

SCOTLAND / JUDGMENT

West v Castlehill LLP & Ors [2008]

ScotCS CSOH_182 (22 December 2008)

[2008] ScotCS CSOH_182

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[2008] CSOH NUMBER PD1767/06 OPINION OF LORD BRODIE in the cause JOSEPH WATT WEST
Pursuer; against CASTLEHILL LLP and OTHERS Defenders: ____ Pursuer: McColl;
Beveridge & Kellas First & Second Defenders: Malco l m Scott Q. C .; Mackinnons; Second
Third Party: Laurence Murphy Q. C ., .; HBM Sayers 22 December 2008

Introduction

This is an action for damages for personal injury to which Chapter 43 of the Rules of Court applies. The pursuer sues in respect of injury that he sustained on October 2003 when working as a deckhand on board the fishing vessel the Resolute which was being unloaded at the pier at Fraserburgh. The first defenders are the owners and operators of the Resolute . The second defender was the skipper at the material time. The first third party is one Arthur Eddie. He was the owner of what I was led to understand was a trailer with a cylindrical tank mounted on it which, when hauled by a tractor unit, was used for the transport of fish. This is variously referred to in the pleadings as a "tank on a lorry", a "tanker", a "trailer", and a "lorry". I shall refer to it as "the tanker". There is no description of the tanker in the pleadings but I understood that on top it had a walkway along all or part of its length which gave access to a hatch with a hinged door. The hatch opened to give access to the interior of the cylindrical tank allowing it to be loaded with fish. There were no guardrails on either side of the walkway. The first third party had been sequestrated in 2000, did not trade as a business and had no third party insurance. The second third party is United Fish Products Limited. It operates a fish processing factory. The pursuer avers that an accident occurred when the Resolute was about to unload its catch of fish at the pier. The fish were to be unloaded from the vessel using a chute from the "separator" which contained the catch, into the tanker. It was very windy. The pursuer climbed on to the top of the

tanker and opened the hatch door. He reached for the rope of the chute to guide it to the hatch. As he did so the hatch door fell and hit him and he fell from the top of the tanker, a distance of about 15 feet, and landed on the concrete dockside, thereby sustaining injury. The pursuer avers that the accident was caused by fault and negligence on the part of the first and second defenders and their breach of Regulations 4, 8 and 9 of the Provision and Use of Work Equipment Regulations 1998, Regulation 13 of the Workplace (Health, Safety and Welfare) Regulations 1992 and Regulation 5 and 6 of the Loading and Unloading of Fishing Vessels Regulations 1988. The action came before me on the Procedure Roll on the motion of the second third party to refuse to remit to probation the defenders' averments, insofar as directed against the second third party, and to dismiss the action insofar as directed against the second third party. Miss McColl appeared for the pursuer but, as the issue did not concern the pursuer, who had no case against the second third party, she asked and was granted leave to withdraw. Mr Malcolm Scott, Q. C., appeared on behalf of the defenders. There was no appearance for the first third party. Mr Laurence Murphy, Q. C., appeared on behalf of the second third party.

Submissions

The second third party Mr Murphy explained that it would be his submission that such cases as were made against the second third party by the defenders, whether on the basis of relief, contribution, apportionment or reimbursement, were not supported by sufficient relevant and specific averments. He submitted that insofar as the defenders rely on a contract between them and the third party, they do not relevantly and specifically aver the nature of the contract or its terms and conditions. Insofar as the defenders rely on a delictual duty of care based on an assumption of responsibility, there were no relevant and specific averments of special knowledge, special relationship representation or actual reliance. Moreover, there were no relevant and specific averments as to: (1) why any independent contractor, and in particular the first third party, was to be viewed as "incompetent", (2) how such independent contractor had been selected and employed by the second third party, or in what respect there had been failure in reasonable care in such selection or what would have occurred had reasonable care been exercised, (3) how any employee for whom the second and third parties party was vicariously liable breached any obligation to the defenders in the absence of averment as to what instructions were given or ought to have been given to an independent contractor or agent by such employee and (4) how the second third party falls to be found vicariously liable for an independent contractor in the absence of averment of either control by the second third party of that independent contractor or of exceptional circumstances apt to lead to the conclusion that an exception to the general rule that an employer was not liable for an independent contractor applied, for example, an unlawful act authorised by the employer, a nondelegable personal duty or hazardous work or operations . Mr Murphy went on to ask what he described as a rhetorical question: on the defenders' averments what is it that they undertake to prove as to who it was who actually uplifted the fish at the pier? He asked that the Court court should bear in mind that the second third party operated a fish processing factory located far from the quayside. They were not road hauliers. They did not own any piece of equipment which was at the pier. They did

