Most Negative Treatment: Distinguished
Most Recent Distinguished: Dempsey v. Bagley | 2016 ABQB 124, 2016 CarswellAlta 394, [2016] A.W.L.D. 1614, [2016] A.W.L.D. 1650, 29 C.C.E.L. (4th) 213, 30 Alta. L.R. (6th) 237, [2016] 8 W.W.R. 344, 264 A.C.W.S. (3d) 825 | (Alta. Q.B., Mar 4, 2016)

1992 CarswellBC 315
Supreme Court of Canada

London Drugs Ltd. v. Kuehne & Nagel International Ltd.

1992 CarswellBC 315, 1992 CarswellBC 913, [1992] 3 S.C.R. 299, [1992] S.C.J. No. 84, [1993] 1 W.W.R. 1, [1993] B.C.W.L.D. 037, 13 C.C.L.T. (2d) 1, 143 N.R. 1, 18 B.C.A.C. 1, 31 W.A.C. 1, 36 A.C.W.S. (3d) 669, 43 C.C.E.L. 1, 73 B.C.L.R. (2d) 1, 97 D.L.R. (4th) 261, J.E. 92-1650, EYB 1992-67042

LONDON DRUGS LIMITED v. DENNIS GERRARD BRASSART and HANK VANWINKEL; KUEHNE & NAGEL INTERNATIONAL LTD. and FEDERAL PIONEER LIMITED (Third Parties); GENERAL TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 31 (Intervenor)

La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin, Stevenson [*] and Iacobucci JJ.

Heard: October 29, 1991
Judgment: October 29, 1992
Docket: Doc. 21980

Counsel: Richard B. Lindsay, Michael J. Jackson, for Appellant
Bryan G. Baynham, William S. Clark, for Respondents

Subject: Employment; Torts; Property; Contracts; Public

Related Abridgment Classifications

Contracts

II Parties to contract
II.4 Privity
II.4.b Third party beneficiary
II.4.b.i General principles

Contracts

VII Construction and interpretation
VII.9 Disclaimer clauses

Labour and employment law

II Employment law
II.4 Relationship to third parties
II.4.c Liability of employee to third parties

Personal property

II Bailment and warehousing

II.7 Hire of custody
II.7.a Bailee's liability to bailor for loss or damage
II.7.a.i Warehousing and storage
II.7.a.i.B Contractual limitation of liability

Headnote

Bailment and Warehousing --- Hire of custody — Bailee's liability to bailor for loss or damage — Warehousing and storage — Contractual limitation of liability

Contracts --- Parties to contract — Privity — Third party beneficiary — General

Employment Law --- Relationship to third parties — Liability of employee to third parties

Contracts — Parties — Privity — Warehouse employees in course of their duties negligently damaging transformer of warehouse customer — Employees owing duty of care to customer — Storage contract limiting "warehouseman's" liability — Customer bringing negligence action against employees for total damage — Supreme Court of Canada stating requirements for employees to benefit from limitation of liability clause in employer-customer contract — Warehouse employees meeting requirements.

Employment — Duties and liability of employee — Negligence — Warehouse employees in course of their duties negligently damaging transformer of warehouse customer — Employees owing duty of care to customer — Storage contract limiting "warehouseman's" liability — Customer bringing negligence action against employees for total damage — Supreme Court of Canada stating requirements for employees to benefit from limitation of liability clause in employer-customer contract — Warehouse employees meeting requirements.

Negligence — Defences — Releases and exclusion clauses — Warehouse employees in course of their duties negligently damaging transformer of warehouse customer — Employees owing duty of care to customer — Storage contract limiting "warehouseman's" liability — Customer bringing negligence action against employees for total damage — Supreme Court of Canada stating requirements for employees to benefit from limitation of liability clause in employer-customer contract — Warehouse employees meeting requirements.

Negligence — Duty and standard of care — Warehouse employees in course of their duties negligently damaging transformer of warehouse customer — Employees owing duty of care to customer — Storage contract limiting "warehouseman's" liability — Customer bringing negligence action against employees for total damage — Supreme Court of Canada stating requirements for employees to benefit from limitation of liability clause in employer-customer contract — Warehouse employees meeting requirements.

Negligence — Defences — Voluntary assumption of risk — Warehouse employees in course of their duties negligently damaging transformer of warehouse customer — Employees owing duty of care to customer — Storage contract limiting "warehouseman's" liability — Customer bringing negligence action against employees for total damage — Supreme Court of Canada stating requirements for employees to benefit from limitation of liability clause in employer-customer contract — Warehouse employees meeting requirements.

