HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 34

on appeal from [2005] EWCA Civ 251

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Majrowski (Respondent)
v.
Guy's and St. Thomas' NHS Trust (Appellants)

Appellate Committee

Lord Nicholls of Birkenhead
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

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Majrowski (Respondent) *v.* Guy's and St Thomas' NHS Trust (Appellants)

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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. The Protection from Harassment Act 1997 ('the 1997 Act') prohibits harassment. A person must not pursue a course of conduct which amounts to harassment of another. A breach of this prohibition may be the subject, amongst other matters, of a claim for damages. The question raised by this appeal is whether an employer is vicariously liable for harassment committed by an employee in the course of his employment.

2. The harassment in this case concerns two employees of Guy's and St Thomas's NHS Trust ('the Trust'). In November 1998 the Trust employed William Majrowski as a clinical auditor co-ordinator. His departmental manager was Mrs Sandra Freeman. Mr Majrowski was not happy with the way she treated him. He claimed she bullied and intimidated him. She was, he said, rude and abusive to him in front of other staff. She was excessively critical of his time-keeping and work. She imposed unrealistic performance targets for him and threatened him with disciplinary action if he failed to meet them. She isolated him by refusing to talk to him. This treatment, he said, was fuelled by homophobia: he is a gay man.

3. On 20 April 1998 Mr Majrowski made a formal complaint of harassment against Mrs Freeman. The Trust investigated this in accordance with its anti-harassment policy. The investigation resulted in a finding that harassment had occurred. Subsequently, on 7 June 1999 the Trust dismissed Mr Majrowski for reasons unrelated to the circumstances of this case.

4. Nearly four years later, on 13 February 2003 Mr Majrowski commenced these proceedings against the Trust. He claimed damages pursuant to section 3 of the 1997 Act for distress and anxiety and consequential losses caused by the harassment he suffered while employed by the Trust. Mrs Freeman, he said, was at all times acting in the course of her employment by the Trust. He made no claim against Mrs Freeman herself. Nor did he make any claim against the Trust for negligence or breach of his contract of employment. His claim was based exclusively on the Trust's vicarious liability for Mrs Freeman's alleged breach of the statutory prohibition of harassment.

5. The proceedings were struck out summarily by Judge Collins CBE sitting at the Central London County Court on 24 February 2004. He held that the 1997 Act was not designed to create another level of liability in employment law. Employees are already adequately protected by the common law.

6. Mr Majrowski appealed. The appeal was heard by the Court of Appeal, comprising Auld, May and Scott Baker LJJ. On 16 March 2005, by a majority of two to one, Scott Baker LJ dissenting in part, the Court of Appeal allowed the appeal. The case should be permitted to go to trial. The court would then have to determine whether Mrs Freeman did harass Mr Majrowski within the meaning of the 1997 Act in the ways he alleged. The Trust has now appealed to your Lordships' House.

Vicarious liability and statutory obligations

7. Vicarious liability is a common law principle of strict, no-fault liability. Under this principle a blameless employer is liable for a wrong committed by his employee while the latter is about his employer's business. The time-honoured phrase is 'while acting in the course of his employment'. It is thus a form of secondary liability. The primary liability is that of the employee who committed the wrong. (To a limited extent vicarious liability may also exist outside the employment relationship, for instance, in some cases of agency. For present purposes these other instances can be put aside.)

8. This principle of vicarious liability is at odds with the general approach of the common law. Normally common law wrongs, or torts, comprise particular types of conduct regarded by the common law as blameworthy. In respect of these wrongs the common law imposes

liability on the wrongdoer himself. The general approach is that a person is liable only for his own acts.

9. Whatever its historical origin, this common law principle of strict liability for another person's wrongs finds its rationale today in a combination of policy factors. They are summarised in Professor Fleming's *Law of Torts*, 9th ed, (1998) pages 409-410. Stated shortly, these factors are that all forms of economic activity carry a risk of harm to others, and fairness requires that those responsible for such activities should be liable to persons suffering loss from wrongs committed in the conduct of the enterprise. This is 'fair', because it means injured persons can look for recompense to a source better placed financially than individual wrongdoing employees. It means also that the financial loss arising from the wrongs can be spread more widely, by liability insurance and higher prices. In addition, and importantly, imposing strict liability on employers encourages them to maintain standards of 'good practice' by their employees. For these reasons employers are to be held liable for wrongs committed by their employees in the course of their employment.

10. With these policy considerations in mind, it is difficult to see a coherent basis for confining the common law principle of vicarious liability to common law wrongs. The rationale underlying the principle holds good for equitable wrongs. The rationale also holds good for a wrong comprising a breach of a statutory duty or prohibition which gives rise to civil liability, provided always the statute does not expressly or impliedly indicate otherwise. A precondition of vicarious liability is that the wrong must be committed by an employee in the course of his employment. A wrong is committed in the course of employment only if the conduct is so closely connected with acts the employee is authorised to do that, for the purposes of the liability of the employer to third parties, the wrongful conduct may fairly and properly be regarded as done by the employee while acting in the course of his employment: see *Lister v Hesley Hall Ltd* [2002] 1 AC 215, 245, para 69, per Lord Millett, and *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, 377, para 23. If this prerequisite is satisfied the policy reasons underlying the common law principle are as much applicable to equitable wrongs and breaches of statutory obligations as they are to common law torts.

11. This approach accords with the trend of judicial decisions and observations and also academic writings. In *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, your Lordships' House

applied the principle of vicarious liability to an equitable wrong. In the shot-firing case of *Harrison v National Coal Board* [1951] AC 639, 671, Lord MacDermott observed:

> 'Vicarious liability is not confined to common law negligence. It arises from the servant's tortious act in the scope of his employment and there can now be no doubt that [the employee] breaking the shot-firing regulations committed a tort.'

In the following year Lord Guthrie, sitting in the Court of Session, followed this observation when deciding the shot-firing case of *Nicol v National Coal Board* (1952) 102 LJ 357. In the further shot-firing case of *National Coal Board v England* [1954] AC 403, 422, Lord Oaksey expressed approval of Lord Guthrie's decision:

> 'Unless there is something in the statute which creates the obligation indicating that no action shall be brought at common law in respect of its breach, the ordinary rules of the common law of tort are applicable, including the doctrine respondeat superior.'

In Canada Craig JA expressed a similar view in the British Columbia Court of Appeal in *Re Nelson and Byron Price & Associates Ltd* (1981) 122 DLR (3d) 340, 347. So did Professor Atiyah in his well-known book *Vicarious Liability in the Law of Torts* (1967), at pages 280-284. Like opinions are expressed in Fleming, *Law of Torts*, 9th ed, (1998), page 567, and Clerk and Lindsell on *Torts*, 18th ed, (2000), para 5-47, and see also 19th edition (2006) para 6-51.