not control anyone at the pier and none of their employees was present at the pier. Mr Murphy then turned to the pleadings with a view to identifying what it was the defenders admitted and offered to prove. As appeared from page 13 of the Record, the defenders averred that the second third party contracted with the first defenders "to take a share of the Resolute's catch from 7 October 2003 ". The defenders accepted that the second third party owned neither the tractor unit nor the tanker. They admitted that Philip Eddie (the son of the first third party) rendered an invoice to the second third party in respect of the collection of fish from the Resolute on the day of the accident. They accepted that none of the second third party's employees were present at the pier. At page 14 of the Record the defenders averred that: "....under the contract between the first defenders and the second third party, the second third party were to collect the fish from the quayside at Fraserburgh. That involved the supply of a tank, on which the first defender's employees would have to work, by the second third party to enable the fish to be unloaded. In these circumstances, the second third party ought to have supplied a tank upon which it was safe for persons such as the pursuer who required to work on it to unload the fish. Without fences and latches as condescended by the pursuer, it was unsafe. In entering the said arrangement, the second third party assumed responsibility for the supply of a suitable tank. They ought to either themselves have supplied such a tank or ensured that others engaged by them did so". The defenders then went on to admit that the first third party traded as Arthur Eddie Transport, operating a haulage business and that his principal business was the delivery of fish. At page 15C to D of the Record, the defenders accept that the driver of the tractor unit was John Ritchie who was an employee of Turriff Transport Consultants Limited. At page 17A to C the defenders aver that it was the responsibility of the driver of the tractor unit to open the hatch and secure it. They aver that the provision and management of the tanker and the management of the driver, Ritchie, were all the responsibility of the first third party. At page 18D the defenders aver that the first third party acted on the instruction of the second third party's employee, Andrew Noble, for whose acts and omissions the second third party are vicariously liable, but, Mr Murphy reminded me, the general rule was that an employer will not be found liable for an independent contractor unless in exceptional circumstances and here there were no averments of exceptional circumstances. At page 19D the defenders aver that the first third party was neither suitable nor competent but no specification was given of that other than the facts that he had been sequestered in 2000, that he did not trade as a business and that he had no third party insurance. In any event, these averments were meaningless unless it was being said that there was a duty on the part of Noble to make inquiry, it not being said that he was aware of these facts. At page 20A the defenders aver red that in the event of the second third party engaging subcontractors or agents to perform its obligations, there is an implied condition of contract between the first defenders and the second third party that they should take reasonable care to engage competent and reputable subcontractors or agents. These averments, said Mr Murphy, were fine as far as they went but they did not go far enough. There was a need to aver what inquiries should have been made by the second third party in respect of the first third party and if these inquiries had been made what would have been the result. It was to be remembered that employing an incompetent contractor is not necessarily the same as negligently employing an incompetent contractor. Whereas the defenders aver at page 31C of the Record that Andrew Noble engaged the

first third party to uplift the fish, and that the first third party was not a suitable or competent person to carry out that task, the defenders do not offer to prove that it was in fact the first third party who did uplift fish. The defenders' position as set out at page 31D of the Record was contradictory. The second third party might be obliged to supply a tanker or it might be obliged to take reasonable care in selecting an independent contractor to provide a tanker, but it could not be both. However, where did the alleged contractual duty averred at page 32A to supply a tanker come from? Here delegation of the task of uplifting the fish was entirely acceptable, and where a truly independent contractor is engaged to collect the fish, and has collected the fish, then it is the independent contractor who is responsible. There was no basis for vicarious liability, as averred at page 32C. Mr Murphy turned to consider the law. Insofar as the case against the second third party was based on contract, there was nothing to suggest how the contract had been entered into or explanation as to the basis upon which it was being said that the second third party "assumed responsibility for the supply of a suitable tank" (page 14C). The reference to assumption of responsibility, if not simply meaningless, suggested a term of art and the analysis contained in *Henderson & Others v Merrett Syndicates Limited*

[1995] 2 AC 145 . As appears from the speech of Lord Goff *supra* at 194D an assumption of responsibility coupled with the concomitant reliance may give rise to a duty of care irrespective of whether there is a contractual relationship between the parties but an averment of assumption of responsibility without anything else, which was what there was here, was irrelevant. Mr Murphy recognised, under reference to Walker , *Delict* at pp.127 to 131 that a principal may be liable for the act of an agent if the act fell within the scope of the agent's authority and the act had been negligent. Here there was no averment of the scope of the authority of the first third party. There was no specification of what was the first third party's negligent act for which the second third party might be vicariously liable. If the person who causes injury is an independent contractor, and not under the control of his employer, the latter cannot be made vicariously liable for the contractor's fault: *Stephen v Thurso Police Commissioners*

(1876) 3R 535 at 538 and 540. An employer may be liable for the actings of an independent contractor if the contractor, although independent, is in a position that he does not have complete freedom to decide himself as to how to carry out the work but is under the effective control of the employer: *Marshall v William Sharp & Sons Ltd* 1991 SLT 114 at 120F. Mr Murphy accepted that there was a spectrum of possibilities. In some cases a person doing work would very obviously be an employee and at the other end of the spectrum he would very obviously be an independent contractor. It depended on the full facts and circumstances but in the present case everything pointed away from vicarious liability. Mr Murphy commended the summary of the law which appeared at paragraph 28.09 of Gloag & Henderson, *The Law of Scotland* (12th Edition). An employer may be negligent in selecting an incompetent contractor, but the duty to select a competent contractor does not, in general, include checking that the contractor has adequate insurance cover: *Honeybourne v Burgess* 2006 SLT 585. The general rule was that an employer is not liable for damage caused by work done by an independent contractor, but

there are exceptions:

