F 2d 1005 at 1009 (1982). His Honour made the point, repeated in his extrajudicial writing, that the denial of liability in an employer for the torts of an independent contractor is consistent with interests of economic efficiency: see Posner, *Economic Analysis of Law*, 5th ed (1998) at 205.

442 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 593.

443 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 473; *Agar v Hyde* [2000] HCA 41 at [64].

444 (1999) 197 CLR 1. See also, with respect to trespass to the person, the observations of Windeyer J in *McHale v Watson* (1964) 111 CLR 384 at 387-388; affd (1966) 115 CLR 199.

445 (1999) 197 CLR 1 at 33-34 [76]-[80].

Rather, the outcome in those cases to a significant degree was dictated by the common law system of pleading under the Hilary Term Rules. There can be no other proper understanding of them.

268 The question then is – what principles, developed outside that pleading system, support the appellants' case? The law of vicarious liability is pressed into service along with notions of "agency". Reliance was placed upon the idea of one charged or "delegated" by another to perform a "task" and under "control" in doing so. These are indeterminate terms; the same might be said of terms such as "unconscientious" and "fraud", but over a long period these have been given legal content in particular areas of discourse. A contrast is drawn between "true" agency[446] and the legal nature of the "agency" said to be exercised by the pilot in this case but what this involves is not explained by the appellants. To use the term "agent" is to begin but not to end the inquiry whether the appellants make out their case. The appellants' submissions eschew the hard questions that would have to be answered in their favour.

269 What the appellants seek to have this Court do is to introduce a new species of actor, one who is not an employee, nor an independent contractor, but an "agent" in a non-technical sense. They then seek to advance this indeterminacy by attaching vicarious liability to the defendant whose social connection with that actor occasioned their injuries.

270 It may be conceded, as noted by Professor Stoljar in the passage set out in Section H of these reasons, that the activities of an agent with authority to bring about a contractual or other legal relationship between the principal and third parties may have legal consequences in tort for which the principal is responsible. But the pilot was not an agent in this sense. It is a significant step to advance from liability in contract to that in tort. As was emphasised in *Astley*[447]:

> "Tort obligations are imposed on the parties; contractual obligations are voluntarily assumed."

271 Here, as has been explained earlier in these reasons, the respondent himself was not negligent. There is no scope for the argument that to render him liable to the appellants will supply an incentive to others to exercise care in the selection and control of those to whom they entrust the performance of social

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446 The phrase used by Dixon J in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 50.

447 (1999) 197 CLR 1 at 36 [84].

tasks. Nor is it to the point that the respondent should bear the risk (with a valueless or limited right of indemnity against the estate of the pilot, Mr Bradford) of bearing the loss occasioned by the negligence of Mr Bradford. The appellants and the respondent alike are innocent parties. Neither bears culpability.

272 Further, as the Chief Justice and Callinan J each explain in their reasons for judgment, to introduce notions of "agency" and "control" in the performance of social activities such as those involved here would be liable to chill ordinary social and familial intercourse.

273 The decision in *Hill v Van Erp*[448] illustrates that, in appropriate circumstances, the law of torts may, like equity, fill what otherwise are perceived to be "gaps" in what should be one coherent system of law. In that case, the appellant's negligence cost the respondent what otherwise would have been the right, enforceable in equity, to have the testator's estate properly administered in accordance with the will in her favour[449]. But equity had "set its face against relieving against mere 'accidents' or errors which cause to miscarry the intention to make a legally effective voluntary disposition of property on death"[450]. There is no comparable deficiency in the operation of legal doctrine in the present case, to be supplied by an extension of concepts of agency and vicarious liability.

274 I would dismiss the appeal with costs.

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448 (1997) 188 CLR 159.

449 (1997) 188 CLR 159 at 197.

450 (1997) 188 CLR 159 at 228.

275 HAYNE J. The facts which give rise to this appeal are set out in the reasons for judgment of other members of the Court and I do not repeat them.

276 The central question for decision is whether the owner of an aircraft (the respondent) should be held to be vicariously responsible for the negligence of a person who flew that aircraft in such a way that it crashed and caused personal injury to the appellants. The appellants submit that, by analogy with a series of decisions holding the owners or bailees of carriages[451], and later, motor cars[452], vicariously responsible for the negligence of the driver of their vehicle, the owner of an aircraft should likewise be held vicariously responsible for the negligence of the pilot of the aircraft if the pilot was operating the aircraft with the owner's consent and for some purpose in which the owner had some concern.

277 The submission should be rejected. The content of, and the foundations for, the principle for which the appellants contend are, at best, uncertain. It is a principle which would impose strict liability upon the owner in circumstances very different from other cases of vicarious responsibility and should not be extended.

The scope of the principle

278 It is as well to begin by noticing some features of the principle which the appellants seek to have applied (if not established) in this case. First, it is a principle which it was said applied to the owners of motor cars, aircraft, or any other "chattel of conveyance". But no basis for restricting the principle's application to chattels of this kind was proffered in argument beyond the obvious fact that a principle circumscribed in this way would suffice for the immediate forensic needs of the appellants. It is, therefore, a principle which, if adopted,

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451 *Chandler v Broughton* (1832) 1 C & M 29 [149 ER 301]; *Booth v Mister* (1835) 7 Car & P 66 [173 ER 30]; *Wheatley v Patrick* (1837) 2 M & W 650 [150 ER 917]; *M'Laughlin v Pryor* (1842) 4 Man & G 48 [134 ER 21]. But see *Quarman v Burnett* (1840) 6 M & W 499 [151 ER 509].

452 In Australia, *Soblusky v Egan* (1960) 103 CLR 215; *Mortess v Fry* [1928] SASR 60; *Christmas v Nicol Bros Pty Ltd* (1941) 41 SR(NSW) 317. In England, *Reichardt v Shard* (1913) 30 TLR 81; (1914) 31 TLR 24; *Pratt v Patrick* [1924] 1 KB 488; *Hewitt v Bonvin* [1940] 1 KB 188; *Ormrod v Crosville Motor Services Ltd* [1953] 1 WLR 1120; [1953] 2 All ER 753. In the Privy Council, *Samson v Aitchison* [1912] AC 844; *Trust Co Ltd v de Silva* [1956] 1 WLR 376; *Launchbury v Morgans* [1973] AC 127. In New Zealand, *Manawatu County v Rowe* [1956] NZLR 78; *Mako v Land* [1956] NZLR 624.

may very well have application to, and impose vicarious liability on, the owner of any chattel the use of which has caused physical injury[453].

279 Secondly, it is a principle which will apply in a social setting. If there are contractual arrangements between the owner and the negligent user of the conveyance or chattel other principles are engaged. In particular, the well-recognised (if sometimes difficult) distinctions between contracts of service and contracts for services would have to be applied.

280 Thirdly, the principle is one which will apply if, and only if, the owner of the conveyance or chattel is not personally at fault. If the owner is negligent, he or she will be directly liable to the injured party, not vicariously liable for the conduct of another.

281 Fourthly, the negligent user of the conveyance or chattel will be bound to indemnify the owner against the consequences of that negligence. It follows that, if the user or operator is able to satisfy the claim of the injured party, the user or operator will bear the ultimate burden of the damages awarded to the injured party and the costs of that claim.

282 It must be recognised, then, that the evident purpose of the principle for which the appellants contend is to provide a second person (not directly at fault) to whom an injured party can look to meet a claim for damages occasioned by the negligence of another with whom that second person (the owner of the conveyance or chattel) stands in no commercial relationship.

Previous authority in this Court

283 The vicarious responsibility of an owner of a motor vehicle for the negligence of the driver was considered in this Court in *Soblusky v Egan*[454]. The Court (Dixon CJ, Kitto and Windeyer JJ) referred[455] to the argument for the appellant in that case as

> "[a] bold but well conceived attack … upon the validity as well as upon the application to the given case of the modern attempt always to fix liability for the negligent management of a motor vehicle upon the owner

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453 *Launchbury v Morgans* [1971] 2 QB 245 at 260 per Edmund Davies LJ; *Brooke v Bool* [1928] 2 KB 578; *Milligan v Wedge* (1840) 12 Ad & E 737 [113 ER 993].

454 (1960) 103 CLR 215.

455 (1960) 103 CLR 215 at 228. (Emphasis added)

> whoever may be the driver *so long as he drives with the owner's consent and for some purpose in which the owner has some concern*."

The Court referred[456] to Fleming's view that this represented a departure from the principle governing the responsibility of a principal for the tortious acts of an agent in the execution of the agency and that this departure should be ascribed to "the pressure of finding a means to reach financially responsible defendants"[457]. That this development rested upon foundations of doubtful strength was recognised. As their Honours said[458]:

> "It is no doubt true that the development particularly in England of the branch of the law relating to the responsibility of the owner of a motor vehicle for the negligence of a person driving under his authority or consent has gone far. It is perhaps true also that it is easier to see the direction in which the branch grows than to understand the support it obtains from the main trunk of traditional doctrine governing vicarious responsibility. Perhaps the discovery of the true principle of the decisions will be *ex post facto*."

But in the end the Court considered that it was bound by earlier English authority (and in particular by the decision of the Privy Council in *Samson v Aitchison*[459]). Thus, the Court said that even though "[m]otor cars from their very nature do not lend themselves in point of fact to analogies to the horse and buggy … it was in horse and buggy days that the law governing such a case as this was settled."[460] The relevant principle was stated[461] in the following terms:

> "It means that the owner or bailee being in possession of the vehicle and with full legal authority to direct what is done with it appoints another to do the manual work of managing it and to do this on his behalf in circumstances where he can always assert his power of control. Thus it means in point of law that he is driving by his agent. … The principle of the cases cited is simply that *the management of the vehicle is done by the*

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456 (1960) 103 CLR 215 at 228-229.

457 (1960) 103 CLR 215 at 229.

458 (1960) 103 CLR 215 at 229.

459 [1912] AC 844.

460 (1960) 103 CLR 215 at 229.

461 (1960) 103 CLR 215 at 231.

hands of another and is in fact and law subject to direction and control." (Emphasis added)

Particular reference was made in *Soblusky* to *Chandler v Broughton*[462], *Booth v Mister*[463] and *Wheatley v Patrick*[464] and the Court said[465] that "[i]t is from this line of authority that *Samson v Aitchison*[466] proceeded".

284 No party sought to have *Soblusky* overruled. The appeal in this Court, and in the Full Court of the Supreme Court of South Australia, was conducted on the basis that the question is whether the holding in *Soblusky* revealed a principle of vicarious responsibility for the acts of an "agent" which should be applied to the owners of aircraft. That question requires consideration of the foundations for the principle which the appellants assert should be applied. In particular, it invites attention to the course of decisions said to support the asserted principle and to whether such a principle can find support from "the main trunk of traditional doctrine governing vicarious responsibility"[467]. I turn first to consider the course of authority.

Earlier authority

285 The nineteenth century English cases dealing with the vicarious responsibility of an owner of a coach for the carelessness of the driver, must be approached with some particular considerations well in mind. First, the distinction between actions in trespass and actions on the case was of great importance. Choosing the wrong form of action was fatal to the claim[468]. The essence of the distinction was:

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462 (1832) 1 C & M 29 [149 ER 301].

463 (1835) 7 Car & P 66 [173 ER 30].