12. The sole reported exception to this trend appears to be the decision of the High Court of Australia in *Darling Island Stevedoring & Lighterage Co Ltd v Long* (1957) 97 CLR 36. In that case a regulation, regulation 31, prescribed precautions which should be observed before loading or unloading a ship. In default a penalty was imposed on the person in charge. The High Court held the employer of the person in charge was not liable for the latter's breach of the regulations.

13. Their Honours did not speak with one voice. There are two principal strands in their reasoning. Neither assists on the broad issue

before your Lordships' House. The first strand concerned the interpretation of regulation 31. The regulation imposed liability on the person in charge. To impose vicarious liability on his employer would give the regulation an operation not justified by its provisions.

14. The second strand of reasoning was more general. The principle of vicarious liability imposes upon an employer liability for his employee's acts, not his wrongs. Vicarious liability exists not because the employee is liable but because of what the employee has done. Regulation 31 imposed no duty on the employer. The duty was imposed solely on the person in charge. So imputing his acts to the employer did not give rise to a claim against the employer.

15. In times past this 'employer's tort' analysis of vicarious liability had respectable support in England. But since then your Lordships' House has firmly discarded this basis in favour of the 'employee's tort' approach. An employer's liability is not confined to responsibility for acts done by an employee in the course of his employment. An employer's liability goes further. He is liable for the wrongs of his employee committed in the course of employment. Reasons of policy so dictate. The employee's wrong is imputed to the employer: see *Staveley Iron and Chemical Co Ltd v Jones* [1956] AC 627 and *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656. This approach has received wide academic support: Fleming *Law of Torts*, 9th ed, (1998), page 412, Clerk and Lindsell on *Torts*, 19th edition (2006) para 6-50, Markesinis and Deakin's *Tort Law*, 5th ed, (2003), page 582, Salmond and Heuston, *Law of Torts*, 21st ed, (1996), pages 431-433, and Munkman on *Employer's Liability*, 13th ed, (2001), page 114. In this country this approach is now settled law. It seems likely this is also the law in Australia: see *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, para 34-35.

16. One further general question should be noted on the interpretation of statutory provisions in this context. The question can be framed this way. Does employers' vicarious liability arise *unless* the statutory provision expressly or impliedly *excludes* such liability? Or does employers' liability arise only *if* the statutory provision expressly or impliedly *envisages* such liability may arise? As already indicated, I prefer the first alternative. It is more consistent with the general rule that employers are liable for wrongs committed by employees in the course of their employment. The general rule should apply in respect of wrongs having a statutory source unless the statute displaces the ordinary rule. This accords with the approach adopted by Lord Oaksey

in the passage cited above from *National Coal Board v England* [1954] AC 403, 422.

17. Accordingly on this point I agree with the Court of Appeal. Unless the statute expressly or impliedly indicates otherwise, the principle of vicarious liability is applicable where an employee commits a breach of a statutory obligation sounding in damages while acting in the course of his employment.

The 1997 Act

18. I turn to the material provisions of the 1997 Act. The purpose of this statute is to protect victims of harassment, whatever form the harassment takes, wherever it occurs and whatever its motivation. The Act seeks to provide protection against stalkers, racial abusers, disruptive neighbours, bullying at work and so forth. Section 1 prohibits harassment in these terms:

> '(1) A person must not pursue a course of conduct –
>
> (a) which amounts to harassment of another, and
>
> (b) which he knows or ought to know amounts to harassment of the other.
>
> (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.'

Certain courses of conduct are excepted: where the course was pursued for the purpose of preventing or detecting crime, or was pursued under any enactment or rule of law, or where in the circumstances it was reasonable to pursue the course of conduct: section 1(3). Harassment is not defined in the Act, but it includes causing anxiety or distress. A course of conduct means conduct on at least two occasions: section 7(2), (3). Harassment may be of more than one person.

19. This statutory prohibition applies as much between an employer and an employee as it does between any other two persons. Further, it is now tolerably clear that, although the victim must be an individual, the perpetrator may be a corporate body.

20. Section 2 creates the criminal offence of harassment. The offence comprises pursuit of a course of conduct in breach of section 1. Criminal proceedings can deal only with offences which have been committed. Section 3 goes further. Section 3 affords victims a civil remedy in respect both of actual breaches of section 1 and also threatened breaches. For instance, a single act of harassment may have occurred, not in itself a course of conduct, and the victim may fear repetition. Section 3 provides:

> '(1) An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.
>
> (2) On such a claim damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.'

Subsequent provisions in the section make plain that the court may grant an injunction for the purpose of restraining a defendant from pursuing any conduct which amounts to harassment. Breach, without reasonable excuse, of such an injunction is itself a criminal offence: subsection (6).

21. The Trust, relying on the permissive 'may' in section 3(2), submitted that an award of damages under this section is discretionary. A claimant is not entitled to damages as of right. Hence, it was said, harassment cannot be equated with a common law tort.

22. I do not agree. The effect of section 3(1) is to render a breach of section 1 a wrong giving rise to the ordinary remedies the law provides for civil wrongs. This includes an entitlement to damages for any loss or damage sustained by a victim by reason of the wrong. Ordinary principles of causation and mitigation and the like apply. Subsection (2) is consistent with this understanding of the section. The phrase 'among other things' assumes that damages are recoverable. The enabling

language ('may be awarded') is apt simply to extend or clarify the heads of damage or loss for which damages are recoverable.

Vicarious liability and harassment

23. Against that legislative background I turn to the Trust's case. The principal thrust of the Trust's submissions is that the 1997 Act was primarily a legislative response to the public order problem of stalking. The Act was not aimed at the workplace. It is a public order provision designed to punish perpetrators for the anxiety and upset they cause to victims, not blameless employers who happen to be solvent and available as a target for litigation. Vicarious liability would have consequences for employers which Parliament cannot have intended. Vicarious liability would mean that a blameless employer would be liable in damages in respect of a cause of action wherein damages are recoverable for anxiety short of personal injury, foreseeability of damage is not an essential ingredient, and the limitation period is six years and not the usual period applicable to personal injury claims. The deterrent effect of ordering the perpetrator to pay compensation would be undermined by drawing litigation away from the very person guilty of the offence. Vicarious liability would increase very considerably the volume of claims based on stress, anxiety or other emotional problems at work. The courts would be unable to strike out unmeritorious claims. The burden on employers, insurers and the administration of justice would be wholly unjustified.