- (1) when the employer has no legal right to do the work ordered by him; (2) where injury is suffered as a result of breach of a nondelegable duty of the employer and (3) where damage is the natural consequence of the execution of the work. It was not, however, averred that any of these exceptions applied here. Mr Murphy then sought to summarise what he had said in what he described as six propositions. First, it was the defenders' case that the second third party either themselves or through others, ought to have supplied a "suitable" tanker. It was evident from the averments of the defenders that the second third party did not supply the tanker. Accordingly, the supply had to have been either by a contractor or by an agent. Second, was there a relevant case in imputing liability for an independent contractor? Mr Murphy submitted that that question fell to be answered in the negative in the absence of any averment of special circumstances to take the case out of the general rule that an employer is not liable for the acts of an independent contractor, there being nothing averred to indicate that the supply or any other part of the operation was under the control of the second third party. Third, was this a case where the second third party had negligently employed an incompetent independent contractor? Again this question fell to be answered in the negative, because there was no averment of what ought to have been done in the circumstances. Fourth, there were no specific averments that the first third party was indeed incompetent. That was not an inference which could be drawn from the third party not having public liability insurance, having been sequestered and not trading as a business or the fact that he was the owner of an item of plant that had been involved in the accident. In any event there was no averment that any of these facts were known to the second third party prior to the accident and no averments as to any duty to inquire. The argument that the second third party was liable for the first third party on the basis that he was an independent contractor therefore disappeared. Fifth, there was no basis upon which the second third party could be liable for the first third party on the basis that the first third party was the second third party's agent in that there was no averment as to the scope of the agency and no averment as to the respect in which the agent was negligent. Sixth, there was no averment as to in what way Mr Noble, the site manager and employee of the second third party was negligent in giving instructions to the first third party to collect the fish. Accordingly, the case as directed against the second third party should be dismissed as lacking in adequate specification. The defenders Mr Scott began by reminding me of what had been said by Lord Normand and Lord Reid in *Jamieson v Jamieson* 1952 SC (HL) 44 at 50 and 63 about the test to be met before a case can be dismissed as irrelevant. He then warned me against too readily assuming what will be established at proof. It might not appear that the first third party was truly an independent contractor, as opposed to an agent or someone sufficiently under the control of the second third party to give rise to vicarious liability. There were three issues to consider: (1) whether there was direct liability on the part of the third party in selecting a competent subcontractor;

- (2) whether on the facts there might be imposed an nondelegable duty owed by the second defender to the pursuer arising out of the antecedent circumstances, including the contract between the second third party and the defenders; and
- (3) whether or not, absent any direct duty to the pursuer, there was an obligation on the part of the second third party arising out of contract to relieve the defenders from any liability they might incur to pay damages to the pursuer. Mr Scott submitted that the precise content of the duty of an employer to select a competent contractor was not simply black and white. The law was more subtle and in factsensitive. He referred to *Sullivan v Gallagher & Craig* and others 1960 SLT 70, *Haseldine Daw & Son Ltd*

[1941] 2 KB 343, *Salsbury v Woodland*

[1970] 1 QB 324, *Green v Fibreglass Ltd*

[1958] 2 QB 243, *Gwilliam v West Hertfordshire Hospitals NHS Trust*

[2003] QB 443, and *Naylor (t/a Main Street) v Payling* [2004] PIQR P36. Mr Scott explained that he was not contending for a freestanding duty to ensure that the independent contractor should carry insurance but, at least before inquiry into the facts, it could not be said ab ante that the absence of insurance was not relevant to the selection of a contractor. It was important to avoid conflating the solvency of a party and his trustworthiness to carry out a particular task. It could not be said that the absence of insurance was not relevant to the question of competence: cf. *Bottomley v Todmorden Cricket Club*

[2004] PIQR P18. It was the defenders' position that the first third party was not competent and that he should never have been appointed but in any event, it could not be said ab ante that he was competent. The issue was not whether the particular characteristics of the first third party which were the subject of averment caused the accident, but, rather, that he should not have been employed at all, notwithstanding the fact that he had been used on at least 20 previous occasions. Contrary to what Mr Murphy had submitted, this was not an innominate contract. It was a contract of sale. It was manifestly absurd to expect that the seller move the fish from the quay to the purchaser's premises. Even if the first third party was acting as an independent contractor, which would be a matter for proof, it was the defenders' case that the second third party had assumed a nondelegable duty to the pursuer of which it was in breach. This was not a case of assumption of responsibility such as was discussed in *Henderson v Merrett supra* but, rather, a responsibility to the pursuer arising out of the contractual

background.

An analogous case was *Rogers v Night Riders*

[1983] RTR 324. Even in the absence of a primary duty owed by the second defenders to the pursuer, the defenders had a case of contractual obligation on the part of the second third party to relieve the defenders of any liability they may have incurred to the pursuer. This