464 (1837) 2 M & W 650 [150 ER 917].

465 (1960) 103 CLR 215 at 231.

466 [1912] AC 844.

467 (1960) 103 CLR 215 at 229.

468 See, for example, *Savignac v Roome* (1794) 6 TR 125 [101 ER 470] where on motion in arrest of judgment, the plaintiff was denied judgment "as it appeared that he had brought an action on the case for that which in law was a trespass" (*M'Manus v Crickett* (1800) 1 East 106 at 109 [102 ER 43 at 44]).

> "[W]here the immediate act itself occasions a prejudice, or is an injury to the plaintiff's person, house, land, &c [trespass will lie] and where the act itself is not an injury, but a consequence from that act is prejudicial to the plaintiff's person, house, land, &c … the plaintiff's proper remedy is by an action on the case."[469]

And the plaintiff had to choose between the forms of action. Until the *Common Law Procedure Act* 1852 (Imp)[470], an action in trespass could not be joined with an action in case[471].

286 Ordinarily, then, if an action were to be brought against a master for the carelessness of a servant, it would not lie in trespass because there was no immediate act by the master which caused the loss. As Lord Kenyon CJ said in *M'Manus v Crickett*[472]:

> "[I]t is laid down by Holt CJ in *Middleton v Fowler*[473], as a general position, 'that no master is chargeable with the acts of his servant but when he acts in the execution of the authority given him.' Now when a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and according to the doctrine of Lord Holt his master will not be answerable for such act."

287 It is against this background that the nineteenth century cases which are said to lie behind the principle for which the appellants contend, must be considered. Two of the five cases I mentioned at the start of these reasons (*Chandler v Broughton* and *M'Laughlin v Pryor*[474]) were actions in trespass; the other three were actions in case[475]. The question presented in the cases in which

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469 *Reynolds v Clarke* (1725) 2 Ld Raym 1399 at 1402 [92 ER 410 at 413].

470 s 41.

471 Not only did the form of judgment differ between the two forms of action, there were differences in costs and in the scope of the general issue. See Prichard, "Trespass, Case and the Rule in *Williams v Holland*", (1964) *Cambridge Law Journal* 234 at 240, n 37.

472 (1800) 1 East 106 at 108 [102 ER 43 at 44].

473 (1699) 1 Salk 282 [91 ER 247].

474 (1842) 4 Man & G 48 [134 ER 21].

475 cf Atiyah, *Vicarious Liability in the Law of Torts*, (1967) at 126.

the claim was in trespass (*Chandler v Broughton* and *M'Laughlin v Pryor*) was, in effect, whether the defendant should be held to be a co-trespasser with the person who was driving the carriage which struck the plaintiff or the plaintiff's carriage.

288 In the other three cases (*Booth v Mister*, *Wheatley v Patrick* and *Quarman v Burnett*[476]) the questions presented were different. In *Booth v Mister*, the question was whether there was sufficient evidence to support the allegation "that the cart of the defendant was so negligently driven *by the defendant's servant* that it struck against a cabriolet in which the plaintiff was riding"[477] when the evidence showed that the servant had given the reins to another man who was riding in the cart at the time of the accident. Lord Abinger CB said[478]: "As the defendant's servant was in the cart, I think that the reins being held by another man makes no difference. It was the same as if the servant had held them himself."

289 In *Wheatley v Patrick*, the declaration stated that "the defendant was possessed of a horse then harnessed to and drawing a chaise of the defendant, which chaise and horse were under the care, management, government, and direction of the defendant, *who was driving the same*"[479]. The evidence was that the defendant had borrowed the horse and a gig and that another man, sitting with the defendant in the gig, was driving when the accident happened. Lord Abinger CB said[480] that, the defendant being in possession of the horse and gig and sitting with the driver, "the question is, whether … he may not be charged as actually driving". To this his Lordship gave the answer[481], "I think he may. As against all the world but Delafosse & Co [the owner], he is the party in possession: he is present, he has the actual control, and he permits another person to drive."

290 Both *Booth v Mister* and *Wheatley v Patrick* can be seen as deciding whether, on the particular facts of each case, a person could be treated as actually driving the vehicle even though another may have held the reins at the time of the accident. But each was a case that turned on the way in which it was pleaded;

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476 (1840) 6 M & W 499 [151 ER 509].

477 (1835) 7 Car & P 66 [173 ER 30]. (Emphasis added)

478 (1835) 7 Car & P 66 at 66-67 [173 ER 30].

479 (1837) 2 M & W 650 [150 ER 917]. (Emphasis added)

480 (1837) 2 M & W 650 at 652 [150 ER 917 at 918].

481 (1837) 2 M & W 650 at 652 [150 ER 917 at 918].

neither appears to have been intended to establish some general principle of law. And both cases must be understood in the light of the then state of authority about an owner's vicarious responsibility for the acts of someone who was not a servant, in particular, the decision in *Laugher v Pointer*[482].

291 In *Laugher v Pointer*, the Court of King's Bench considered a rule nisi to set aside a nonsuit in an action on the case brought against the owner of a carriage who had hired horses and a driver to drive it. The plaintiff's horse was injured as a result of the negligent driving of the carriage. The driver was held not to be the servant of the owner of the carriage. The court divided equally upon the question whether the owner of the carriage was liable for the negligence of the driver. As Story said in the first edition of his work on *Agency*, published in England in 1839[483], "[v]ery nice questions sometimes arise, as to who is to be deemed the employer or principal. … The opinions of the learned Judges [in *Laugher v Pointer*] exhausted the whole learning of the subject". But, because the Court divided equally, the question whether an owner was vicariously liable for the negligence of a driver whom the owner did not employ was unresolved at the time of the decisions in *Booth v Mister* and *Wheatley v Patrick* and in neither *Booth v Mister* nor *Wheatley v Patrick* was it suggested that the point was being decided. Yet when *Booth v Mister* and *Wheatley v Patrick* were decided, the general principles of vicarious responsibility for the negligence of another had been established. Story described those principles in the following terms[484]:

> "It is a general doctrine of law, that, although the principal is not ordinarily liable (though he sometimes is) in a criminal suit[485], for the acts or misdeeds of his agent, unless, indeed, he has authorised or co-operated in those acts or misdeeds; yet, he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorise, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade them, or disapproved of them[486]. In all

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482 (1826) 5 B & C 547 [108 ER 204].

483 At § 453, n 5.

484 Story, *Commentaries on the Law of Agency*, (1839) at § 452.

485 *Attorney-General v Siddon* 1 Tyrw R 41; *Rex v Gutch* (1829) M & M 432 at 437 [173 ER 1214 at 1216]; Lloyd, *Paley on Agency* at 294-298, 305, 306; Chitty, *A treatise on the laws of commerce and manufactures* at 209, 210.

486 Chitty, *A treatise on the laws of commerce and manufactures* at 208, 209, 210; Lloyd, *Paley on Agency* at 294, 295, 296, 301-307; *Smith on Mercantile Law* at 70, 71; Story, *Commentaries on the Law of Agency*, (1839) at §§ 139, 217, 308, 309,

(Footnote continues on next page)

> such cases the rule applies; *Respondeat Superior*; and it is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents[487]."

Thus neither *Booth v Mister* nor *Wheatley v Patrick* can safely be seen as standing for some general proposition about vicarious responsibility of an owner (or bailee) for the conduct of a person who was not a servant or agent of the owner. That general question (left open after *Laugher v Pointer*) was not decided until *Quarman v Burnett*.

292 In *Quarman v Burnett*, the defendants kept a carriage of their own but hired horses and a coachman from a job-mistress. They generally had the same horses and always the same coachman (a man employed by the job-mistress). The defendants would pay the coachman a set amount for each drive or, when they went away for longer periods, a set amount each day. When driving the defendants, the coachman wore a coat and livery hat supplied by the defendants. Once, when returning his hat to the defendants' house, the coachman left the horses and carriage unattended and they started off and ran into the plaintiff's chaise. The plaintiff's claim against the defendants failed. In delivering the judgment of the court, Parke B said[488]:

> "It is undoubtedly true, that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like."

But no such case was made out in *Quarman v Burnett*. Parke B went on to say[489]:

310; *Doe v Martin* (1790) 4 TR 39 at 66 per Lord Kenyon CJ [100 ER 882 at 897]; *Bush v Steinman* (1799) 1 Bos & Pul 404 [126 ER 978]; *Attorney-General v Siddon* 1 Tyrw R 41; Story, *Commentaries on the Law of Agency*, (1839) at §§ 315-319.

487 Blackstone, *Commentaries on the Laws of England*, vol 1 at 431, 432; *Abbott on Shipping*, Pt 2, ch 2 at § 11; *Ellis v Turner* (1800) 8 TR 531 at 533 [101 ER 1529 at 1531]; *Bush v Steinman* (1799) 1 Bos & Pul 404 [126 ER 978]; *Laugher v Pointer* (1826) 5 B & C 547 [108 ER 204].

488 (1840) 6 M & W 499 at 507 [151 ER 509 at 513].

489 (1840) 6 M & W 499 at 509 [151 ER 509 at 513-514].

> "The immediate cause of the injury is the personal neglect of the coachman, in leaving the horses, which were at the time in his immediate care. The question of law is, whether any one but the coachman is liable to the party injured; for the coachman certainly is.
>
> Upon the principle that qui facit per alium facit per se, the master is responsible for the acts of his servant; and that person is undoubtedly liable, who stood in the relation of master to the wrong-doer – he who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorised by him to appoint servants for him, can make no difference."

Again, in *Quarman v Burnett*, it was held that no such case was made out. The coachman was held *not* to be the servant of the defendants. And Parke B rejected the wider proposition that "a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit"[490]. Of this Parke B said[491]:

> "That, however, is too large a position, as Lord Chief Justice Eyre says in the case of *Bush v Steinman*[492], and cannot be maintained to its full extent, without overturning some decisions, and producing consequences which would, as Lord Tenterden observes, 'shock the common sense of all men:' not merely would the hirer of a post-chaise, hackney-coach, or wherry on the Thames, be liable for the acts of the owners of those vehicles if they had the management of them, or their servants if they were managed by servants, *but the purchaser of an article at a shop, which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness, whilst passing along the street*." (Emphasis added)

Quarman v Burnett, then, decided that no general principle holding an owner of a chattel responsible for the negligence of any user of the chattel should be adopted.

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490 (1840) 6 M & W 499 at 510 [151 ER 509 at 514].

491 (1840) 6 M & W 499 at 510 [151 ER 509 at 514].

492 (1799) 1 Bos & Pul 404 [126 ER 978].

293 In *Quarman v Burnett* (which was an action in case), Parke B did acknowledge that the conduct of "the hirer of job-horses and servants" could make the hirer responsible for the neglect of a servant "though not liable by virtue of the general relation of master and servant"[493]. He referred[494] in this regard to the owner "taking the actual management of the horses, or ordering the servant to drive in a particular manner". And there was nothing novel in suggesting that such conduct would render the owner liable. What is important for present purposes is that, by the time *M'Laughlin v Pryor* was decided (about two years after *Quarman v Burnett*) the focus of inquiry, in cases where the defendant owner was not the employer of the driver, appears to have been whether there was evidence of an express assertion of control by the defendant over the conduct of the driver, thus rendering the defendant liable in trespass. In *M'Laughlin v Pryor* (an action in trespass), the defendant was held liable as a co-trespasser because, not only did he have control over the conduct of the postboys on his carriage whose actions caused the collision, he had positively assented to their acts[495].