24. I am not persuaded by these arguments. Neither the terms nor the practical effect of this legislation indicate that Parliament intended to exclude the ordinary principle of vicarious liability.

25. As to the terms of the legislation, by section 3 Parliament created a new cause of action, a new civil wrong. Damages are one of the remedies for this wrong, although they are not the primary remedy. Parliament has spelled out some particular features of this new wrong: anxiety is a head of damage, the limitation period is six years, and so on. These features do not in themselves indicate an intention to exclude vicarious liability. Vicarious liability arises only if the new wrong is committed by an employee in the course of his employment, as already described. The acts of the employee must meet the 'close connection' test. If an employee's acts of harassment meet this test, I am at a loss to see why these particular features of this newly created wrong should be thought to place this wrong in a special category in which an employer

is exempt from vicarious liability. It is true that this new wrong usually comprises conduct of an intensely personal character between two individuals. But this feature may also be present with other wrongs which attract vicarious liability, such as assault.

26. Nor does imposition of criminal liability only on the perpetrator of the wrong, and on a person who aids, abets, counsels or procures the harassing conduct, point to a different conclusion. Conversion, assault and battery may attract criminal liability as well as civil liability, but this does not exclude vicarious liability.

27. I turn to the practical effect of the legislation. Vicarious liability for an employee's harassment of another person, whether a fellow employee or not, will to some extent increase employers' burdens. That is clear. But, here again, this does not suffice to show Parliament intended to exclude the ordinary common law principle of vicarious liability. Parliament added harassment to the list of civil wrongs. Parliament did so because it considered the existing law provided insufficient protection for victims of harassment. The inevitable consequence of Parliament creating this new wrong of universal application is that at times an employee will commit this wrong in the course of his employment. This prompts the question: why should an employer have a special dispensation in respect of the newly-created wrong and not be liable if an employee commits this wrong in the course of his employment? The contemporary rationale of employers' vicarious liability is as applicable to this new wrong as it is to common law torts.

28. Take a case where an employee, in the course of his employment, harasses a non-employee, such as a customer of the employer. In such a case the employer would be liable if his employee had assaulted the customer. Why should this not equally be so in respect of harassment? In principle, harassment arising from a dispute between two employees stands on the same footing. If, acting in the course of his employment, one employee assaults another, the employer is liable. Why should harassment be treated differently?

29. As I see it, the matter of most concern to employers is the prospect of abuse in cases of alleged workplace harassment. Employers fear the prospect of a multiplicity of unfounded, speculative claims if they are vicariously liable for employees' harassment. Disgruntled employees or ex-employees, perhaps suffering from stress at work

unrelated to harassment, perhaps bitter at being dismissed, will all too readily advance unmeritorious claims for compensation for harassment. Internal grievance procedures will not always satisfy an employee who is nursing a grievance. Although awards of damages for anxiety under the 1997 Act will normally be modest, a claimant may well pursue his present or erstwhile employer, not the alleged wrongdoer himself. The claim may be put forward for the first time years after the alleged harassment is said to have occurred. The alleged perpetrator may no longer be with the employer and may not be traceable.

30. This is a real and understandable concern. But these difficulties, and the prospect of abuse, are not sufficient reasons for excluding vicarious liability. To exclude liability on these grounds would be, to use the hackneyed phrase, to throw the baby out with the bathwater. It would mean that where serious harassment by an employee in the course of his employment has occurred, the victim – who may not be a fellow employee - would not have the right normally provided by the law to persons who suffer a wrong in that circumstance, namely, the right to have recourse to the wrongdoer's employer. The possibility of abuse is not a good reason for denying that right. Courts are well able to separate the wheat from the chaff at an early stage of the proceedings. They should be astute to do so. In most cases courts should have little difficulty in applying the 'close connection' test. Where the claim meets that requirement, and the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under section 2.

The overlap with the EC discrimination legislation

31. I turn next to a difficult part of the case. The Trust placed reliance on the overlap which exists between the harassment provisions in the 1997 Act and the harassment provisions in the series of non-discrimination regulations introduced to give effect to Directives 2000/43/EC, 2000/78/EC and 2002/73/EC. These directives were made pursuant to a new non-discrimination article, article 13, inserted into the Treaty on European Union by the Amsterdam Treaty in 1997. The Amsterdam Treaty came into force on 1 May 1999. The directives

established a common framework for tackling discrimination on six specific grounds: sex, race, disability, sexual orientation, religion or belief, and age.

32. One example of the overlap will suffice. On the relevant point the several regulations are substantially to the same effect. The Race Relations Act 1976 (Amendment)) Regulations 2003 (SI 2003/1626) inserted into the Race Relations Act 1976 new provisions regarding harassment. The effect of section 4(2A), read with section 3A, is that it is unlawful for an employer to subject an employee to harassment on the grounds of race or ethnic or national origins. Harassment means, in short, engaging in unwanted conduct which has the purpose or effect of violating another person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for another person. Section 32, which was part of the statute as originally enacted in 1976, provides that anything done by a person in the course of his employment shall be treated as done by his employer as well as by him, subject to the 'employer's defence', as it is known colloquially. The employer's defence is that in proceedings brought against an employer in respect of an act alleged to have been done by an employee the employer has a defence where he can prove he took such steps as were reasonably practicable steps to prevent the employee from doing that act or acts of that description: section 32(3). The Trust contrasted the availability of this defence in proceedings brought under the Race Relations Act 1976 with the position under the 1997 Act if an employer is strictly liable under the 1997 Act for harassment committed by his employees in the course of their employment. The contrast means that if an employer's liability under the 1997 Act is strict, victims of racial harassment can in some circumstances bypass the defence intended to be available to employers under the amendments made to the Race Relations Act 1976. Victims can do so by taking the simple step of bringing their harassment claims under the 1997 Act. By this means victims can also bypass the strict time limits applicable to discrimination claims.

33. Had the amending regulations of 2003 been made before the 1997 Act was enacted this would have been a telling point. But they were not. In short the historical explanation of how it comes about that the employer's defence is available in harassment claims brought under the Race Relations Act 1976 is as follows.

34. The employer's defence seems to have had its origin in the Race Relations Act 1968, section 13. Employers were subject to non-discrimination obligations. But these obligations were qualified. Acts

done by an employee in the course of his employment were to be treated as done by his employer, subject to the employer being able to show he had taken all reasonably practicable steps to prevent his employee doing such acts. Harassment was not mentioned in this 1968 statute. In due course the employer's defence was brought forward into the Race Relations Act 1976, section 32. That is the starting point.