was a right of relief improperly so called. The expression "reimbursement" which was used in the pleadings, was appropriate: Green's Encyclopaedia , Vol.12, para.963; Glegg Reparation (4 th Edition) 407. The contract, with its obligation on the second third party to uplift the fish, had obvious consequences for the pursuer working on the tanker. The reference to assumption of responsibility was an assumption of responsibility for the physical safety of the defenders' employees. Mr Scott then turned to answer some specific points made by Mr Murphy. As far as the submission that there were no relevant averments to the effect that the second third party did indeed select an incompetent subcontractor, Mr Scott explained that the issue was one of trust in circumstances when inquiry would have disclosed the first third party was not someone who could be trusted with the task. The duty to instruct competent agents or contractors was clearly stated at page 31D of the Record. It was going too far too fast to draw any conclusions about the first third party's competence. The first third party could be regarded as the second third party's agent because the second third party had authorised the first third party to uplift the fish. Assuming that the second third party did in fact know nothing about the first third party, then it should have done. The first third party should never have been employed. Second speech for the second third party In a brief second speech Mr Murphy submitted that the cases of Bottomley , Gwilliam and Naylor could be distinguished as English cases relating to occupiers' liability in inherently dangerous situations. He drew attention to the terms of section 2(4)(b) of the (English) Occupiers Liability Act 1957. No equivalent provision was found in the Scottish Act. The trend of the authorities was to back off from a freestanding duty to check on insurance. Rogers v Night Rider was a very different sort of case from the present . Discussion Mr Scott responded to the attack on the relevancy of the pleadings on behalf of the defenders by presenting three issues which he saw as raised by the pleadings: (1) whether there was direct liability of the second third party to the defenders by reason of their breach of duty to select a competent subcontractor;

- (2) whether on the facts there might be imposed a nondelegable duty of care owed by the second third party directly to the pursuer; and (3) whether, absent any direct duty to the pursuer, there might nevertheless be a contractual obligation on the part of the second third party to the defenders to relieve them of such liability as they might have incurred in the circumstances to pay damages to the pursuer by way of reparation for personal injury. Each of these issues relates to an allegation of breach by the second third party of a delictual or contractual obligation, in consequence of which, in the event of the defenders incurring liability to the pursuer in damages for breach of the duties owed by them to the pursuer either at common law or by virtue of statute, the second third party is liable to relieve them of or reimburse them for or contribute to that liability. Mr Murphy submitted that none of these potential bases for liability on the part of the second third party was supported by sufficiently relevant and specific averments. However, in addition to these cases of direct liability Mr Murphy apprehended that the defenders' pleadings also sought to make a case of vicarious liability for the fault of the first third party and he was anxious to stress the rule

that an employer is only liable for the fault of an independent contractor in special circumstances. The basis for Mr Murphy's apprehension is to be found at page 18 D of the Record where it is averred that the first third party acted as an agent and at pages 31D and 32C of the Record where it is said that the first third party was an agent or contractor for the second third party but whichever it was the second third party was vicariously liable for his acts and omissions. It appears to me that I can deal with vicarious liability relatively shortly. There was no dispute as to the applicable law and, in particular, the rule that an employer is not liable for the fault of his "independent" contractor except in special circumstances. Mr Scott cautioned against too readily assuming that on a proper analysis the first third party would fall to be regarded as an independent contractor after proof. He also reminded me of the familiar passages from *Jamieson v Jamieson* supra which encapsulate the principle to be applied in a debate on relevancy (whether in an action falling under chapter 43 or otherwise): "The true proposition is that an action will not be dismissed as irrelevant unless it must necessarily fail even if all the pursuer's averments are proved. The onus is on the defender who moves to have the action dismissed, and there is no onus on the pursuer to show that if he proves his averments he is bound to succeed". (Lord Normand at 50) and "...before a pursuer's averments are to be held to be irrelevant, it must be clear that, even if the proof discloses an atmosphere wholly favourable to the pursuer, the pursuer's case would still fail." (Lord Reid at 63). On the same page Lord Reid also said: "if it can be shown that, even if the pursuer succeeds in proving all that he avers, still his case must fail, it appears....to be highly advantageous that time and money should not be spent on fruitless inquiry into the facts....". As far as vicarious liability is concerned I see matters as clearcut. The defenders describe the first third party both as a "contractor" and as an "agent". I can see that he may be one or other or indeed both. If he is viewed as a contractor there is nothing averred to take him out of the general rule. He is therefore to be taken to be independent of the second third party and there is then no question of vicarious liability on its part. Viewing the first third party as an agent, Mr Murphy complains that there are no averments defining the scope of his authority or any negligence in carrying out what he had been authorised to do. That is true; there are no such averments. It is nevertheless apposite to describe the first third party as the second third party's agent as far as contractual obligations or nondelegable duties are concerned. On the averments, it appears to me that it is only in relation to such obligations or duties that vicarious liability might arise and that, accordingly, the relevance of references in the defenders' pleadings to vicarious liability or to agency depends on the defenders having relevantly set out a case of breach of contract or breach of nondelegable delictual duty. I turn then to look at the other suggested bases of liability. I begin with what is said to flow from the contract between the first defenders and the second third party. The defenders' averments in relation to contract are to be found at pages 13A, 14A to D, 20A to B, 31E, and 32A of the Record. What is said there is that the second third party contracted with the first defenders to take a share of the Resolute's catch and that the second third party was to collect the fish from the quayside at Fraserburgh. The contractual obligations said to have been breached are essentially two in number: "to supply a suitable tank as condescended upon" and "to [take reasonable care to] instruct competent contractors or agents in respect