294 By the middle of the nineteenth century, then, authority suggested that to hold an owner liable for the acts of another who drove the owner's carriage and who was not a servant of the owner, it was necessary to establish that the owner in fact had controlled the driver's conduct.

The motor car cases

295 *Samson v Aitchison*[496], decided in 1912 by the Privy Council on appeal from the Court of Appeal of New Zealand, is the next significant decision. Perhaps it can be seen as remaining within the bounds of the stream of nineteenth century authority because of the emphasis that was given to what was said to be a finding of *fact* at trial that the defendant "had not abandoned the control"[497] over the way in which the vehicle was driven. But the Board went on to say[498] that:

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493 (1840) 6 M & W 499 at 507 [151 ER 509 at 513].

494 (1840) 6 M & W 499 at 507 [151 ER 509 at 513].

495 (1842) 4 Man & G 48 at 59 per Coltman J, 60 per Erskine J, 61-62 per Cresswell J [134 ER 21 at 25-26].

496 [1912] AC 844.

497 [1912] AC 844 at 850.

498 [1912] AC 844 at 850.

> "if the control of the car was not abandoned, then it is a matter of indifference whether Collins [the driver], while driving the car, be styled the agent or the servant of the appellant in performing that particular act, since it is the retention of the control which [the owner] would have in either case that makes him responsible for the negligence which caused the injury".

Because the test was cast negatively – as whether the owner had *abandoned* control – the focus was later to be understood as having shifted from the positive assertion of control by the owner to the capacity of the owner to assert it[499]. And what was treated in *Samson v Aitchison* as a question of fact was later translated into a question of mixed law and fact. That is, the dominant question came to be whether the defendant owner had abandoned what otherwise would be the legal power to assert control over what was to be done[500]. But that shift was not made at once.

296 The judgment of du Parcq LJ in *Hewitt v Bonvin*[501] is referred to in many of the later cases in this area. In particular, reference has been made to his Lordship's statement that[502]:

> "The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf."

And this has been read as if it were a sufficient statement of the relevant principle[503]. But it is necessary to recall that the claim in *Hewitt v Bonvin* failed, it being held that the son of the owner of the car was not driving on his parent's behalf even though the car was taken with permission for a purpose which the son's mother knew. On no view, then, does *Hewitt v Bonvin* support the contention that giving permission to drive, or having legal power to control the

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499 cf *Brooke v Bool* [1928] 2 KB 578.

500 See, especially, *Ormrod v Crosville Motor Services Ltd* [1953] 1 WLR 1120; [1953] 2 All ER 753.

501 [1940] 1 KB 188.

502 [1940] 1 KB 188 at 194-195.

503 See, for example, *Ormrod v Crosville Motor Services Ltd* [1953] 1 WLR 1120; [1953] 2 All ER 753; *Carberry v Davies* [1968] 1 WLR 1103; [1968] 2 All ER 817; *Vandyke v Fender* [1970] 2 QB 292; *Launchbury v Morgans* [1971] 2 QB 245.

driver, is sufficient to make the owner of a motor car liable for the negligence of the driver. If either or both permission and legal power to control were sufficient, the decision in *Hewitt v Bonvin* would have been to the opposite effect.

297 *Ormrod v Crosville Motor Services Ltd*[504] may be seen as the most liberal statement of a principle of the kind for which the appellants now contend; the notion of driving "on the owner's behalf", spoken of by du Parcq LJ in *Hewitt v Bonvin*, was given a very wide meaning in *Ormrod*. The driver of a motor car was held to be driving as the "agent" of the owner (who was not travelling in the car) because the driver was driving with the consent of the owner "partly for his own purposes and partly for the owner's purposes"[505] or, was "doing something *for* the owner"[506]. It is important to recognise that this is a more liberal statement of principle than was adopted in *Soblusky*. There, the principle was described as depending upon "management of the vehicle [being] done by the hands of another and … in *fact and law* subject to direction and control"[507]. The reference to the power to control in fact (if given full effect) would provide a significantly narrower test than that adopted in *Ormrod*. (It may also be compared with *Christmas v Nicol Bros Pty Ltd*[508] where Jordan CJ said that "it is necessary to show that the driver was at the time an agent of his, acting for him and with his authority in some matter in respect of which he had the *right* to direct and control his course of action".)

298 To complete the reference to English authority in this area, however, reference must be made to the decision of the House of Lords in *Launchbury v Morgans*[509]. There, Lord Wilberforce criticised the contention that vicarious liability should depend only upon identification of "interest or concern" of the owner in the journey undertaken by the driver[510]. This he condemned as too vague a criterion of liability with nothing in reason or authority to commend it.

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504 [1953] 1 WLR 1120; [1953] 2 All ER 753.

505 [1953] 1 WLR 1120 at 1122 per Denning LJ; [1953] 2 All ER 753 at 754.

506 [1953] 1 WLR 1120 at 1122 per Singleton LJ; [1953] 2 All ER 753 at 754. (Emphasis added)

507 (1960) 103 CLR 215 at 231. (Emphasis added)

508 (1941) 41 SR(NSW) 317 at 320. (Emphasis added)

509 [1973] AC 127.

510 [1973] AC 127 at 134-135.

He concluded[511] that the common law had reached the point in the field of vicarious liability of holding generally that:

> "The owner ought to pay … because he has authorised the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct. He ought not to pay (on accepted rules) if he has no control over the actor, has not authorised or requested the act, or if the actor is acting wholly for his own purposes."

But what is meant by saying that a driver is carrying out a task or duty *delegated*? What *control* will suffice to make an owner liable? To say, as did some members of the House in *Launchbury v Morgans*, that "[w]hether or not the driver is acting as agent of the owner is a question of fact"[512] or that "the phrase qui facit per alium, facit per se correctly expresses the principle on which vicarious liability is based"[513] does not advance the debate very far. What is meant by saying that the driver acts as "agent" of the owner? The difficulty in identifying the content of the principle suggests that its foundations may be shallow and unstable.

"Agency"

299 Frequent reference is made to "agency". Care must be taken in understanding what is meant by saying in connection with a question of vicarious responsibility that one person is "agent" of another. At the end of the nineteenth century, Lord Herschell said[514]:

> "No word is more commonly and constantly abused than the word 'agent.' A person may be spoken of as an 'agent,' and no doubt in the popular sense of the word may properly be said to be an 'agent,' although when it is attempted to suggest that he is an 'agent' under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading."

In *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co*[515], this Court pointed out that:

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511 [1973] AC 127 at 135.

512 [1973] AC 127 at 139-140 per Viscount Dilhorne.

513 [1973] AC 127 at 140 per Viscount Dilhorne; cf at 140 per Lord Pearson.

514 *Kennedy v De Trafford* [1897] AC 180 at 188.

515 (1958) 100 CLR 644 at 652.

> "Agency is a word used in the law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties."

But that is not how the words "agent" or "agency" are used in the present context. As Lord Wilberforce recognised in *Launchbury v Morgans*[516] "agency", in the context of cases like the present, "is merely a concept, the meaning and purpose of which is to say 'is vicariously liable'" and that "respondeat superior is the law saying that the owner ought to pay". Thus, to say of the pilot of the respondent's aircraft (or the driver of a motor car owned by another) that the pilot or driver was the "agent" of the owner of the aircraft or motor car is to state a conclusion about vicarious responsibility, not to state a reason for imposing that responsibility. Similarly, to assert that the combination of the owner's consent to the use of the aircraft (or motor car) and the use being for a purpose in which the owner "has some concern"[517] warrants holding the owner vicariously responsible for the negligence of the pilot or driver, invites attention to why that should be so.

The asserted principle and vicarious responsibility generally

300 It is desirable to turn to see where the asserted principle would fit in the more general fabric of vicarious responsibility. Of course, as was recognised in *Soblusky*, there may be no single thread that runs through that fabric other than "the cynical conclusion of the late Dr *Baty* … that the real reason is that the damages are taken from a deep pocket"[518]. And whether that conclusion is expressed as a search for a deep-pocket defendant or, in less pejorative terms, as being justified by "the principle of loss-distribution"[519], it seems plain that considerations of insurance and the relative capacity of employers and employees to pay damages have had a significant influence on the development of vicarious liability, even if they may not provide a unifying or sufficient justification for the rules that have developed[520].

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516 [1973] AC 127 at 135.

517 *Soblusky* (1960) 103 CLR 215 at 228.

518 *Soblusky* (1960) 103 CLR 215 at 229. See also Atiyah, *Vicarious Liability in the Law of Torts*, (1967) at 6, 15-28; Atiyah, "Personal Injuries in the Twenty-First Century: Thinking the Unthinkable", in Birks (ed), *Wrongs and Remedies in the Twenty-First Century*, (1996) 1 at 15-16.

519 Atiyah, *Vicarious Liability in the Law of Torts*, (1967) at 22.

520 See Pollock and Maitland, *History of English Law*, 2nd ed (1923), vol 2 at 533.

301 For present purposes, however, what is significant in what I have called the general fabric of vicarious responsibility, is that, in a commercial setting, much will turn upon the distinction between a contract of service and a contract for services. That is, much will depend upon the distinction between the relationship of employer and employee and that of employer and independent contractor. Vicarious responsibility will be imposed on the employer in the former case for negligent acts or omissions in the course of the employment but will not be imposed on the employer in the latter case[521]. In drawing the distinction between a contract of service and a contract for services, questions of control, and power to control, will often loom large[522]. Further, it is necessary to keep at the forefront of consideration that the control or power to control which will fall for consideration is the control or power given or withheld by a commercial bargain struck between the parties. That is, the vicarious responsibility of A, who contracts with B for B to perform a task, is much affected by the nature of the contract which those parties make. If A stipulates that he or she will have the right to control the way in which B performs the task, it is likely that A will be held to be vicariously responsible for the negligence of B in the course of performance of that task. By contrast, if A stipulates only for the performance of the task and, under the agreement, A has no right to control how B does it, A will ordinarily not be vicariously responsible for B's negligence[523].

302 The principle for which the appellants now contend imposes strict liability on the owner. It is a principle which would apply where the owner has no contract with the driver or user of the chattel and therefore *cannot* stipulate for the nature of the relationship between them. In particular, the owner cannot stipulate for what, if any, degree of control he or she will have over the manner in which the driver or user operates or uses the chattel. Because the occasion is a social, not a business occasion it is inappropriate to speak of the parties

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521 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 48 per Dixon J; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

522 *Yewens v Noakes* (1880) 6 QBD 530 at 532-533 per Bramwell LJ; *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539 at 545 per Latham CJ, 552 per Dixon J; *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at 404 per Dixon J; *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 at 571 per Dixon CJ, Williams, Webb and Taylor JJ; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24 per Mason J, 35-37 per Wilson and Dawson JJ, 49 per Deane J.

523 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

stipulating for a particular level of control. The circumstances in which the asserted principle would apply are circumstances in which the owner and driver or user do not intend to enter any legal relationship, let alone any contract, regulating the use of the conveyance or chattel. Thus the party to be held vicariously responsible is not able to contract out of that responsibility as that party could if deciding between employing someone as an employee or as an independent contractor.