35. The next step was that Council Directive 2000/43/EC made provision for putting the principle of equal treatment into effect in member states. For the purposes of this directive equal treatment means there should be no discrimination based on racial or ethnic origin. Harassment related to racial or ethnic origin is deemed to be discrimination for this purpose: article 3.

36. The final step was that, as one would expect, effect was given to this directive in this country by making appropriate amendments to the existing race discrimination legislation, namely, the Race Relations Act 1976. Harassment by an employer is deemed by the directive to be discrimination, and so harassment was treated in this country's legislation on much the same footing as discrimination. Accordingly the employer's defence was applied to acts of harassment in the same way as it already applied to acts of discrimination.

37. The legislative history regarding harassment on grounds of sex or disability is essentially similar. Amendments were made by regulations to the existing discrimination legislation: the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995. Both those statutes already included provision for the employer's defence in respect of discrimination claims. There was no discrimination legislation already in existence regarding sexual orientation, religion or belief, or age. In these cases corresponding provision was made by regulations which have to stand on their own feet.

38. Given this history, the *existence* of the employer's defence in the discrimination legislation, embracing harassment as it now does pursuant to the requirements of the directives, and the *absence* of such a defence from the (earlier) 1997 Act, does not assist materially in the interpretation of the 1997 Act. The discrimination legislation, as it existed in 1997, is too removed from harassment for the inclusion of the employer's defence in that legislation to throw any light on the interpretation of the 1997 Act. The accretion of harassment to the discrimination legislation derives from the directives and came later.

39. Although these later amendments to the discrimination legislation do not assist in the interpretation of the 1997 Act, it must be acknowledged that in the fields they cover they have produced a discordant and unsatisfactory overlap with the 1997 Act.

Scotland

40. A final point should be noted on the interpretation of the 1997 Act. Sections 1 to 7 of the 1997 Act apply to England and Wales. Sections 8 to 11 make corresponding provision for Scotland. During the oral hearing of this appeal my noble and learned friend Lord Hope of Craighead drew attention to section 10. Section 10 inserts a new section, section 18B, into the Prescription and Limitation (Scotland) Act 1973. As explained by Lord Hope in his speech, the new section 18B envisages that the employer of a person responsible for harassment may be the defender in an action of harassment. In other words, section 18B appears to assume that in Scotland an employer may be vicariously liable. This is confirmatory of the conclusion expressed above regarding England and Wales. Parliament cannot have intended that in this respect the position would be different north and south of the border.

41. I would dismiss this appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

42. The question in this case is whether an employer may be held vicariously liable in damages under section 3 of the Protection from Harassment Act 1997 for a course of conduct by one of its employees which amounts to harassment in breach of section 1 of that Act. Underlying this question there is a broader issue. This is whether an employer may be vicariously liable for a breach of a statutory duty imposed only on his employee. But the Court of Appeal held unanimously that in general an employer may be vicariously liable for a breach of statutory duty imposed on the employee which is committed in the course of his employment, and Mr Turner QC for the appellant accepted that he could not succeed on that issue in his appeal to this

House. So the question which has to be decided by your Lordships has been confined to the narrow issue. This is whether conduct by an employee in breach of section 3 of the 1997 Act is conduct for which the employer may be vicariously liable.

43. Had it not been for the fact that the wording of the Act itself provides the answer, I would have found it hard to disagree with the reasons which Scott Baker LJ gave in his dissenting opinion in the Court of Appeal for answering this question in the negative. He said that the statutory duty which the Act imposed was personal in nature, that it was difficult to envisage circumstances in which it would be just and reasonable to hold an employer vicariously liable and that he did not think, viewing the statute as a whole, that it was Parliament's intention that an employee should be vicariously liable: [2005] QB 848, para 113. It seemed to me that there were indeed powerful reasons for thinking that Parliament intended that liability in damages should be personal to the perpetrator of the harassment and that it should not be extended to his employer, if any, under the doctrine of vicarious liability. My noble and learned friend Lord Nicholls of Birkenhead, whose speech I have had the advantage of reading in draft, has subjected them all to careful scrutiny. While I respectfully agree with the conclusions that he has reached, the issue nevertheless seems to me to be finely balanced and far from easy to decide.

44. But in my opinion there is no escape from the fact that the statute when viewed as a whole includes sections 8 to 11, which provide for a new civil wrong of harassment extending only to Scotland, as well as sections 1 to 7 which extend only to England and Wales. For perfectly understandable reasons, it was to the provisions relating to England and Wales that the judges in the courts below directed their attention. Overlooked by everybody (including, it appears, A Barron, *Vicarious Liability for Employees and Agents*, 2006 SLT (News) 79 in his comments on this case from the Scottish viewpoint at p 82), until attention was drawn to it in the course of Mr Turner's very attractive oral argument, is a phrase which appears in section 10(1) of the 1997 Act which deals with the limitation of actions of harassment in Scotland. This subsection provides:

> "After section 18A of the Prescription and Limitation (Scotland) Act 1973 there is inserted the following section –
>
> "**Actions of harassment**

> 18B. – (1) This section applies to actions of harassment (within the meaning of section 8 of the Protection from Harassment Act 1997) which include a claim for damages.
>
> (2) Subject to subsection (3) below and to section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of 3 years after –
>
> (a) the date on which the alleged harassment ceased; or
>
> (b) the date (if later than the date mentioned in paragraph (a) above) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to have become, aware that the defender was a person responsible for the alleged harassment *or the employer or principal of such a person.*
>
> (3) In the computation of the period specified in subsection (2) above there shall be disregarded any time during which the person who is alleged to have suffered the harassment was under legal disability by reason of nonage or unsoundness of mind." [emphasis added]

45. For reasons that I must now explain, it is impossible to avoid the conclusion that the effect of the phrase "or the employer or principal of such a person" in section 18B of the 1973 Act is to show that it was the intention of Parliament that it was to be open to the court, in appropriate circumstances, to find an employer vicariously liable in damages to the victim of a course of conduct amounting to harassment in breach of the relevant provision of the 1997 Act where the person responsible was an employee.

Section 18B of the 1973 Act: the statutory context

46. It is necessary first to explain how section 18B of the 1973 Act fits in to the system for the prescription of obligations and limitation of actions in Scots law. It is clear that a decision had to be taken as to how the action for harassment was to be accommodated in the Scottish system. Section 6 of the 1997 Act contains the provision about limitation that was thought appropriate for England and Wales. It provides simply that in section 11 of the Limitation Act 1980 there was to be inserted a new subsection (1A) to the effect that that section was not to apply to any action brought for damages under section 3 of the 1997 Act. The effect of that provision is that an action brought under

section 3 of the 1997 in England and Wales is subject to a six year time limit. It is unnecessary for this purpose to decide whether the action is to be classified as founded on tort and or is for a sum recoverable by statute, as the time limit in both of these cases is the same: sections 2 and 9 of the 1980 Act. Mr Turner submitted that the right to claim damages in section 3 of the 1997 did not create a new tort. In my opinion it did, just as the equivalent remedy which it created for Scotland is properly classified as a delictual one. But in any event the solution that was thought appropriate for England and Wales could not be fitted in to the system which limits the time within which claims may be brought in Scotland, as Scots law does not have a six year time limit equivalent to that which is to be found in the 1980 Act.