of the unloading of the Resolute " (Record page 32A). Mr Murphy characterised the contract founded on by the defenders as innominate and unusual. "Unusual" may be to go too far if it is intended to indicate something over and above "innominate" but I consider that he was entitled to describe the arrangement averred by the defenders as an innominate contract in the absence of reference in the defenders' averments to any of the familiar categories, such as sale. The importance of this is in relation to implication of terms. As is noted by Gloag Contract (2 nd edition) at p 288, the distinction is explained by Stair at i 10, 12: "We shall only then touch the common requisites, first, of all contracts, and next, the specialities of such prime ones, unto which law or custom hath given a special nature, that by the very naming of the contract and agreement, all the obligations, interests, and consequences thence arising, are commonly known and presumed, and are as effectual as if they were all expressed, without necessity to dispute precisely what reason and equity will conclude, from the nature of what is done or said. This seems to be the only profitable distinction betwixt contracts nominate and innominate; for in all contracts, not only that which is expressed must be performed, but that which is necessarily consequent and implied; but in nominate contracts, law hath determined these implications." Thus, simply by describing the contract between the defenders and the second third party as one of the nominate contracts, say, sale, "all the obligations, interests, and consequences thence arising, are commonly known and presumed". If, on the other hand, the contract is innominate its terms will have to be determined by reference to "what reason and equity will conclude, from the nature of what is done or said." Essentially the same exposition is given by Lord Steyn in the passage from his speech in *Equitable Life Assurance Society v Hyman*

[2002] 1 AC 408 quoted by Lord Reed at paragraph [53] of *Credential Bath Street v Venture Investment Placement Ltd*

[2007] CSOH 208 . When he came to address me Mr Scott said that it had not occurred to him that the contract as between the defenders and the second third party was other than a contract of sale (which is how it is described in the second third party's pleadings). While that begs the question as to why such a familiar expression is nowhere to be found in the defenders' pleadings, I accept that what is averred is suggestive of sale and for the purposes of this Procedure Roll debate I shall so regard it. Where then is the basis in the general law of sale or the particular averments in this case for the assertion that the second third party was under the first of the contractual obligations relied on by the defenders: "to supply a suitable tank as condescended upon"? There is no dispute but that a contract was entered into but there are no averments as to how this occurred. Mr Scott told me in the course of the debate that he understood there to have been a radio message from the Resolute to the second third party. Nothing was said by Mr Scott about the content of that message. More importantly, nothing is averred in the pleadings about the content of the message. A feature of a nominate contract such as sale is that very little is required to have the result that parties may be bound in a quite complex way; the exchange of a few words in whatever medium the parties choose to adopt or a simple act such as the selection of goods exposed by a shopkeeper may suffice. The detail will, as

Stair explained, be determined by the law. In the case of sale "the law" is in large part contained in statute, principally, but not exclusively, in the Sale of Goods Act 1979, as amended. It was a matter of agreement that the second third party was obliged to take delivery of a certain quantity of fish at the quay at Fraserburgh on 7 October 2003 . There was no discussion during the debate as to what is implied as to the purchaser's obligations by virtue of the 1979 Act or other relevant statute. That being the state of the discussion Mr Murphy insisted in his submission that there was a complete absence of necessary averments to support the unexplained assertion in the pleadings that the obligation founded on was incumbent on the second third party by virtue of the contract which Mr Scott described in his argument, but not in his pleadings, as a contract of sale. As far as the supposed obligation "to supply a suitable tank as condescended upon" is concerned, I agree with Mr Murphy. Conditions of contract are express or implied. If express, parties must have expressed them in some way. There is nothing to that effect in the pleadings. Therefore the obligations on which the defenders found must be implied, either as incidents impliedly annexed to a particular form of contracts or implied on the basis of the imputed intention of the parties: *Equitable Life Assurance Society v Hyman* supra at 458 under reference to *Luxor (Eastbourne) Ltd v Cooper*

[1941] AC 108 at 137, again quoted by Lord Reed at paragraph [53] of *Credential Bath Street v Venture Investment Placement Ltd* supra . As purchaser of the fish, the second third party was obliged to take delivery of what it agreed to buy at the quayside at Fraserburgh. Mr Murphy went the distance of accepting, in response to a question from the court, that incidental to the obligation to take delivery of the fish, the second third party might be under obligation to provide a reasonably efficient means of taking delivery. Mr Scott seized on what he suggested had been Mr Murphy's concession and pointed to the defenders' averments at page 14A to D as giving the defenders a sufficient basis for the obligation to supply a "suitable tank" aspect of his case going to proof before answer. Where the goods that are subject to the sale are fish then an obligation to provide the means of taking delivery meant an obligation to provide a tanker and if a tanker had to be provided then the second third party had to provide one that was suitable for the first defender's employees (and, presumably, share fishermen) to work on. So went Mr Scott's step by step argument. I was not persuaded. It appeared to me to be an altogether too large step from an unquestionable obligation to take delivery, even if elaborated as an obligation to take delivery by efficient or convenient means and therefore to provide a mobile containing tank, to an obligation to supply a tanker which would be suitable in the sense of conforming with all the defenders' common law and statutory duties to their employees should they chose to work on top of it. What that would mean would be that the second third party was obliged as a matter of contract, to assume, to an extent, the defenders' duty to provide their employees with a safe place of work and their duty to comply with the relevant statutory provisions intended to promote health and safety, in circumstances where the second third party had no control over what that work would be or the circumstances in which it would be carried out. Taking this as an example of the nominate