303 It is convenient to notice three other relevant considerations at this stage. First, it is clear that if A instigates or procures B to commit a tort, A is deemed to have committed the tort personally[524]. Thus, if the owner of a vehicle directs the driver to drive too fast or to attempt to push through too narrow a gap, the owner will be liable in negligence for the damage that ensues[525]. Similarly, if the owner of an aircraft directed the pilot to fly it in a particular (negligent) way, the owner will be liable in negligence.

304 Because that is so, it might be thought that the decided cases in this area can be understood as turning more on questions of evidence (in a search for direct liability) than of principle (and questions of vicarious responsibility). But that is not right.

305 Undoubtedly, evidentiary questions can arise in the area, but the questions that have arisen in the past have been concerned with inferences of vicarious responsibility, not inferences of direct liability. In *Hewitt v Bonvin*, du Parcq LJ said[526] that "if a plaintiff proves that a vehicle was negligently driven and that the defendant was its owner, and the Court is left without further information, it is legitimate to draw the inference that the negligent driver was either the owner himself, or some servant or agent of his". And in *Christmas v Nicol Bros Pty Ltd*[527], Jordan CJ concluded that evidence that a commercial vehicle was being driven by an employee of the defendant, whose job was to drive it, was evidence sufficient to found an inference that it was being driven for the employer and in the course of the driver's employment[528]. But evidence of the defendant's ownership of a vehicle, and presence in it at the time of an accident, would not I think, without more, found an inference that the owner gave directions about the manner of driving and support a finding of direct liability. And whether or not

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524 *Barker v Braham and Norwood* (1773) 3 Wils KB 368 [95 ER 1104].

525 *M'Laughlin v Pryor* can be seen as a case of this kind.

526 [1940] 1 KB 188 at 194.

527 (1941) 41 SR(NSW) 317.

528 (1941) 41 SR(NSW) 317 at 322.

that is so, no such inference was considered in either *Hewitt v Bonvin* or *Christmas v Nicol Bros Pty Ltd*.

306 Questions of evidentiary inference and questions of the principle being applied may not always have been given the separate consideration that they require. Indeed, the decision in *Ormrod v Crosville Motor Services Ltd* might, perhaps, be seen to run the two questions together. When it is recalled, however, that *Soblusky* held that, the owner of the vehicle being in the vehicle at the time of the accident (but asleep), the management of the vehicle was in fact and law subject to his direction and control, it can be seen that the decision in that case did not depend upon any finding that the owner had *in fact* directed the commission of the tort.

307 Secondly, there are some non-delegable, personal duties to ensure that reasonable care is taken[529], but it seems unlikely that such principles would have any relevant operation in a context of the kind now under consideration. Ordinarily, at least, there would not be that "element in the relationship between the parties that makes it appropriate to impose on the defendant a duty to ensure that reasonable care and skill is taken for the safety of the persons to whom the duty is owed"[530].

308 Thirdly, it must be recalled that in *Burnie Port Authority v General Jones Pty Ltd*[531] it was held that the rule in *Rylands v Fletcher*[532] has now been subsumed within the principles of negligence. And, although it was also held that the circumstances in that case gave rise to a non-delegable duty of care[533], it is unlikely, as I have said, that similar circumstances will be found to exist in the case of a gratuitous loan of a chattel. What is more significant, for present purposes, is the abandonment of a rule imposing strict liability on the owner or occupier of real property for consequences of the use of that property. It would be incongruous now to apply such a rule in respect of some kinds of chattel.

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529 For example, of a school to its pupil: *The Commonwealth v Introvigne* (1982) 150 CLR 258, and at least some aspects of an employer's duty to employees: *Kondis v State Transport Authority* (1984) 154 CLR 672.

530 *Kondis* (1984) 154 CLR 672 at 687 per Mason J.

531 (1994) 179 CLR 520.

532 (1866) LR 1 Ex 265; (1868) LR 3 HL 330.

533 (1994) 179 CLR 520 at 555 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

309 If it is right to consider whether the asserted principle will lead to better "loss distribution" (by giving a plaintiff a claim against a defendant more likely to have a deep pocket) it must be recognised that the principle for which the appellants contend is one which will have its operation in relation to transactions of a social rather than commercial kind. And whereas once it may have been thought desirable (even necessary) to multiply the number of possible defendants to whom a plaintiff, physically injured in a motor accident, could look for compensation, legislation providing for compulsory third party insurance and schemes of no fault liability have long since overtaken the common law in relation to such personal injury claims to the point where it may be doubted that the question presented in *Soblusky* will now often arise. Further, unlike the employer who, it is to be assumed, seeks to earn profit from the employment of labour, the voluntary lender of a vehicle or other chattel will ordinarily obtain no financial benefit from the transaction. If, as Lord Brougham said in *Duncan v Findlater*[534],

> "The rule of liability, and its reason, [in employment cases, is]: I am liable for what is done for me and under my orders by the man I employ, for I may turn him off from that employ when I please: and the reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it",

the imperfect nature of an analogy between such a case and the present is apparent.

310 Finally, given that the setting in which the asserted principle would apply is social, not commercial, it cannot be said that the risks of vicarious responsibility will ordinarily, or should as a matter of prudence, be insured against by the owner of the chattel. To that general proposition about insurance one exception must, however, be acknowledged. Insurance of motor vehicles against the risks of damage to the vehicle and liability for damage to the property of others is very common. So far as that insurance relates to the risk of damage to the insured's vehicle, the acceptance of a principle of the kind for which the appellants contend would, in many cases, lead only to adjustments between insurers. In relation to damage to the property of others, however, different considerations may be said to intrude. In such a case, the third party who has suffered loss because of damage to property will have a claim against the insured owner of the vehicle only if the owner was driving or the owner is vicariously responsible for the negligence of the driver. That may be said to suggest that the principle that was applied in *Soblusky* might continue to find useful application in relation to motor vehicle property claims. But that is not a question which was

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534 (1839) 6 Cl & F 894 at 909-910 [7 ER 934 at 940].

decided in *Soblusky* or must be decided now. Thus, in so far as *Soblusky* held that an owner of a motor vehicle is vicariously responsible for damages (in that case, for personal injury) suffered when "the management of the vehicle is done by the hands of another and is in fact and law subject to direction and control"[535] by that owner, it is neither necessary nor desirable to consider in this case whether there should, hereafter, be some departure from it.

311 I would reject the appellants' contentions. In particular, I reject the contention that an aircraft owner is vicariously responsible for the negligence of the pilot when the pilot was operating the aircraft with the owner's consent and for a purpose in which the owner had some concern. If the decision in *Soblusky* is still good law (and that is a question I need not decide) its foundations are such that I would not extend it beyond its application to the vicarious responsibility of the owner of a motor vehicle. And even if *Soblusky* were to be applied to the circumstances of this case, the respondent not being on board the aircraft when it was flown negligently, I do not consider that the management of the aircraft was in fact subject to his direction and control.

312 The appeal should be dismissed with costs.

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535 (1960) 103 CLR 215 at 231.

313 CALLINAN J. Mr Davis restored and flew old aeroplanes from his private aerodrome adjoining his residence at Jacob's Creek in South Australia. Occasionally he allowed other, competent enthusiasts to fly those aeroplanes there.

314 Among the aircraft that he owned was an Aeronca[536], an aeroplane which had a reputation for being without any inherent vices.

315 On 29 July 1990 the appellants visited the respondent's residence. The appellant Mrs Scott is the sister-in-law of the respondent. The appellant Travis Scott, her son, was then 11 years old.

316 Mr Bradford had telephoned a "few days before the 29th" to invite himself to the aerodrome on that day. He was a licensed aircraft mechanical engineer with many years of experience in that profession. He was also a qualified pilot[537].

317 The occasion which drew the appellants and others to the respondent's residence was a party to celebrate the 21st birthday of the respondent's daughter.

318 Mr Bradford had previously been permitted to fly the Aeronca, a two-seater, but only after the respondent had flown with him and assured himself that Mr Bradford was well capable of flying it.

319 At some stage during the day, the appellant Mr Scott, and another visitor, Mr Beeching, who was also a guest at the party and the father of two boys, both asked the respondent "whether there would be a chance of the boys having a ride". No reference was made to any particular aeroplane or pilot. The respondent after considering the request agreed to it. The trial judge made this finding about the respondent's reasons for doing so:

> "Whether or not the joyrides occurred was of small moment to him. He organised them as a favour to the boys and their families. It was part of providing a good day for guests at the party he and Mrs Davis were giving their daughter. If one searches for benefit to him, it goes no further than giving himself the satisfaction of being a kind host in giving pleasure to his guests. There was no obligation or profit motive on his part."

320 Later, by a request conveyed by his wife, the respondent asked Mr Bradford if he would take the appellant Travis Scott for a flight in the

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536 65 HP high wing monoplane.

537 His licence was not endorsed for aerobatic manoeuvres.

Aeronca. Mr Bradford agreed. Once airborne, because there was no radio in the aeroplane, there were no means of communication between the pilot and anyone on the ground.

321 The appellants must have been aware that Mr Bradford was the pilot of the aeroplane in which Travis was to fly. The evidence was that Mrs Scott actually brought Travis to the edge of the aerodrome and watched him climb into the Aeronca.

322 Not very long into the flight the Aeronca crashed as a result of Mr Bradford's negligence. Mr Bradford was killed and the appellant Travis seriously injured. His parents who witnessed the crash suffered nervous shock.

323 The question in this case is whether the respondent, who was in no respects negligent and who could derive no benefit whatsoever from the tragic joy-flight, should be liable to the appellants for the injuries they suffered.

324 The primary judge in the District Court in South Australia, Bright DCJ, thought he should be[538]. The Full Court of South Australia, Doyle CJ and Nyland J (Milhouse J dissenting) thought he should not be[539].

The Appeal to this Court

325 In finding for the appellants the primary judge regarded himself as applying a principle accepted in *Launchbury v Morgans*[540], that an owner of a chattel may be liable in some circumstances for the negligence of another who is using it at the request of the owner. In that case the House of Lords held in favour of the owner of a motor car, being driven by another, on the basis that the owner's mere interest or concern in respect of it did not render that owner liable for injuries sustained by a passenger as a result of the driver's negligence. Lord Wilberforce said[541]:

> "… I regard it as clear that in order to fix vicarious liability upon the owner of a car in such a case as the present it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty. The substitution for this clear conception of a vague test based on 'interest' or 'concern' has nothing in reason or authority to commend it.

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538 *Scott v Davis & Davis* (1997) 194 LSJS 338.

539 *Davis v Scott* (1998) 71 SASR 361.

540 [1973] AC 127.

541 [1973] AC 127 at 135.

> Every man who gives permission for the use of his chattel may be said to have an interest or concern in its being carefully used, and, in most cases if it is a car, to have an interest or concern in the safety of the driver, but it has never been held that mere permission is enough to establish vicarious liability. And the appearance of the words in certain judgments[542] in a negative context (no interest or concern, therefore no agency) is no warrant whatever for transferring them into a positive test. I accept entirely that 'agency' in contexts such as these is merely a concept, the meaning and purpose of which is to say 'is vicariously liable,' and that either expression reflects a judgment of value - respondeat superior is the law saying that the owner ought to pay. It is this imperative which the common law has endeavoured to work out through the cases. The owner ought to pay, it says, because he has authorised the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct. He ought not to pay (on accepted rules) if he has no control over the actor, has not authorised or requested the act, or if the actor is acting wholly for his own purposes. These rules have stood the test of time remarkably well. They provide, if there is nothing more, a complete answer to the respondents' claim against the appellant."