47. The rules by which a right or a claim is extinguished after the lapse of a given time limit in Scotland are to be found in what is known as the law of prescription. Until the law was reformed by the Prescription and Limitation (Scotland) Act 1973 these rules were set out in a series of Acts of the pre-Union Scottish Parliament, of which the most important was the Prescription Act 1469 which introduced the long negative prescription of twenty years. On the one hand there is the positive prescription, by which rights to land are fortified and rendered unchallengeable by the exclusion of all objections thereto after the lapse of a given time limit. On the other there are the negative prescriptions, by which rights of various kinds are extinguished after the expiry of the relevant prescriptive period. But Scots law has also adopted from English law the concept of limitation, the effect of which is not to extinguish claims but to render them unenforceable after a stated period. This system was introduced into Scots law by the Law Reform (Limitation of Actions) (Scotland) Act 1954 for actions of damages for personal injury or death in consequence of personal injury. As its short title indicates, the 1973 Act has retained these two concepts. Part I of the Act reforms the law of prescription. Part II of the Act, as amended by section 2 of the Prescription and Limitation (Scotland) Act 1984, preserves the system of limitation of actions.

48. For present purposes all that needs to be said is that the first choice that had to be made was whether actions of harassment should be subject to the five year negative prescription or to the limitation system. Actions of damages for harassment of the kind contemplated by section 8 of the 1997 Act would have been subject to the five year negative prescription provided in Part I of the 1973 Act (see section 6 read with paragraph 1(d) of Schedule 1), had it not been for the amendment which is contained in section 10(1) of the 1997 Act. The effect of that

amendment is to bring these actions within the limitation system in Part II of the 1973 Act, as amended.

49. Once it had been decided that the limitation system was to be applied to these actions the draftsman had to decide how the amendment to the 1973 Act ought to be worded. Part II of that Act, as amended, already contained three separate limitation provisions. Section 17, as substituted by section 2 of the 1984 Act, applies to actions in respect of personal injuries not resulting in death. Section 18, as substituted by section 2 of the 1984 Act, applies to actions where death has resulted from personal injuries. Section 18A, which was inserted by section 12(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, introduced a three year limitation on actions for defamation. The three year period referred to in section 18A is not capable of being extended, except to allow for any time during which the person alleged to have been defamed was under legal disability by reason of nonage or unsoundness of mind. But the three year periods referred to in sections 17 and 18 are capable of being extended so that the period runs from the date when the pursuer was, or should have been, aware of certain facts. The draftsman could have chosen an absolute limit of three years, subject only to an extension on the ground of legal disability, following the precedent set by section 18A. But he chose instead to follow the precedents set by sections 17 and 18 and to allow for a more generous extension of the three year period of the kind for which they provide.

50. Among the facts which are relevant to the question whether the three year period in sections 17 and 18 of the 1973 Act should be extended are the identity of the person against whom the action should be brought. Section 17(2)(b)(iii) and section 18(2)(b)(ii) use the same formula to describe this fact. It is in these terms:

> "that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person."

The new section 18B which section 10(1) of the 1997 Act inserts into Part II of the 1973 Act for actions of harassment adopts, with modifications, the same formula in subsection (2)(b). It provides for it in these terms:

> "that the defender was a person responsible for the alleged harassment or the employer or principal of such a person."

Does this formula contemplate vicarious liability?

51. There is no doubt that the purpose of the formula which is to be found in sections 17(2)(b)(iii) and 18(2)(b)(ii) of the 1973 Act was to accommodate claims based on the employer's vicarious liability by permitting an extension of the limitation period to the date when the pursuer became aware, or it would have been reasonably practicable for him to become aware, of the identity of the employer of the person to whose act or omission the injuries were attributable. As Lord President Cooper explained in *Matuszczyk v National Coal Board*, 1953 SC 8, 17-18, a case based on the principle of vicarious liability which would have been hopelessly irrelevant so long as the defence of common employment was available had by then become a relevant one:

> "… now that common employment has been abolished, the law of Scotland must be back where it was in *Dixon v Rankine* (1852) 14 D 420, which was disapproved in the *Bartonshill* case (1858) 3 Macq 266; and we can again rely after a prolonged eclipse upon the well-known judgment of Lord Justice-Clerk Hope from which I take this sentence in which his Lordship is referring to the victim's fellow servants: 'For their careful and cautious attention to duty, for their neglect of precautions by which danger to life may be caused, he (the employer) is just as much responsible as for such misconduct on his own part, if he were actually working or present.' In other words, so far as regards conduct within the scope of the servant's employment, there is no limit in the general case to the rule respondeat superior."

52. There is no doubt that the principle of vicarious liability is available where the employee is in breach of a duty owed by him to his fellow employee at common law. That fact provides a sufficient explanation for the use of the formula in sections 17(2)(b)(iii) and 18(2)(b)(ii) of the 1973 Act. The relief which is to be found in these provisions against a strict application of the three year limitation period would have been incomplete without it. The use of the same formula in section 18B(2)(b) for actions of harassment seems to lead inevitably to the conclusion that it was the intention that the principle of vicarious

liability should be available in actions of harassment also. That is the conclusion which David Johnston draws in *Prescription and Limitation* (1999), para 11.16 where in his analysis of section 18B he writes:

> "These provisions bear a certain resemblance to those on the limitation of actions for personal injuries under sections 17 and 18 of the 1973 Act. They are, however, much simpler. First, there is only one 'normal' date for the start of the limitation period, namely the date when the harassment ceased. This seems reasonable, since by definition what is being complained of is a course of conduct. Second, it is awareness of only one fact, namely the identity of the defender (whether liable personally *or vicariously*) which may be material in order to postpone the start of the limitation period." [emphasis added]

53. The remedy which Parliament has provided in cases of harassment is, of course, a statutory remedy. Nevertheless it recognised in section 10 of the 1997 Act that in harassment cases, as in a case of personal injury caused by a breach of the employee's duty at common law, the employer may be vicariously liable for conduct of the employee that amounts to harassment under the statute. At first sight this might seem surprising, in view of the paucity of authority to show that the doctrine of vicarious liability applies to duties laid on the employee by statute. Reported examples of cases where the principle of vicarious liability has been applied, without express statutory authority, to a breach of a statutory duty laid on the employee personally are hard to find. Statutory provisions providing for the safety, health and welfare of employees in the work place normally include provisions which impose a direct duty on the employer in such circumstances, of which regulation 32(2) of the Offshore Installations (Operational Safety, Health and Welfare) Regulations 1976 (SI 1976/1019) is an example: see *MacMillan v Wimpey Offshore Engineers and Constructors Ltd*, 1991 SLT 515. It provides:

> "It shall be the duty of the employer of an employee employed by him for work on or near an offshore installation to ensure that the employee complies with any provision of these Regulations imposing a duty on him or expressly prohibiting him from doing a specified act."