contract of sale I do not see this supposed obligation of the purchaser as one which "the law hath determined", to use the language of Stair, or "an incident impliedly annexed to a particular form of contract" to quote Lord Steyn. For a contractual condition to be implied it has to meet the familiar test which is discussed in detail by Lord Reed in *Credential Bath Street* supra and which can be paraphrased in terms of necessity for business efficacy. In my opinion the defenders have failed to aver that this supposed obligation was either a matter of express agreement or that it must be implied as a matter of business efficacy. In relation to necessity for business efficacy in a question as between the parties to the contract, I would see the matter becoming all the more difficult for the defenders if regard is had to their averments at page 17A to C of the Record to the effect that it was the responsibility of the driver of the tractor unit to open the hatch and secure it (rather than any employee of the first defenders) and that the provision and management of the tanker and the management of the driver, Ritchie, were all the responsibility of the first third party. I shall return to what I would understand to be the admitted contractual obligation to take reasonable care in selecting an independent contractor and the case of liability based on an alleged breach of that obligation, but it is convenient next to look at the case based on breach of a duty of care owed directly by the second third party to the pursuer. The way Mr Scott introduced his submissions on this aspect of the case was to identify the question as being whether the second third party had assumed a nondelegable duty and had become "a tortfeasor in his own right". Notwithstanding the reference to assumption of liability in the defenders' pleadings Mr Scott disclaimed the *Henderson v Merritt* exposition of how liability might arise and relied, rather, on the decision of the Court of Appeal in *Rogers v Nightriders*. Clearly, if the second third party had a duty of care which it owed to the pursuer and if it breached that duty and the breach of duty contributed to the accident in which the pursuer was injured, in the event of the defenders becoming liable to make reparation to the pursuer by reason of their separate breach of duty they would then be entitled to relief and contribution as provided by section 3

- (2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940: cf *Singer v Gray Tool Co (Europe) Ltd* 1984 SLT

149. Curiously, while it would appear from the defenders' averments at page 33A to B of the Record that the defenders seek contribution from the first third party, they do not appear to seek contribution from the second party. I do not see anything as turning on that. Neither Mr Murphy nor Mr Scott suggested that it was of importance and the issue of contribution as between the parties is raised by the second third party at page 35B of the Record. The defendants in *Rogers v Nightriders* operated a minicab service. The plaintiff's mother, on behalf of the plaintiff, telephoned the defendants and asked them to send a minicab to her home address to take the plaintiff and her father to Euston Station. A vehicle arrived. In the course of its journey a door flew open, struck a stationary vehicle and slammed back, injuring the plaintiff. It was found at trial that the accident had been caused by negligent maintenance on the part of the ownerdriver of the vehicle. It transpired that the driver, who could not be traced and against whom the action was discontinued, was an independent

contractor. The judge at first instance found against the plaintiff and for the defendants because as the relationship of the defendants and the driver was that of principal and independent contractor the defendants were not vicariously liable in respect of his acts and omissions. That decision was reversed by a Court of Appeal constituted by Eveleigh and Dunn LJ. The principal judgment is that of Eveleigh LJ. At 328 to 329 he said this: "In my opinion, this is not a case where we are concerned to consider vicarious liability or whether there is liability for the act of an independent contractor. We are concerned to consider a case of primary duty on the part of the defendants. It was never suggested, and it was not put to the plaintiff, that she knew that the defendants were simply a kind of post box to put her in touch with someone else with whom she would be able to make an independent contract. On the facts of this case, in my opinion, the defendants undertook to provide a car and driver to take the plaintiff to her destination. They did not undertake, and neither did she request them, to put her in touch with someone else who would undertake this obligation. Now in those circumstances of undertaking to provide a car and its driver to take her to her destination the defendants could foresee that she might be injured if the vehicle were defective, and so they owed a duty arising out of this relationship to take care to see that the vehicle was safe. They relied upon the driver to do this. Whether he was a servant or an independent contractor matters not, he was a third person upon whom they relied to perform their duty arising from their relationship with the plaintiff, and it is well established law that such a duty cannot be delegated. It is possible to treat this case as one of contract and to say that the plaintiff and defendants entered into a contract whereby the defendants would provide a car for reward for a purpose and an implied term that the vehicle would be reasonably fit for that purpose. It is said that the vehicle would be reasonably fit for that purpose. It is said that the case has not been pleaded in contract. It is true the words 'breach of contract' were not used. It is also said that breach of contract was not argued in the court below, but to my mind it does not matter on the facts of this case. What was clearly set out in the pleadings was that the plaintiff had hired a minicab from a firm who were in the minicab business and that the defendants were in breach of a duty to take care that the vehicle provided was properly maintained." The much shorter judgment of Dunn LJ, *supra* at 331, reiterates and encapsulates the pragmatic and robust approach of both members of the Court. It merits quotation almost in full: "The firm Night Riders or A1 Cars hold themselves out to the general public as a car hire firm and they undertook to provide a hirecar to take the plaintiff to Euston Station. In those circumstances, they owed the plaintiff a duty to take reasonable steps to ensure that the car was reasonably fit for that purpose. It matters not whether the duty is put in contract or in tort, either way it is a duty they could not delegate to a third person so as to evade responsibility if the car was not fit for that purpose. There was no suggestion in the evidence in the court below, and it was never put to the plaintiff, that she was told of the true position of the firm, that is to say, the car did not belong to them and that the firm was no more than a booking agent for ownerdriven cars over which they had no control. If there had been such evidence and if the true nature of the defendants' business had been known to the plaintiff, then the situation would have been different. But so far as the plaintiff was concerned, she was dealing with a carhire firm not a mere booking