326 Their Lordships also rejected an alternative submission that a special rule to impose virtual, absolute liability on owners should operate in cases involving the use of motor vehicles. What Lord Wilberforce said of that was as true of Australia as it was of the United Kingdom and remains so[543]:

> "Whatever may have been the situation in 1913 in the youth of the motor car, it is very different now, when millions of people of all ages drive for a vast variety of purposes and when there is in existence a complicated legislative structure as to insurance - who must take it out, what risks it must cover, who has the right to sue for the sum assured. Liability and insurance are so intermixed that judicially to alter the basis of liability without adequate knowledge (which we have not the means to obtain) as to the impact this might make on the insurance system would be dangerous and, in my opinion, irresponsible."

327 Viscount Dilhorne rejected the suggested proposition that a grant of permission by an owner to a user should fix the owner with liability for the user's negligence[544]:

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542 *Ormrod v Crosville Motor Services Ltd* [1953] 1 WLR 409 at 410 per Devlin J; [1953] 1 All ER 711 at 712; [1953] 1 WLR 1120 at 1122 per Denning LJ; [1953] 2 All ER 753 at 755.

543 [1973] AC 127 at 137.

544 [1973] AC 127 at 138.

"It is not, and in my opinion has never been, the law of this country that the owner of a chattel is responsible in law for damage done by the negligence of a person to whom he has lent it or whom he has permitted to use it[545]. If all that had to be shown to establish liability on the part of the owner of a vehicle was that he had permitted its use by the person who was negligent, then *Hewitt v Bonvin* was wrongly decided. There the son was permitted to use the car and it was held that the father was not responsible for the son's negligent driving as the son was not his servant or agent at the time."

328 Lord Cross of Chelsea put the matter this way[546]:

"Before this case the law as to the vicarious liability of the owner of a chattel for damage caused by its use by another person was, I think, well settled. The owner of the chattel will be liable if the user of it was using it as his servant or his agent: *Hewitt v Bonvin*[547]. As *Ormrod v Crosville Motor Services Ltd*[548] and *Carberry v Davies*[549] show, the user need not be in pursuance of a contract. It is enough if the chattel is being used at the relevant time in pursuance of a request made by the owner to which the user has acceded. In deciding whether or not the user was or was not the agent of the owner it may no doubt be relevant to consider whether the owner had any interest in the chattel being used for the purpose for which it was being used. If he had no such interest that fact would tell against the view that the user was his agent while conversely the fact that the owner had an interest might lend support to the contention that the user was acting as the owner's agent. But despite the way in which the matter is put by Denning LJ in *Ormrod's* case[550], I do not think that the law has hitherto been that mere permission by the owner to use the chattel coupled with the fact that the purpose for which it was being used at the relevant time was one in which the owner could be said to have an

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545 See *Quarman v Burnett* (1840) 6 M & W 499 at 510-511 per Parke B [151 ER 509 at 512-513]; *Ormrod v Crosville Motor Services Ltd* [1953] 1 WLR 1120 at 1122 per Singleton LJ; [1953] 2 All ER 753 at 754.

546 [1973] AC 127 at 144.

547 [1940] 1 KB 188.

548 [1953] 1 WLR 1120; [1953] 2 All ER 753.

549 [1968] 1 WLR 1103; [1968] 2 All ER 817.

550 [1953] 1 WLR 1120 at 1123; [1953] 2 All ER 753 at 754-755.

> interest or concern would be sufficient to make the owner liable in the absence of any request by the owner to the user to use the chattel in that way."

329 The history of the development of a principle of liability of owners of chattels of conveyance had earlier been discussed in *Hewitt v Bonvin* by du Parcq LJ[551]:

> "The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty. Thus in *Wheatley v Patrick*[552] the defendant, who had borrowed a horse and gig for an excursion to the country, permitted a friend to drive on the way home. The friend's negligent driving caused damage to the plaintiff. The declaration alleged that the defendant had himself driven negligently, and the Court of Exchequer held that this allegation was supported by the evidence. The reason is plain. The defendant had delegated to his friend the duty of driving and was personally responsible for his acts as the acts, not of a servant, but of an agent. There could hardly be a better illustration of the maxim qui facit per alium facit per se. The decision of the Privy Council in *Samson v Aitchison*[553] was founded on the same principle."

However it is open to question whether the earlier cases do provide a sound foundation for such a far reaching principle as that stated by du Parcq LJ.

330 *M'Manus v Crickett*[554] was decided in 1800. There a servant wilfully drove the master's chariot into the plaintiff's chaise. The plaintiff who sued the master as owner of the chariot in trespass was non suited. Kenyon LCJ in delivering the unanimous opinion of the Court said[555]:

> "where the servant is in point of law a trespasser, the master is not chargeable as such; though liable to make a compensation for the damage consequential from his employing of an unskilful or negligent servant."

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551 [1940] 1 KB 188 at 194-195.

552 (1837) 2 M & W 650 [150 ER 917].

553 [1912] AC 844.

554 (1800) 1 East 106 [102] ER 43. See also *Savignac v Roome* (1794) 6 TR 125.

555 (1800) 1 East 106 at 108 [102 ER 43 at 44].

331 In *Chandler v Broughton*[556] the plaintiff brought an action in trespass against a defendant whose gig had run into a church. The defendant was not driving the gig but was sitting next to his servant who was driving it. The report is short and the reasoning far from clear. There was an issue in the case whether the accident occurred because the horse drawing the gig may have been an unsuitable one to be driven in a single harness, or because of an act of momentary negligence by the servant. In argument, Bayley B said that when the master and servant are sitting together the master has the immediate control over the servant. Bayley B held, repeating what his Lordship had said in argument, that when an owner and driver are sitting together the act of the driver is the act of the master[557].

332 In *Wheatley v Patrick*[558] the defendant was the bailee of a horse and gig. He had taken this equipage into the country and allowed it to be driven by a friend who was accompanying him. A collision between it and the plaintiff's horse causing the death of the horse occurred. The plaintiff brought an action on the case against the defendant. All members of the Court (Lord Abinger CB, Bolland B and Alderson B) held the defendant to be liable on the ground that, being in possession of the horse and gig, and sitting beside the driver, he should be treated as if he were the driver.

333 In *Quarman v Burnett*[559] the plaintiff, who had been injured in a collision between his coach and a coach owned by the defendants but drawn by horses owned by a third party, and hired with a driver to the defendants by the day, sought to claim damages against the defendants. Parke B delivered the judgment of the Court (Parke B, Alderson B and Rolfe B). His Lordship in the course of doing so said[560]:

> "It is undoubtedly true, that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a

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556 (1832) 1 C & M 29 [149 ER 301].

557 See Keeler, "Driving agents: to vicarious liability for (some) family and friendly assistance?", (2000) 8 *Torts Law Journal* 41 at 43. See also Atiyah, *Vicarious Liability in the Law of Torts*, (1967).

558 (1837) 2 M & W 650 [150 ER 917].

559 (1840) 6 M & W 499 [151 ER 509].

560 (1840) 6 M & W 499 at 507 [151 ER 509 at 513].

> particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like."

334 In *M'Laughlin v Pryor*[561] the plaintiff had been injured when a carriage and horses, hired together with coachmen, by a party, including the defendant, pushed their way into a line of traffic. Before the coachmen took this course of action there had been "cries" from within the carriage "that they should not move on"[562], from the defendant. The Court held the defendant liable. This was therefore a case in which control was directly and momentarily exercised by the defendant when the defendant had the capacity and power to give effective directions as to the driving of the coachmen.

335 *Sharrod v The London and North Western Railway Company*[563] is a case of a collision between the defendant's steam locomotive and the plaintiff's stock which had wandered on to the line though a gap in a fence. The plaintiff sued and failed in trespass although an action on the case might have succeeded. In rejecting the claim Parke B on behalf of the Court (Alderson B, Rolfe B and Parke B) said[564]:

> "Our opinion is, that, in all cases where a master gives the direction and control over a carriage, or animal, or chattel, to another rational agent, the master is only responsible in an action on the case, for want of skill or care of the agent – no more; consequently, this action cannot be supported."

336 In *Laugher v Pointer*[565], which was considered by all the common law judges and in which the Bench was equally divided (Abbott CJ and Littledale J; Bayley and Holroyd JJ dissenting), Littledale J distinguished damage caused by the use of chattels from damage caused on or about land and buildings[566]:

> "Houses and land come under the fixed use and enjoyment of a man for his regular occupation and enjoyment in life; the law compels him to take care that no persons come about his premises who occasion injury to

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561 (1842) 4 Man & G 48 [134 ER 21].

562 (1842) 4 Man & G 48 at 50 [134 ER 21 at 22].

563 (1849) 4 Ex 580 [154 ER 1345].

564 (1849) 4 Ex 580 at 586 [154 ER 1345 at 1348].

565 (1826) 5 B & C 547 [108 ER 204].

566 (1826) 5 B & C 547 at 562-563 [108 ER 204 at 210].

> others. The use of a personal chattel is merely a temporary thing, the enjoyment of which is, in many cases, trusted to the care and direction of persons exercising public employments, and the mere possession of that, where the care and direction of it is entrusted to such persons, who exercise public employments, and in virtue of that furnish and provide the means of using it, is not sufficient to render the owner liable. Moveable property is sent out into the world by the owner to be conducted by other persons: the common intercourse of mankind does not make a man or his own servants always accompany his own property; he must in many cases confide the care of it to others who are not his own servants, but whose employment it is to attend to it. And in the instances of various kinds of carriages, they are frequently, in the common intercourse of the world, confided to the care of persons, who provide the drivers and horses, and it is not considered that the drivers necessarily belong to the owner of the carriage. And I think that there cannot be any difference, in point of law, as to the liabilities of these persons arising from the mere ownership of the carriage, and that the ownership of the carriage makes him no more responsible than it would do if it had been sent to be repaired by a coachmaker who, in the course of repair, had occasioned any damage to other persons; but if the injury arises from the driver, it is he, or the person who appoints him, that is to be responsible."

337 It is not surprising that Lord Russell of Killowen CJ in *Jones v Scullard*[567] said that were it not for the authorities[568] (including some of those to which reference is made above) he would not have felt the perplexity that he did in deciding the case then before him which turned upon its own facts and does not, in my opinion, lay down any principle capable of application in this appeal. The decision also turned, in part at least, upon an argument that the defendant may have himself been negligent in not informing the driver of a vice of one of the horses involved in the accident. The driver had driven for the defendant consistently for about six weeks before the accident but knew little about the suspect horse which the defendant had only recently acquired and was said to be "a puller".

338 These early cases provide no safe foundation for any modern comprehensive principle for which the appellants contend. They are, as Lord Russell of Killowen CJ said in *Jones v Scullard*, difficult to reconcile[569]. They were decided in circumstances far removed from modern conditions of

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567 [1898] 2 QB 565.

568 [1898] 2 QB 565 at 569: his Honour referred to *Laugher v Pointer* (1826) 5 B & C 547 [108 ER 204] and *Quarman v Burnett* (1840) 6 M & W 499 [151 ER 509].