A provision to the same general effect was included, "for the removal of doubts", in section 159 of the Mines and Quarries Act 1954.

54. Questions as to whether the employer was vicariously liable had however been raised under the legislation relating to coal mines prior to the enactment of the 1954 Act. Sections 75 and 102(8) of the Coal Mines Act 1911 had the effect of absolving the owner of the mine from direct responsibility for any contravention or non-compliance with a provision of the Act if he could prove that he had taken all reasonable precautions to prevent it or that it was not reasonably practicable to avoid or prevent the breach. This left open the possibility that the only route by which a remedy could be obtained against the employer for breach of a statutory duty laid on the employee was by applying the strict doctrine of vicarious liability.

55. In *Harrison v National Coal Board* [1951] AC 639 the question was raised, but not decided because an answer to it was unnecessary, whether the effect of the abolition of the doctrine of common employment was that a plaintiff could succeed against the owner on the basis of vicarious liability for a shot-firer's breach of his statutory duty not to fire without having first ascertained that all persons in the vicinity had taken proper shelter. Lord MacDermott said at p 671 that vicarious liability was not confined to common law negligence:

> "It arises from the servant's tortious act in the scope of his employment and there can be no doubt that [the servant] in breaking the shot-firing regulations committed a tort."

Although Lord MacDermott was alone in expressing that view, Lord Guthrie adopted and applied the same reasoning in another case where it was contended that the owner of the mine was liable vicariously for a shot-firer's breach of the regulations. In *Nicol v National Coal Board* (1952) 102 LJ 357 he held that the fireman in doing his work as a shot-firer was acting in the course of his employment by the defenders and that the firing of the shots was the work which he was employed by the defenders to do:

> "His failure to take the precautions that Parliament has required of him in doing that work did not take him outwith the scope of his employment. Accordingly, his acts were still within the area in which the vicarious liability of a master operates."

56. The issue was raised again in *Matuszczyk v National Coal Board*, 1953 SC 8. In that case however the pursuer's case was based on duties said to have been owed to him by the shot-firer at common law. The defenders' argument was that these duties had been superseded by the duties laid down by statutory regulation, for which the employer was not vicariously liable. The argument that, if the regulation was not complied with, the failure was a duty in statutory duty only which could not also be a failure in common law duty was rejected. Lord President Cooper found it unnecessary to discuss whether a case could be made against the owner of the mine for a breach of the statutory duty laid upon the shot firer: p 18. But Lord Keith said at p 15 that his first impression was that the employers would be vicariously liable, whether the breach of duty was at common law or under statute. He observed that Lord MacDermott's observation to the same effect in *Harrison v National Coal Board* had attracted sympathetic comment from Lord Porter, and that Lord Reid said that he was not prepared to dismiss the argument as unworthy of consideration.

57. In *National Coal Board v England* [1954] AC 403, which was another shot-firing case, the House again reserved its decision on the issue. But Lord Porter said at p 416 that Lord Guthrie's opinion in *Nicol v National Coal Board* expressed the view which he held, which was that the shot firer's failure to take the precautions required of him by the regulation did not take him outwith the scope of his employment. Lord Oaksey said at p 421 that he agreed with Lord Guthrie's judgment in *Nicol v National Coal Board*. He added this comment at p 422:

> "Unless there is something in the statute which creates the obligation indicating the intention that no action shall be brought at common law in respect of its breach, the ordinary rules of the common law of tort are applicable, including the doctrine respondeat superior."

This supports Lord Nicholls' conclusion, with which I agree, that employers are vicariously liable for wrongs having a statutory source unless the statutory provision expressly or impliedly excludes such liability: see para 15 of his speech.

58. Against this background the decision to include a reference to the employer or principal of the person responsible for the harassment cannot be dismissed as based on a misunderstanding about the extent of the employer's vicarious liability. There is no rule in Scots law which

precludes a finding that the employer is liable vicariously for a breach of a statutory duty imposed on his employee. So far as conduct within the scope of the employee's employment is concerned, the doctrine respondeat superior applies irrespective of whether the duty the employee has breached was laid on him by the common law or by statute. In Scots law too, therefore, the general rule applies in respect of wrongs having a statutory source unless it is displaced by the statute. Parliament could have chosen, had it wished, to exclude the application of the doctrine in the case of conduct by an employee amounting to harassment. But it chose not to do so. It provided expressly, and deliberately, in section 10(1) of the 1997 Act to the contrary. That subsection was included in the Bill from the outset of its passage through Parliament. We can take it that, according to the normal practice in those pre-devolution days, it would have been drafted in the Lord Advocate's Department and that it would have been shown to the Parliamentary draftsman who was responsible for the part of the Bill that was to apply to England and Wales. It would have been removed from the Bill if it had been contrary to the instructions that had been given to the draftsman of that part.

Secondary, not vicarious, liability?

59. In a valiant attempt to meet this obstacle to his argument Mr Turner said that the purpose of section 10(1) of the 1997 Act was to deal only with situations where the employer was secondarily, and thus personally and not vicariously, responsible for conduct by his employee which amounted to harassment. He referred to *Mattis v Pollock (trading as Flamingos Nightclub)* [2003] 1 WLR 2158 as an example of that kind of liability. That was a case where the doorman at a nightclub, having been involved in a violent altercation with the claimant on the premises while performing his duties there, armed himself with a knife which he fetched from his flat a short distance away and attacked him in the street with it some time afterwards. The Court of Appeal held that the responsibility of the nightclub owner for the actions of his aggressive doorman was not extinguished by the separation in time and place from what had happened in the nightclub, and that vicarious liability was therefore established: para 32. But it went on to say that, although personal liability would not necessarily and always follow the establishment of vicarious liability, in that case it did. This was because the owner had chosen to employ the doorman, knowing and approving of his aggressive tendencies, which he had encouraged rather than curbed.