agency and, accordingly, the defendants were under a primary duty to her." It respectfully appears to me that the Court of Appeal in *Rogers* arrived at the correct conclusion on the facts. One can only admire the direct way in which it did so. The case was treated as one of breach of contract notwithstanding that that expression was not used in the pleadings and it had not been so argued at first instance. It is true that Dunn LJ expressly contemplated the relevant duty being one in tort and in the course of discussion before me Mr Scott asked rhetorically whether the result would have been different had the other passenger in the car been injured rather than the plaintiff. I rather think that Eveleigh LJ would have elided that difficulty as he did such difficulty as was presented by the fact that it was the plaintiff's mother who had made the telephone call to the defendants: by taking the contract to have been made on behalf of both passengers, but I accept that an analysis of similar facts to those in *Rogers* might lead to the contract being held to have been made with one passenger and injury being suffered by the other. In that event I see that it would seem no more satisfactory to deny the noncontracting passenger damages than, from a modern perspective, it would have been to have denied Mrs Donoghue damages simply because it was her companion who purchased the ginger beer. However, agreeing with Mr Murphy, while I have no difficulty with accepting the correctness of the decision in *Rogers*, it is a very different case on its facts from the present. In *Rogers* the defendants had expressly agreed to provide a specific service to or at least for the benefit of the plaintiff who was an entirely passive recipient of that service. The case was essentially one of contract but, in any event, although not so analysed in the judgments of the Court of Appeal, the circumstances were amenable to analysis as productive of a special relationship of the sort discussed in *Hedley Byrne v Heller*

[1964] AC 465. These features are not present in this case and, accordingly, I do not accept that *Rogers* provides a sufficient basis for the proposition that the second third party owed a direct and nondelegable duty to the pursuer to take reasonable care to secure that such vehicle as was to be used to take delivery of the fish from the first defenders was "safe" or "suitable". What then is the consequence of that for the relevancy of this aspect of the defenders' case? Disclaiming any reliance on *Henderson & Others v Merrett Syndicates Limited* supra, the only other authority on duty of care mentioned by Mr Scott was *Donoghue v Stevenson* 1932 SC (HL) 31 and, implicitly, the dictum of Lord Atkins supra at 44. Now, in many cases where damages are sought for negligence it is unnecessary to analyse whether or not the circumstances are capable of giving rise to a duty of care; particular relationships are well recognised as giving rise to particular duties, at least as far as personal injury is concerned: *Gloag & Henderson* supra para 27.01. Similarly, where there is such a relationship, as between employer and employee or as between fellow road users for example, little is required by way of pleading to establish why a particular duty arises: *J Dykes Ltd v Littlewoods Mail Order Stores Ltd* 1982 SLT 50 at 52. The position is rather different where the case is more unusual and the supposedly proximate relationship more problematic. I would see this as such a case: the relationship in question being that between a purchaser of a consignment of fish who has contracted to

take delivery from the seller's vessel and the seller's employee (or someone equivalent to an employee); the duty relied on being to procure the equipment of the vehicle used to transport the consignment with particular features (fences and latches); and the breach being a failure to do so. This is not a case of the direct inflicting of harm but, rather, the omission to do something which would have reduced the risk of harm. In my opinion this is an example of the more unusual case and, accordingly, one where a question arises as to whether the particular duties towards the pursuer relied on by the defenders were indeed incumbent upon the second third party. From time to time the courts have used different analytical tools to answer that sort of question. As Lord Hamilton observed in *Gibson v Orr* 1999 SC 420, there have been various milestones along the way of which *Donoghue v Stevenson* is but an early one, and one from which the law has advanced. More than one set of criteria for the determination of negligence remain current (*Henderson & Others v Merrett Syndicates Limited* provides one example) although the most favoured is the threefold test laid down in *Caparo Industries v Dickman*

[1990] 2 AC 605 by Lord Bridge at 618: *Chief Constable of The Hertfordshire Police v Van Colle*

[2008] 3 WLR 593 Lord Bingham at 609, *Mitchell v Glasgow City Council* 2008 SC 351, Lady Paton at para [57], *Gibson v Orr* supra at 431. I would not therefore regard an analysis based simply on foreseeability, as apparently proposed by Mr Scott in the event that I rejected *Rogers v Night Riders* as a precedent, to be adequate. Lord Reed's quotation, in *Mitchell v Glasgow City Council* supra at para [89] of Gleeson CJ in *Modbury Triangle Shopping Centre Pty Ltd v Anzil*