569 [1898] 2 QB 565 at 569.

engagement and employment of employees. And the outcome was often determined by the technicalities and forms of pleadings in the nineteenth century which were strictly then enforced, and of which *Sharrod v The London and North Western Railway Company*[570] is an example. Those technicalities and forms are discussed in *Bullen and Leake's Precedents of Pleadings*[571]:

> "In actions for an injury caused to the plaintiff by the defendant's negligently doing an act, the plea of not guilty denies that the defendant did the act, that he did it negligently, that the alleged damage happened, and that it was caused by the negligence. Under this issue the defendant may show that the plaintiff caused the damage by his own want of care, so that it was not attributable to the act of the defendant.
>
> In cases of negligence resulting in acts of trespass, as in collisions, if the declaration charges the injury as a direct trespass, and not as the consequence of the negligence of the defendant, the plea of not guilty denies the mere act alleged; and any defence admitting the act to be that of the defendant, as that it was caused by the plaintiff's negligence, must be specially pleaded[572].
>
> In actions for collisions arising from negligent driving, where the declaration states by way of inducement that the defendant was possessed of a carriage, or that a carriage was under his management or that of his servant at the time of the injury, these facts are admitted by the plea of not guilty[573]. But in a declaration charging that the defendant by his servant negligently drove a cart and horse and injured the plaintiff, an allegation by way of inducement 'that the defendant was possessed of a cart and horse, which was being driven by his servant,' without stating 'at the time of the grievance complained of,' was held an immaterial allegation and not traversable, and therefore not admitted, and the defendant was allowed to show under the plea of not guilty that the driver was not his servant[574]." (some footnotes omitted)

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570 (1849) 4 Ex 580 [154 ER 1345].

571 3rd ed (1868) at 701.

572 *Knapp v Salsbury* (1810) 2 Camp 500 [170 ER 1231]; *Hall v Fearnley* (1842) 3 QB 919 [114 ER 761]; *McLaughlin v Pryor* (1842) 4 Man & G 48 [134 ER 21].

573 *Taverner v Little* (1839) 5 Bing NC 678 [132 ER 1261]; *Hart v Crowley* (1840) 12 A & E 378 [113 ER 856]; *Dunford v Trattles* (1844) 12 M & W 530 [152 ER 1308].

574 *Mitchell v Crassweller* (1853) 13 CB 237 [138 ER 1189].

339 It is also relevant to point out that no case was cited in argument which was not a case concerned with a road or railway accident, or a chattel of conveyance. Although the term "chattel" has been freely used in the judgments, its usage seems always to have been in such a context.

340 The facts of *Rand v Bomac Construction Ltd*[575] had in common with this case that the plaintiff had suffered injury as a passenger in an aircraft whose owner had no interest in the plaintiff's gratuitous journey in it, and which was flown, negligently, by a pilot who was flying it only to accommodate the plaintiff. The Saskatchewan Court of Appeal (Hall, Vancise and Wakeling JJA) held that because the pilot was not acting in the course of any employment by the owner of the aircraft, the latter was not liable to the plaintiff. The other Canadian case that was cited, *Pawlak v Doucette*[576], was concerned with an accident which occurred when a water skier was injured when the motor boat which was to draw him, started so quickly and violently as to catch him unawares and cause him injury. The owner of the boat, who was not its driver at the time was held liable, but the fact that the owner was actually controlling the driving and the water skiing from the shore nearby, and was negligent in doing so, provided a sufficient and independent foundation for that finding.

341 In some parts of the United States a doctrine of liability to attach to mere ownership of what has been described as a dangerous agency or dangerous instrumentality has been developed. Of this Prosser and Keeton write[577]:

> "In a small group of older cases a master who entrusted his servant with an instrumentality highly dangerous in itself, or capable of being misused in some way involving a high degree of risk to others, was held liable when the servant misused it for a purpose entirely his own[578]. Thus

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575 (1988) 55 DLR (4th) 467.

576 [1985] 2 WWR 588.

577 *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 507-508.

578 See Horack, "The Dangerous Instrument Doctrine", (1917) 26 *Yale Law Journal* 224.

the rule was applied in the case of steam locomotives[579], torpedoes[580], and poisons[581]. The cases indicate that the master will be held liable only while the servant is engaged in his employment, and while so engaged has custody of the instrumentality[582]. The doctrine has been rejected by a number of courts[583]. It is not very difficult to find a justification for it in the case of things such as dynamite or vicious animals, which are so extremely dangerous in themselves that strict liability may properly be imposed upon the enterprise which makes use of them, and the employer would be liable even if they were entrusted to an independent contractor. The courts which have extended it beyond such instrumentalities are pursuing a policy of holding the enterprise responsible for the danger, which goes beyond the limitations usually imposed upon strict liability at the present time. The justification for it must lie in the especial opportunity and temptation afforded to the servant to misuse the instrumentality under the conditions likely to arise in the employment - or in other words, again, the foreseeability and indeed especial likelihood of the tort." (some footnotes omitted)

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579 *Alsever v Minneapolis & St Louis Railroad Co* 88 NW 841 (1902) (blowing off steam to frighten child); *Toledo, Wabash & Western Railway Co v Harmon* 47 Ill 298 (1868) (similar facts); *Stewart v Cary Lumber Co* 59 SE 545 (1907) (blowing whistle to "make the mule dance").

In *Southern Cotton Oil Co v Anderson* 86 So 629 (1920), this rule was applied to an automobile; and this has continued to be the Florida doctrine. … All other courts have rejected such an application. See, for example, *Terrett v Wray* 105 SW 2d 93 (1937).

580 *Harriman v Pittsburgh, Cincinnati & St Louis Railway C*o 12 NE 451 (1887); *Euting v Chicago & North Western Railroad Co* 92 NW 358 (1902).

581 *Smith's Administratrix v Middleton* 66 SW 388 (1902).

582 *Obertoni v Boston & Maine Railroad Co* 71 NE 980 (1904); *Johnson v Chicago, Rock Island & Pacific Railway Co* 141 NW 430 (1913). See Horack, "The Dangerous Instrument Doctrine", (1917) 26 *Yale Law Journal* 224.

583 *American Railway Express Co v Davis* 238 SW 50 (1922) (pistol); *Galveston, H & S A R Co v Currie* 96 SW 1073 (1906) (compressed air); *Vadyak v Lehigh & New England Railroad Co* 179 A 435 (1935) (steam locomotive); *Thomas-Kincannon-Elkin Drug Co v Hendrix* 168 So 287 (1936) (powerful laxative); Second Restatement of Agency, § 238, Comment *d*.

342 The authors gave special consideration to the position of owners of motor cars in the United States and referred to an assumed capacity to pay as a questionable justification for its existence[584]:

> "As in the case of the doctrine of joint enterprise, the advent of the automobile has been responsible for a number of other extensions of the principle of vicarious liability. The enormous annual traffic accident toll, together with the frequent financial irresponsibility of the individual driving the car, has led to a search for some basis for imposing liability upon the owner of the vehicle, even though he is free from negligence himself. Bluntly put, it is felt that, since automobiles are expensive, the owner is more likely to be able to pay any damages than the driver, who may be entirely impecunious; and that the owner is the obvious person to carry the necessary insurance to cover the risk, and so to distribute any losses among motorists as a class[585]. Beyond this, also, is the feeling that one who originates such a danger by setting the car upon the highway in the first instance should be held responsible for the negligence of the person to whom he entrusts it; and also the idea that the assumption of such responsibility is a fair price for the owner to pay for the privilege of having the car operated, at the cost of the taxpayers, over the expensive highways of the state.
>
> This quest for a financially responsible defendant has led, in the automobile cases, to a variety of measures. Where the owner of the car entrusts it to an unsuitable driver[586], he is held liable for the negligence of the driver, upon the basis of his own negligence in not preventing it. But even where the owner has exercised all due care of his own, vicarious responsibility has been imposed. When the owner is present as a

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584 *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 522-524.

585 "The justification for imputing negligence to an innocent party is the social necessity to provide injured plaintiffs with financially responsible defendants": *Nowak v Nowak* 394 A 2d 716 at 723 (1978).

586 See, for example, *Mathis v Stacy* 606 SW 2d 290 (1980); *Allen v Toledo* 109 Cal App 3d 415 (1980); 167 Cal Rptr 270; *Chiniche v Smith* 374 So 2d 872 (1979); *Bohnen v Wingercid* 398 NE 2d 1204 (1979); *Worth v Dortman* 288 NW 2d 603 (1979) (independent from owner consent statute). See generally Annot. 19 ALR 3d 1175 (1968) (intoxicated driver).

Compare the "special circumstances" rule applied in some states holding the owner liable, for negligently leaving the keys in the car, to third persons injured by a thief who foreseeably steals the car. See, for example, *Hosking v Robles* 98 Cal App 3d 98 (1979); *Illinois Farmers Insurance Co v Tapemark, Co*, 273 NW 2d 630 (1978).

passenger in his own car, a number of courts have held that he retains such a 'right of control' over the operation of the vehicle that the driver is to be regarded as his agent or servant. In many of these cases, it is not clear that anything more is meant than that the owner has failed, when he had the opportunity, to interfere with the negligent driving, and so has been negligent himself[587]. In others, special circumstances have indicated that the owner in fact retained the authority to give directions as to the operation of the car[588]. But some courts clearly have gone further, and have held that the right of control, sufficient to impose responsibility, is established by the mere presence of the owner in the car[589]. Most jurisdictions have rejected such an arbitrary rule, and have held that the owner may surrender his right to give directions, and become a guest in his own car[590]. It is generally agreed that the plaintiff may be aided by a

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587 cf *Dofflemyer v Gilley* 384 So 2d 435 (1980); *Bauer v Johnson* 403 NE 2d 237 (1980).

588 *Archambault v Holmes* 4 A 2d 420 (1939) (prospective purchaser); *Kelley v Thibodeau* 115 A 162 (1921) (inexperienced driver); *Chambers v Hawkins* 25 SW 2d 363 (1930) (driving at owner's request); *Smith v Spirek* 195 NW 736 (1923) (driving under actual directions); see *Ritter v Taucher* 382 NE 2d 343 (1978) (jury could find mother should have warned son about taking car on snowy day).

589 See, for example, *Boker v Luebbe* 252 NW 2d 297 (1977); *Hover v Clamp* 579 P 2d 1181 (1978) (noting that rule has been "criticized severely"); cf *Parrish v Walsh* 429 NE 2d 1176 (1982) (retaining rule in actions involving third parties, but abandoning it when owner-passenger sues driver).

Such "control" used to be found quite frequently when one spouse was driving the other's car. *Goehee v Wagner* 178 NE 553 (1931); *Fisch v Waters* 57 A 2d 471 (1948).

590 *Davis v Spindler* 56 NW 2d 107 (1952); *Sackett v Haeckel* 1 NW 2d 833 (1957); *Reiter v Grober* 181 NW 739 (1921). His presence is merely "an important element in showing agency or control by inference." *Neese v Toms* 12 SE 2d 859 (1941); *Grinter v Haag* 344 NE 2d 320 (1976).