60. It is by no means impossible to conceive of circumstances where an employer could be held to be secondarily liable for a course of conduct by an employee amounting to harassment. As the Court of Appeal indicated in *Mattis*, the encouragement or approval by the employer of such conduct could lead to that result. Indeed, section 7(3A) of the 1997 Act, inserted by section 44(1) of the Criminal Justice and Police Act 2001, expressly provides for precisely such a situation. But I do not regard this a sufficient explanation for the reference to the employer in section 18B(2)(ii). The wording of that provision, when closely analysed, is a sufficient indication to the contrary. It refers to awareness that the defender was a person responsible for the alleged harassment *or* the employer or principal of such person. The word "or", which appears also in the corresponding provisions of sections 17 and 18, provides for the situation where the liability of the employer or the principal, as the case may be, comes in place of that of the employee. That is the essence of the doctrine of vicarious liability. So I would reject Mr Turner's argument that section 18B does not imply the existence of vicarious liability of the employer but provides merely for an extension of the limitation period in cases where a culpable employer is secondarily liable for the acts of a harassing employee.

The 1997 Act in practice

61. Among the arguments that persuaded Scott Baker LJ that the 1997 Act created a liability that was personal only to the perpetrator of the harassment was the fact that, if vicarious liability was imposed by it, this was done without any limitation as to the circumstances. As he said in para 111, no statutory defence is provided. So the only control mechanisms on the employer's strict liability are those laid down by the common law, as explained in *Lister v Hesley Hall Ltd* [2002] 1 AC 215, *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 and *Bernard v Attorney General of Jamaica* [2005] IRLR 398. Mr Turner suggested that recognition that the employer could be vicariously liable would provide a strong incentive to the commencement of proceedings against employers, and that employers generally were particularly vulnerable to such claims for which their insurers might decline to provide cover.

62. It may be worth noting however that there has been no sign of such a development in Scotland, despite the clear indication in the statute that employers may be vicariously liable in damages for harassment by their employees. This is not because opportunities which the statute provides for obtaining a civil remedy under the 1997 Act have gone entirely unnoticed. But the eight cases which have been

reported so far deal only with the use of non-harassment orders. These were orders sought in civil proceedings in the sheriff court (eg *McCann v McGurran* 2002 SLT 592, where the order was sought against a former husband, and *McGuire v Kidston*, 2002 SLT (Sh Ct) 66, where the parties had previously had a relationship) or orders sought in criminal proceedings under section 234A of the Criminal Proceedings (Scotland) Act 1995 following a conviction for an offence involving harassment (eg *McGlennan v McKinnon*, 1998 SLT 494, where the accused, who was convicted of a breach of the peace by shouting at the complainer, had previously had a relationship with her). There are no reported instances of claims made under the Act for damages against an employer for harassment by an employee. The practice appears to have been to continue to use the employment tribunal as the forum for the making of claims based on conduct amounting to harassment in the employment context.

Conclusion

63. Although the provisions of the 1997 Act which apply to Scotland differ in various respects from those which apply to England and Wales (see Sam Middlemiss, *Liability of Employers under the Protection from Harassment Act 1997* [2006] Edin LR 307), it was not suggested that the intention of Parliament was that there was to be any difference in substance as between the two jurisdictions as to the scope of the civil remedy for harassment. On the contrary, the Home Secretary, Michael Howard, said when introducing the Bill at second reading that the aims of the Bill as it applied to England and Wales were identical to those for Scotland: Hansard, HC Debates, 18 December 1996, vol 287, col 785. The indication in section 10(1) that vicarious liability is available in Scotland where damages are claimed for conduct by an employee amounting to harassment within the meaning of the 1997 Act must be taken to apply to England and Wales also. I would dismiss the appeal.

BARONESS HALE OF RICHMOND

My Lords,

64. If we had been the promoters of the Protection from Harassment Act 1997, we might have asked ourselves the policy question, 'Should the employers of people who harass others in the course of their

employment be vicariously liable for any damages the court may order under the Act?' The legislators might have thought of a number of policy reasons why the answer should be 'no'.

65. They might have considered that the principal purpose of the Act was prevention and protection rather than compensation. It begins with the prohibition of harassment in section 1. This is then made a criminal offence by section 2. Civil remedies, including damages and injunctions are provided for in section 3. The aim, it might be thought, was to deter, to punish or to encourage the perpetrator to mend his ways by the wide range of criminal disposals available on summary conviction, including the restraining orders provided for in section 5, or by the sort of specific prohibitions which may be helpfully contained in an injunction.

66. If this was the aim, it is easy to see why the definition of harassment was left deliberately wide and open-ended. It does require a course of conduct, but this can be shown by conduct on at least two occasions (or since 2005 by conduct on one occasion to each of two or more people): section 7(3). All sorts of conduct may amount to harassment. It includes alarming a person or causing her distress: section 7(2). But conduct might be harassment even if no alarm or distress were in fact caused. A great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour.

67. If prevention and protection were the aim, it is also easy to see why the mental element was framed as it was. A person is guilty of harassment if he knows or ought to know that his course conduct amounts to harassment: section 1(1)(b). He ought to know this if a reasonable person in possession of the same information would think that it amounted to harassment: section 1(2). There is no requirement that harm, or even alarm or distress, be actually foreseeable, although in most cases it would be. This broad formulation helps the courts to intervene to warn the perpetrator and encourage him to mend his ways.

68. The promoters of the Act might well have thought that this intense focus on the perpetrator and getting him to stop would not be helped, and might even be hindered, by making the employer vicariously liable. Vicarious liability, as my noble and learned friend, Lord Nicholls of Birkenhead, has so clearly explained, does not depend upon the employer having done anything wrong or even having broken any legal duty imposed upon him. It merely requires that the enterprise

pay for damage done by its employees in the course of their employment, a concept which now has a very broad meaning, and certainly embraces conduct which the employer was actively trying to deter and could have done nothing more to prevent. On the facts of this case, the employer had a grievance procedure which was designed to prevent workplace harassment and the perpetrator resigned as a result.

69. The promoters might have considered that our law does not generally award damages for anxiety and injury to feelings unless these are so severe as to amount to a recognised psychiatric illness. Discrimination and harassment are statutory exceptions to this rule. But the rule has a sound policy basis in limiting the scope for claiming compensation. There is already concern amongst some of our legislators that the scope for claiming compensation, even for recognised physical injuries, has gone too far. The avowed purpose of the Compensation Bill currently before Parliament is to reign in the so-called 'compensation culture'. The fear is that, instead of learning to cope with the inevitable irritations and misfortunes of life, people will look to others to compensate them for all their woes, and those others will then become unduly defensive or protective.