(2000) 205 C. L. R. 254 at para.28: "If people were under a legal duty to prevent foreseeable harm to others, the burden imposed would be intolerable", makes the point with particular force. However, even if consideration is restricted to foreseeability (which is, in any event, the first element in the *Caparo* test) I have great difficulty in seeing how it can be said that the second third party, through their manager, Andrew Noble, should have foreseen that his act in agreeing to buy the fish and take delivery of it or his subsequent act of arranging that the first third party take delivery on behalf of the second third party, would be likely to cause injury to any of the defenders' employees. The position might have been different if Mr Noble, on behalf of the second third party, had contracted to provide a piece of equipment which foreseeably would form part of the defenders' employees' working place and which was so designed as to meet all safety requirements of such a working place, both at common law and statute, but in my opinion the second third party did not so contract. Moving to the other elements in the *Caparo* test, I would not see there as being a proximate relationship as between the second third party and the pursuer but that is essentially because of the view that I take on foreseeability. As far as the possibly tautologous "fair, just and reasonable" element, I do not find any averments upon the basis of which it might be found to be fair, just and reasonable to impose on a purchaser of goods who has undertaken to do no more than take the goods away, a liability to the seller's employee which exactly mirrors the duties owed by the employer to his

employees. Accordingly, in my opinion the defenders do not have relevant averments to support a duty of care owed directly by the second third party to the pursuer. In the absence of a duty owed directly to the pursuer and in the absence of a contractual obligation to supply a suitable tanker there is no basis for regarding the first third party as an agent or for vicarious liability. I now turn back to the second contractual obligation founded on by the defenders. The defenders' averment at page 20A of the Record that it was an implied condition of the contract between the first defenders and the second third party that, in the event of the second third party engaging subcontractors or agents to perform their obligations, that reasonable care would be taken to engage competent and reputable subcontractors or agents is not formally admitted but during the course of the debate I understood Mr Murphy to concede that in the event that the second third party chose to employ a haulier or other contractor to take delivery on its behalf, it was under an implied obligation to take reasonable care to select a reasonably competent contractor. The existence of that obligation is therefore not in issue. What is in issue is whether there is sufficient averred to infer breach of that obligation. For the purposes of argument, I did not understand Mr Murphy to dispute that by using or supplying a tanker which did not have the desiderated features the first third party might be held to have supplied unsuitable equipment. That, submitted Mr Murphy, did not mean that the first third party was necessarily incompetent but, even if he was, there is a difference between engaging an incompetent contractor and negligently engaging an incompetent contractor. Even assuming the first third party to be incompetent, the defenders had failed to aver what reasonable care required in the selection and engagement of a contractor or what would have occurred had it been exercised. The defenders were therefore not offering to prove why it was that they said the second third party was in breach of this contractual obligation or how that breach caused the accident and thus the defenders' possible liability to pay damages to the pursuer. Mr Murphy pointed out that none of what were pled by the defenders as indicators of incompetence were causally connected to the pursuer's accident but, in any event, what, he asked, was the relevance of these indicators when it is not said that Andrew Noble or any other employee of the second third party knew about them and it is not averred that there was a duty to make inquiry? I see there as being considerable force in Mr Murphy's criticisms but, having regard to the Jamieson v Jamieson criteria, I am not prepared to refuse the defenders probation of this aspect of their case. I accept, as I took Mr Scott to submit, that more than one sort of competence and therefore incompetence may be in issue here. There is purely technical competence in the sense of knowing what sort of tanker was required and then there is what one might describe as moral competence in the sense of being trustworthy as someone who would take responsibility for ensuring that the sort of tanker that was required was in fact supplied. I do not see it as a necessary conclusion on the basis of what is averred that the first third is to be regarded as incompetent in either sense but, equally, I would accept that there is enough averred to allow a court that has heard the evidence to conclude that the first third party was indeed incompetent and therefore, as Mr Scott submitted, should not have been instructed by an employer who was aware of the fact. Now that would not be

enough to allow the defenders to succeed. They would have to be able to show that the second third party had failed to exercise reasonable care in selecting the first third party. How they will attempt to do that is not entirely clear from the averments. Accepting the correctness of the decision of Lady Smith in *Honeybourne v Burgess supra*, Mr Scott did not contend for a freestanding duty to inquire as to whether a contractor had insurance against third party claims. As Lady Smith points out in *Honeybourne*, English cases based on what was required of an occupier of property are an unreliable guide as to what is required of an employer of a contractor as a matter of Scots law, given the terms of section 2 (4) (b) of the (English) Occupiers Liability Act 1957. There is also the question of the causal connection between any breach of contract of which the second third party may be found guilty and such loss in the form of liability to pay damages to the pursuer as may be incurred by the defenders. That in turn might be found to depend upon the precise scope of the contractual obligation: cf. *South Australia Asset Management Corp v York Montague Ltd*

[1997] AC 191 . There was no detailed discussion of this before me and, as with the question as to whether the second third party can be said to have failed to exercise reasonable care in selecting the first third party, I would see such an issue best considered after proof. My intention is to allow the defenders proof before answer of their case insofar as based on a claim for relief arising from the alleged breach of the second third party's contractual obligation, in the event of it subcontracting any of its contractual obligations to the first defenders, to take reasonable care to select and appoint a competent contractor, but otherwise it is my intention to refuse the defenders proof of their cases against the second third party. Quoad ultra I would propose to allow parties proof of their respective averments. With a view to achieving that result, I propose to refuse probation to the following averments: at page 14B to D from "In these circumstances" to "them did so."; at 18E "The first third party acted as agent for the second third party."; at 31C "He acted as agent or contractor for the second third party who are accordingly vicariously liable for his acts and omissions."; and at 31 E to 32C from "Further and in" to "of statutory duty." However, in order that parties may have the opportunity to address me on what is proposed and whether I have correctly identified which averments should not be allowed probation, the case will be brought out by order before I pronounce any interlocutor. Meantime I reserve all questions in relation to expenses. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: https://www.bailii.org/scot/cases/ScotCS/2008/CSOH_182.html

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