See also *Kalechman v Drew Auto Rental, Inc* 308 NE 2d 886 (1973) (abolishing doctrine imputing driver's contributory negligence to owner-passenger in action against third party); *Parrish v Walsh* 429 NE 2d 1176 (1982) (same, except limiting abolition to actions by owner-passenger against his own driver); Note (1974) 6 *St Mary's Law Journal* 526.

presumption that the driver is an agent or servant[591], but the owner may prove the contrary.

If the owner is not present in the car, but has entrusted it to a driver who is not his servant, there is merely a bailment, and there is usually no basis for imputing the driver's negligence to the owner[592]. It is here that the owner's liability to the injured plaintiff stops at common law[593]. Only the courts of Florida have gone the length of saying that an automobile is a 'dangerous instrumentality'[594], for which the owner remains responsible when it is negligently driven by another. Courts in other states have refused to accept this simple but sweeping approach[595], and have instead struggled hard to find some foundation for vicarious liability in the circumstances of the particular case." (some footnotes omitted)

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591 *Ritter v Taucher* 382 NE 2d 343 (1978); *Rhoads v Bryant* 289 SE 2d 637 (1982) (imputed contributory negligence).

592 See, for example, *Moyer Car Rental Inc v Halliburton Co* 610 P 2d 232 (1980) (rental car); *Siverson v Martori* 581 P 2d 285 (1978) (motorcycle); *Great Central Insurance Co v Harris* 360 NE 2d 1151 (1977) (no liability for damage caused by garage operator bailee's employees); *Woods v Nichols* 416 So 2d 659 (1982) (car); cf *Littles v Avis Rent-A-Car System* 248 A 2d 837 (1969) (rental truck); *Forrester v Kuck* 579 P 2d 756 (1978) (same); *Strickland v King* 239 SE 2d 243 (1977) (co-owner with driver).

593 "We know of no statutory or jurisprudential rule that would make a non-negligent automobile owner liable for the torts commited by a friend while operating the owner's car." *Rhodes v Fromenthal* 385 So 2d 415 at 416 (1980) (owner not liable for accident caused by his live-in girlfriend on way to beauty parlor).

594 See, for example, *Langston v Personal Service Insurance Co* 377 So 2d 993 (1977); *Slitkin v Avis Rent A Car System* 392 So 883 (1980) (plaintiff has burden of proof to show owner's knowledge and consent); *Fort Myers Airways Inc v American States Insurance Co* 411 So 2d 883 (1982) (airplane is dangerous instrumentality); *Atlantic Coast Development Corp v Napoleon Steel Contractors* 385 So 2d 676 (1980) (crane).

595 See, for example, *Hunter v First State Bank of Morrilton* 28 SW 2d 712 (1930); *Leonard v North Dakota Co-op Wool Marketing Association* 6 NW 2d 576 (1942); *Elliott v Harding* 140 NE 338 (1923); cf *Boyd v White* 276 P 2d 92 (1954) (airplane).

343 The authors[596] also discussed a principle based upon ownership and use of a "family car", of a kind embraced by Denning MR in *Launchbury v Morgans* in the Court of Appeal[597] and rejected on appeal to the House of Lords[598]:

> "One such device used in some jurisdictions[599] is the 'family car', or 'family purpose' doctrine[600]. Under this doctrine, the owner of an automobile who permits members of his household to drive it for their own pleasure or convenience is regarded as making such a family purpose his 'business', so that the driver is treated as his servant[601]. Sometimes it is said that the owner would be liable for the negligence of a chauffeur whom he hires to drive his family, and therefore should be liable when he entrusts the same task to a member of his family instead[602]. There is obviously an element of unblushing fiction in this manufactured agency; and it has quite often been recognized, without apology, that the doctrine is an instrument of policy, a transparent device intended to place the liability upon the party most easily held responsible[603]."

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596 *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 524.

597 [1971] 2 QB 245.

598 [1973] AC 127.

599 The doctrine prevails in about a dozen states in the United States, including: Arizona, Colorado, Connecticut, Georgia, Nebraska, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, Washington and West Virginia.

600 The doctrine is at least as old as *Lashbrook v Patten* 62 Ky (1 Duv) 316 (1864), where "the son must be regarded as in the father's employment, discharging a duty usually performed by a slave."

See generally Kidd, "Vicarious Liability and the 'Family Car'," (1971) 121 *New Law Journal* 529; Fridman, "The Doctrine of the 'Family Car': A Study in Contrasts", (1976) 8 *Texas Technical Law Review* 323; Lattin, "Vicarious Liability and the Family Automobile", (1928) 26 *Michigan Law Review* 849; Notes (1950) 38 *Kentucky Law Journal* 156; (1952) 22 *Tennessee Law Review* 535; (1966) 18 *South Carolina Law Review* 638; (1967) 55 *Kentucky Law Journal* 502.

601 See *State Farm Mutual Automobile Insurance Co v Duran* 601 P 2d 722 (1979); *Williams v Wachovia Bank & Trust Co* 233 SE 2d 589 (1977).

602 *Davis v Littlefield* 81 SE 487 (1914); *Griffin v Russell* 87 SE 10 (1915).

603 "The Family Purpose Doctrine is a humanitarian one designed for the protection of the public generally, and resulted from recognition of the fact that in the vast

(Footnote continues on next page)

344 There has been a trend of authority in Australia to extend the liability of owners of motor cars for the negligence of drivers of them on account virtually of ownership only. In South Australia, *Mortess v Fry*[604] is an early case in which such an approach was adopted. In *Gosson Industries Pty Ltd v Jordan* the Full Court of the Supreme Court of New South Wales (Herron CJ, Wallace and Taylor JJ) said[605]:

> "The law in this State has been extended over recent years by the widening of the principle of vicarious liability, with the object of enabling a person suffering loss or damage from negligent driving of motor vehicles to reach the owner of the vehicle and fasten upon him responsibility for the careless conduct of the driver, even if he was himself free from blame. The justice of the case is preserved by investing the latter with a right of indemnity against the driver. Recent authorities have imputed to the owner a fictitious notion of control if, at the material time, the driver had authority, express or implied, to drive on the owner's behalf or at any rate if he allows the vehicle to be driven by another, provided it is being driven wholly or partly on the owner's business or for his purposes[606]. This policy of the law has, in New South Wales, been reinforced by the procedural device of treating ownership of a commercial vehicle as prima facie evidence, fit to be left to a jury, that the person driving the vehicle was the servant and agent of the owner and acting within the course of his employment or, to meet the criteria laid down in *Ormrod's Case,* at least partly for the owner's purposes[607]."

345 Four comments may be made about that passage. The owner's rights of recourse against a driver will in many cases be illusory because the driver's means of satisfying a judgment obtained by the owner will be no greater than those which would be available to satisfy a judgment obtained against the driver by the injured person. Secondly, many would dispute that there is any justice in

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majority of instances an infant has not sufficient property in his own right to indemnify one who may suffer from his negligent act": *Turner v Hall's Administratrix* 252 SW 2d 30 at 32 (1952). See also *Heenan v Perkins* 564 P 2d 1354 (1977); *Bartz v Wheat* 285 SE 2d 894 (1982).

604 [1928] SASR 60.

605 [1964] NSWR 687 at 688. See also *Barnard v Sully* (1931) 47 TLR 557; *Joyce v Capel* (1838) 8 Car & P 370 [173 ER 536]; *Hibbs v Ross* (1866) LR 1 QB 534.

606 *Ormrod v Crosville Motor Services Ltd* [1953] 1 WLR 1120; [1953] 2 All ER 753.

607 *Christmas v Nicol Bros Pty Ltd* (1941) 41 SR (NSW) 317; *Wiseman* v *Harse* (1948) 65 WN (NSW) 159; *Christie v Luke* (1959) 77 WN (NSW) 97.

a law that holds an entirely blameless owner liable merely because he is the owner. Thirdly, the necessity for a plaintiff to establish the element of control, as the early cases to which I have referred show, was, in 1964, neither a fiction nor the product of only recent authority. And, fourthly, what was apparently regarded as a rebuttable evidentiary presumption in New South Wales can provide no basis for a principle of substantive law that a driver of a motor vehicle is to be treated as the servant or agent of the owner in circumstances in which the driver clearly does not have that relationship with the owner[608].

346 As is implicit in *Gosson*[609] and as Prosser and Keeton[610] and others candidly acknowledge to be the truth in many North American jurisdictions and elsewhere, the presence of an insurer, especially an insurer in a system of compulsory insurance, or the likelihood that usually the owner will better be able to pay than the driver, has influenced the result[611], not only on the issue of liability but also perhaps of damages, in consequence of which the law has become distorted, and justifications for its development in this area artificial and unconvincing. This is so even though in modern times car ownership is very widespread and certainly no indicator of affluence.

347 One school of thought would hold that to find the owner of a chattel liable for its negligent misuse by another at the owner's request involves neither anomaly, injustice nor social dislocation: that public risk insurance or some other form of chattel insurance, or the right of the owner to recoup his or her loss from the actual wrongdoer does provide an acceptable answer to any complaint of an unfair imposition upon owners. The other view is that to hold an owner liable in an entirely non-commercial context, and absent any negligence on his or her part, is to ignore the realities of ordinary society: that many people will not be aware of the availability of, or if they are, be able to afford insurance; and that, in consequence ordinary social and indeed familial intercourse is likely to be seriously inhibited. The majority of the Full Court of South Australia were anxious about the implications of any rule that ownership of any chattel used by another at an owner's request might give rise to liability upon the owner for its misuse. Their Honours appreciated that no rule had been stated in Australia in

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608 It was pointed out in *Harris v Van Spijk* [1986] 1 NZLR 275 that several decisions in New Zealand before that case also involved similar reasoning: *Ansin v R & D Evans Ltd* [1982] 1 NZLR 184; *Mihaka v Wellington Publishing Co (1972) Ltd; Alister Taylor Publishing Ltd* [1975] 1 NZLR 10.

609 [1964] NSWR 687.

610 *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 524.

611 Fleming, *The Law of Torts*, 7th ed (1987) at 357: refers as a factor to the "alarming carnage of motor traffic".

terms confining liability to any particular type of chattel. They gave as an example a household chattel in common use, a family barbeque[612]. The owner of the barbeque asks a guest familiar with it to light it. Unthinkingly, but carelessly, the guest brings the gas bottle too close to the flame. An explosion occurs. Other guests are injured. In those circumstances, the Full Court thought, it would be unfair that the owner might be liable for all the consequences of the explosion.

348 Examples can be multiplied. A cricket bat manufacturer lends a cricket bat to a member of the Australian women's cricket team with a request that it be used in international matches. That player becomes incapacitated and in turn lends the bat to another player whose competence is beyond question. The first woman knows this because they have had many fruitful partnerships. The former asks the latter to use the bat "to play it in" as frequent contact by it with the ball will harden and enlarge its "sweet spot". The latter accedes to the request. Grossly negligently she loses her grip on the handle of the bat. It flies from her grasp and strikes a fielder close to the wicket. Who, apart from the negligent player, if anyone is to be liable: the manufacturer, or the first mentioned player, or both of them?

349 These examples provide good reason for a narrow rule confining any principle at its widest to chattels of conveyance. The one that the Full Court gave was influential in its holding that any principle of liability for ownership should not extend beyond motor cars. These examples also expose the fallacy that only some chattels when misused or carelessly handled are capable of causing serious injury or damage, and the anomalies and difficulties to which any attempted classification of chattels as either dangerous or non-dangerous instrumentalities of the kind adopted in Florida in the United States may give rise[613].