70. The promoters might have thought that employers already owe a duty of care towards their employees, to take reasonable steps to protect them from foreseeable harm to their physical or mental health. There has been a rapid expansion in claims for psychiatric injury resulting from stress at work. Liability turns on the foreseeability of such injury to the particular employee and what the employer might reasonably have been expected to do to avoid it. If employers can be vicariously liable for anxiety and distress caused without any breach of duty on their part, such claims will not only be routinely added to stress at work claims, they will also found a quite separate stream of, admittedly probably small, claims for harassment at work. The promoters might have thought that there were better ways than a myriad of new small claims to encourage better practice in the workplace if such were needed.

71. The promoters did address their minds to the appropriate limitation period and deliberately disapplied the ordinary three year period for personal injury claims: section 6. Harassment can take place over very long periods and they would not have wanted the earlier conduct to be left out of account.

72. But these were policy questions for the legislators. As Mr Robin Allen QC for the respondent points out, floodgates arguments may assist the courts in deciding how to develop the principles of the common law. They are of little help to us in construing the language which Parliament has used. Mr Mark Turner QC, on behalf of the appellant NHS Trust accepts that it is a question of construction. He argues that there should be no general presumption one way or the other that a statute aimed at prohibiting the conduct of one person should or should not import vicarious liability if that conduct is committed in the course of employment. However, Parliament must be assumed to legislate in the knowledge of the general law, which includes the law of vicarious liability, so that one must look for indications that Parliament did not intend it to apply to the particular duties or prohibitions it was imposing.

73. But in this case there can be no doubt, for the reasons explained by my noble and learned friend, Lord Hope of Craighead, that Parliament contemplated vicarious liability. Despite Mr Turner's valiant efforts, the Scottish limitation provisions can be explained in no other way. Although the Scottish limitation rules are different from the English, there is no indication that the substantive liabilities created by the Act were intended to be any different.

74. As we are not policy-makers and legislators, but judges construing the language used by Parliament, in the context of the general law of vicarious liability of which Parliament must be presumed to have been aware, I am driven to conclude, in agreement with my noble and learned friends, Lord Nicholls and Lord Hope, that this appeal should be dismissed.

LORD CARSWELL

My Lords,

75. Three of the classic methods of interpretation of a statutory provision are construction of the language of the enactment, consideration of the mischief at which the provision was aimed and weighing of the consequences of the conflicting interpretations of the provision in question. All are designed to assist the object of the tribunal interpreting the provision, to determine the meaning which Parliament intended in enacting it.

76. The wording of the enactment, not merely individual provisions, but the whole enactment, is the first resort of the interpreter, and in many, if not most, cases it will resolve the question. The Court of Appeal in the present case did not find sufficient indications in the language of the Protection from Harassment Act 1997 ("the 1997 Act") to determine the question whether an employer was to be liable for harassment committed by his employee in the course of his employment. It therefore resorted to consideration of the statutory objective and the consequences of adopting either interpretation.

77. All three members of the Court of Appeal held, on what they described as the broad issue, that an employer's vicarious liability can extend as a matter of principle to breaches of statutory duty by an employee. In common with your Lordships, I am in agreement with that conclusion. Where they differed was on the narrow issue, whether an employer would be liable under the 1997 Act for harassment committed by his employee in the course of his employment. In their judgments there was a thorough and penetrating discussion of the policy of the legislation, the statutory objective and the consequences of adopting either answer to the question posed. The majority, Auld and May LJJ, came down in favour of finding that the employer would be vicariously liable, while Scott Baker LJ's consideration, particularly of the statutory policy, took him to the opposite conclusion.

78. If we had no other aids to construction but these factors, I should myself regard them as very evenly balanced. I can see considerable force in the respective arguments which prevailed with the majority and the minority. The matter might be concluded by the operation of a presumption : on the existence of such a presumption I respectfully agree with the view expressed by my noble and learned friend Lord Nicholls of Birkenhead at paras 16 and 17 of his opinion. I would observe, however, that the 1997 Act is not confined in its scope to the workplace and, as its history shows, its original focus was not the workplace at all. One can envisage situations in which it is desirable in which there should be vicarious liability for the acts of an employee towards a member of the public, where the victim cannot identify the employee or obtain redress from him.

79. Be that as it may, the question of construction is in my opinion determined by the terms of section 10, which inserted a new section 18B into the Prescription and Limitation (Scotland) Act 1973. This part of the Act, the significance of which had not been brought to the attention of the Court of Appeal, furnishes an indication of the statutory intention

by resort to the primary source of interpretation, the wording of the enactment itself. It is quite apparent, as my noble and learned friend Lord Hope of Craighead has demonstrated, that in its use of the words in section 18B(2)(b) "the defender was a person responsible for the alleged harassment or the employer or principal of such a person" Parliament envisaged that an employer would be vicariously liable for his employee's harassment of another person. I cannot suppose that it was contemplated that that should be the position only in Scotland and that the same should not apply to England and Wales (Northern Ireland has its own legislation, the material parts of which are virtually in identical terms to the 1997 Act, and the same interpretation will apply to that). It therefore seems to me the most direct and compelling indication of the intention of Parliament that there should be vicarious liability in a case such as the present. The other approaches accordingly recede into the background. As I have stated, I would myself regard the factors weighed up in consideration of these other approaches as evenly balanced; certainly, they cannot be said to point away from the conclusion indicated by the wording of the Act with sufficient strength to require one to question that conclusion.

80. I accordingly agree with your Lordships that the appeal should be dismissed.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

81. I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Nicholls of Birkenhead, Lord Hope of Craighead and Baroness Hale of Richmond. I respectfully agree with Lord Nicholls that the principle of vicarious liability is applicable where an employee commits a breach of a statutory obligation sounding in damages while acting in the course of his employment unless the statute expressly or impliedly indicates otherwise (paragraph 17 above). That said, but for the virtually conclusive inference that the vicarious liability principle is indeed here applicable which arises from section 10 of the 1997 Act (identified by Lord Hope in the course of the hearing), I would have been strongly inclined to conclude, consistently with Scott Baker LJ's persuasive dissenting judgment in the court below, that the 1997 Act *did* impliedly indicate otherwise. I agree, therefore, with Lord Hope that there seemed "indeed powerful reasons for thinking that Parliament

intended that liability in damages should be personal to the perpetrator of the harassment" (his paragraph 43), and I agree equally with Baroness Hale's suggested policy reasons as to why that might have been so. In the end, however, I too feel driven to conclude that that was not after all what Parliament intended and that this appeal, therefore, must be dismissed.