350 One case in another common law jurisdiction should be noted. *Moynihan v Moynihan*[614] is a case with some features in common with this one. The

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612 *Davis v Scott* (1998) 71 SASR 361.

613 See *Grain Dealers National Mutual Fire Insurance Co v Harrison* 190 F 2d 726 at 729-730 (1951) where the United States Court of Appeals, Fifth Circuit (Holmes, McCord and Russell JJ) said that there was no room for doubt that under the law of Florida, aeroplanes should be similarly classified with the automobile as a "dangerous agency when in operation", in consequence of which an owner will be liable for the acts and omissions of the pilot. In *Orefice v Albert* 237 So 2d 142 (1970) the Supreme Court of Florida (Adkins, Thornal and Boyd JJ; Spector DCJ concurring; Drew ACJ dissenting) held an aeroplane to be a "dangerous instrumentality" and subject to the same rule.

614 [1975] IR 192.

plaintiff was an infant. The defendant was a close relative of the plaintiff, her grandmother in fact. The occasion was one of the provision of hospitality. The chattel was a teapot full of hot tea, covered by a brightly coloured tea cosy. The plaintiff overturned the teapot and injured herself after the defendant's daughter who had put the teapot on the table, left the room. The Supreme Court of Ireland (O'Higgins CJ, Walsh J; Henchy J dissenting) held that the defendant as the householder, and as the person in control of the hospitality being provided by her in her own home, could be vicariously liable for damage resulting from the negligence of her daughter in performing a gratuitous service in the course of the provision of the hospitality. Henchy J, in dissent, made these observations[615]:

> "In the present case it would seem that, if the defendant had received and accepted an offer from the plaintiff's mother to make and serve the tea on the defendant's behalf, and if the plaintiff's mother in doing so had acted as Marie did, the defendant would be liable for the negligence of the plaintiff's mother. One's first reaction to the sweep of this submission, which implies a vicarious liability for negligence in the countless acts of that kind that are done in the course of the daily round, is that one would expect to find many cases illustrating the operation of such a rule. Yet, counsel for the plaintiff is unable to put forward any case in support of his proposition."

The case provides a clear, actual example of the way in which ordinary social and familial intercourse might be seriously damaged, were a far reaching rule in relation to chattels to be adopted.

351 A special rule confined in its operation, or constituting an exception to a general rule is no novel thing in the common law which has frequently been ingenious to devise exceptions and special rules.

352 The law in relation to both vicarious liability and damage arising out of the use of chattels is a far from seamless cloth as the cases to which I have referred show. Take for example the case of a chattel with a capacity to cause injury. As laid down in *Donoghue v Stevenson*[616], its manufacturer, notwithstanding that he or she intended it to be sold and used, was only to be liable to a purchaser or user of it, if there has not been an opportunity for it to be subjected to an intermediate examination. But the law has moved somewhat beyond that point, and not necessarily in an orderly and predictable way, since 1932[617]. And, as Fleming points out with respect to the law governing the

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615 [1975] IR 192 at 200.

616 [1932] AC 562.

617 Fleming, *The Law of Torts*, 7th ed (1987) at 127-129.

liability of principals for the activities of independent contractors in carrying out "non-delegable duties," the Courts have not been slow to hold duties of diverse kinds to be non-delegable and to do so without stating any unifying and clear principle[618]:

> "The list of cases where this vicarious liability, under the fictitious guise of non-delegable duties, has been found is long and diverse. Understandably, it includes all instances of strict liability, such as those relating to extra-hazardous substances and fire, providing lateral support for adjacent land[619], and the near strict duty to maintain premises abutting the highway in sound repair[620]. But it has been extended also to situations where the duty (as ordinarily formulated) is merely to use reasonable care, thereby converting it into the higher duty to assure that care is taken. Examples are the obligation of employers to provide a safe system of work[621] and to comply with statutory safety standards[622]; of hospitals to care for their patients, and of occupiers to safeguard contractual entrants and, with some qualifications, invitees[623]; even of developers for the safety of home purchasers[624]. Apparently included also are cases where damage results from undertakings which, but for statutory authority, would be unlawful, as where a contractor carelessly left some timber lying in a field after making trial bores on behalf of a government authority[625]. The most homogeneous group seems to consist of cases where the work involves a high risk in the absence of special precautions, so that - perhaps for the sake of additional risk prevention - the employer should be encouraged to ensure its proper performance by whomever he employs to get it done.

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618 Fleming, *The Law of Torts*, 7th ed (1987) at 362.

619 *Dalton v Angus* (1881) 6 App Cas 740.

620 *Tarry v Ashton* (1876) 1 QBD 314.

621 See, for example, *Kondis v State Transport* (1984) 154 CLR 672; cf *Stevens v Brodribb* (1986) 160 CLR 16.

622 *Groves v Wimborne* [1898] 2 QB 402 at 410.

623 But not licensees: *Morgan v Girls' Friendly Society* [1936] 1 All ER 404.

624 *Mt Albert v Johnson* [1979] 2 NZLR 234 (CA: liable for builder).

625 *Darling v Attorney-General* [1950] 2 All ER 793. See also *Hardaker v Idle District Council* [1896] 1 QB 335 at 351; *Holliday v National Telephone Company* [1899] 2 QB 392 at 398 (decisions which could be based on the extra-hazardous nature of the work).

> Another common thread has been discerned in the existence of a 'special protective relationship' as in the case of employers, schools and hospitals[626]; but that does not explain other instances nor why such a relation should demand this rather than some other form of increased responsibility, such as a higher degree of care or outright strict liability." (some footnotes omitted)

353 Commentators and judges have strived unsuccessfully for uniformity of language and meaning in these difficult areas of vicarious liability and of liability of owners of chattels, particularly in non-commercial contexts[627]. Both the notion and language of vicarious liability will usually be quite foreign to activities undertaken in a domestic or social setting.

354 The appellants in this case sought to rely on some statements by Dixon J in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*[628], a case of slander by an independent contractor whose business was the solicitation of proposals on behalf of the insurance company he represented. It was held there that the company was liable for the contractor's slanderous remarks in disparagement of the company competitors. But the outcome depended in part at least upon the commercial relationship between the contractor and the company, as his Honour's references to the acceptance of premiums and the soliciting of proposals show[629]:

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626 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687.

627 See McDonald and Swanton, "The Common Lawyer" (1995) 69 *Australian Law Journal* 323; Paterson, "Rylands v Fletcher Into Negligence: Burnie Port Authority v General Jones Pty Ltd", (1994) 20 *Monash University Law Review* 317; Swanton, "'Another Conquest in the Imperial Expansion of the Law of Negligence': *Burnie Port Authority v General Jones Pty Ltd*", (1994) 2 *Torts Law Journal* 101; Swanton, "Non-delegable Duties: Liability for the Negligence of Independent Contractors" - Pt 1 (1991) 4 *Journal of Contract Law* 183; Swanton, "Non-delegable Duties: Liability for the Negligence of Independent Contractors" - Pt 2 (1992) 5 *Journal of Contract Law* 26; Whippy, "A Hospital's Personal and Non-delegable Duty to Care for Its Patients - Novel Doctrine or Vicarious Liability Disguised?", (1989) 63 *Australian Law Journal* 182.

628 (1931) 46 CLR 41; see also *Doyle v Pick & Rickwood* [1965] WAR 95; *Kirth v Tyrrell* [1971] Qd R 453.

629 (1931) 46 CLR 41 at 49.

> "In this very case the 'agent' has authority to obtain proposals for and on behalf of the appellant; and he has, I have no doubt, authority to accept premiums."

355 There have always been special rules, common law and statutory, relating to the navigation of boats and ships and responsibility therefor[630]: and these and other situations will fall to be considered in that and other contexts as and when they arise. The issues presented here are the breadth and true meaning of the principle for which *Soblusky v Egan* stands, and whether it should be extended to aeroplanes.

356 In my opinion this Court was aware of the desirability of stating a general principle and a narrow one in *Soblusky v Egan*[631]. True it is that Dixon CJ, Kitto and Windeyer JJ said they thought the case an obvious one but that was certainly not the universal opinion in the profession when it was argued and the decision given[632]. Their Honours' statement of principle should be taken to be one of general application to motor vehicles only, but it does require some clarification. They said[633]:

> "It means that the owner or bailee being in possession of the vehicle and with full legal authority to direct what is done with it appoints another to do the manual work of managing it and to do this on his behalf in circumstances where he can always assert his power of control. Thus it means in point of law that he is driving by his agent. It appears quite immaterial that Soblusky went to sleep. That meant no more than a complete delegation to his agent during his unconsciousness. The principle of the cases cited is simply that the management of the vehicle is done by the hands of another and is in fact and law subject to direction and control."

The key words in the judgment are " ... appoints another to do the manual work of managing it and to do this on his behalf in circumstances where he can always assert his power of control.[634]"

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630 A pilot who is carrying out pilotage can be treated as a "servant" of the shipowner: *Clark v J & P Hutchison Ltd* (1925) 21 Ll L Rep 169. See also *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626.

631 (1960) 103 CLR 215.

632 (1960) 103 CLR 215 at 231.

633 (1960) 103 CLR 215 at 231.

634 (1960) 103 CLR 215 at 231.

357 The conditions necessary to establish liability of an owner of a motor car for the acts of its driver are these. First, there must be an appointment, engagement or request. That appointment, engagement or request needs to be a real appointment, engagement or request. The request must be made in something other than a merely domestic or social context. It must be made in circumstances in which the owner will derive a real benefit. The benefit need not be a financial benefit but it must be more than, as here, the deriving of a sense of satisfaction from the bestowal of a social favour or kindness. Secondly, there must be the reality of an actual power of control. The existence of a power of control can be of no relevance unless its exercise is, or is likely to be effective. That is why so many of the early cases to which I have referred stressed the presence of the owner and his relationship with the person, usually a coachman or driver, who was actually managing the chattel, as relevant factors, even though any ability to exercise any effective control was probably a fiction, as it often would have been with horses, and, as indeed it will usually be, with a car or any other fast moving object, that may cause or suffer damage in a split second. The use of the word "always" by their Honours in *Soblusky* is therefore significant and important as implying the need for a real and continuing power of, and capacity for effective intervention. Furthermore, an owner not actually personally using or managing the car can hardly be expected to intervene to exercise effective control unless there become apparent circumstances which call for intervention of a kind which is likely to be effective. These are, in my opinion, the minimum conditions to be satisfied and should constitute the rules to apply to the liability of owners (or bailees) of motor cars being used or operated by others in a non-commercial context on a proper reading of *Soblusky v Egan*.

358 If these rules were to be applied to this case the appeal would have to be dismissed. The context was entirely non-commercial. The respondent derived no relevant benefit from providing the aeroplane and making the request of Mr Bradford. Nothing suggested itself to the respondent as being untoward or calling for his intervention in the earlier flying of the aeroplane by Mr Bradford. There was here neither an occasion calling for, nor the opportunity for, the respondent to take any steps that could have been effective to prevent Mr Bradford from operating the aeroplane the way in which he did.

359 The appeal should also be dismissed on the ground that the principles stated in *Soblusky v Egan* should not be extended beyond motor cars. I would dismiss the appeal with costs.