A customer entered into a written contract with a warehouse owner for the storage of its transformer. Clause 11(*a*) of the contract provided that the responsibility of a "warehouseman" was the reasonable care and diligence required by law. Clause 11(*b*) limited the liability of a "warehouseman" to $40. Clause 10(*e*) of the contract used the term "warehouse employee." When the contract was signed, the customer knew of the clause limiting liability. The customer chose not to obtain additional insurance from the warehouse owner and instead obtained its own

coverage. Two warehouse employees damaged the transformer while moving it. At the time, they were acting in the course of their employment and were performing services directly related to the contract. The customer brought action against the warehouse owner and its employees for breach of contract and negligence. The trial judge found the employees negligent in their handling of the transformer and found them personally liable for the full amount of damages. He limited the warehouse owner's liability to $40. The majority of the Court of Appeal allowed the employees' appeal and reduced their liability to $40. The customer was granted leave to appeal to the Supreme Court of Canada. The employees argued on cross-appeal that they should be completely free of liability.

Held:

Appeal and cross-appeal dismissed.

Per Iacobucci J. (L'HEUREUX-DUBÉ, SOPINKA AND CORY JJ. concurring): The employees owed a duty of care to the customer when handling the transformer. It was reasonably foreseeable to them that their negligence in handling the transformer would result in its damage. There was such a close relationship between the parties as to place a duty to exercise reasonable care on the employees. Reliance, as used here, goes to the existence of a duty of care owed and *not* to liability for breach of a duty of care. There is no general rule in Canada that an employee acting in the course of his or her employment and performing the "very essence" of the employer's contractual relations with a customer, does not owe a duty of care to the employer's customer. The question of whether a duty of care arises will depend on the circumstances. As the employees owed a duty of care to the customer in their handling of the transformer, the cross-appeal should be dismissed.

The doctrine of privity of contract has two distinct aspects. It precludes parties to a contract from imposing liabilities on third parties. It also prevents third parties from enforcing rights or benefits under a contract, even where the contract attempts to confer third party benefits. The doctrine of privity should be relaxed in the circumstances of this case, where a third party beneficiary was relying on a contractual provision as a defence in an action brought by one of the contracting parties. There would be no concerns about double recovery or floodgates of litigation brought by third party beneficiaries. The doctrine of privity fails to appreciate the special considerations which arise from the relationships of employer-employee and employer-customer. There is an identity of interest between the employer and its employees in performing the employer's contractual obligations. When an employer and its customer contract for services and include a clause limiting the liability of the employer for damages arising from conduct normally performed by the employer's employees, and in fact so performed, there is no valid reason to deny the benefit of the clause to those employees. The nature and scope of the limitation of liability clause would coincide essentially with the nature and scope of the contractual obligations performed by the employees. Upholding a strict application of the doctrine of privity here would also have the effect of allowing the customer to circumvent the limitation of liability clause to which it had expressly consented. It could not obtain more than $40 from the warehouse owner, in contract or in tort, because of the clause. However, resorting to exactly the same grounds, it attempted to obtain the full amount from the individual "warehousemen." Finally, there are sound policy reasons why the doctrine of privity should be refused here. A limitation of liability clause enables the contracting parties to allocate the risk of damage and to procure insurance accordingly. A prudent customer would not omit to obtain insurance because it was looking to employees for recovery. In addition, in this case the employees did not reasonably expect to be subject to unlimited liability for damages that occurred in performing a contract which limited the liability of the "warehouseman" to a fixed amount. It did not make commercial sense to hold that the term "warehouseman" was not intended to cover the employees. The doctrine of privity should not stand in the way of commercial reality and justice.

Employees should be entitled to benefit from a limitation of liability clause between their employer and its plaintiff customer if the following requirements are satisfied: 1) The limitation of liability clause must, either expressly or impliedly, extend the benefit to the employees seeking to rely on it; and 2) the employees seeking the benefit

of the clause must have been acting in the course of their employment *and* must have been performing the very services provided for in the contract between their employer and its plaintiff customer when the loss occurred. These requirements represent only an incremental change to the common law relating to privity of contract, and do not affect any recognized exceptions to privity of contract such as trust and agency. Here the only question was whether the employees were third party beneficiaries with respect to the limitation of liability clause so as to come within the first requirement of the test. The employees were *implied* third party beneficiaries. The use of the term "warehouse employee" in cl. 10(*e*) of the contract did not by itself preclude interpreting "warehouseman" in cl. 11(*b*) to implicitly include employees. When all the circumstances were taken into account, including the nature of the relationship between the employees and their employer, the identity of interest respecting contractual obligations, the fact that the customer knew that the employees would be involved in performing the contractual obligations, and the absence of a clear indication in the contract to the contrary, the term "warehouseman" in cl. 11(*b*) should be interpreted as meaning "warehousemen."

Per MCLACHLIN J.: Tort and contract constitute separate legal regimes. The customer's action against the employees was necessarily in tort, since there was no contract between it and the employees. The theory of voluntary assumption of risk permits an employee sued in tort to rely on a term of limitation in the employer's contract. On this theory, a plaintiff, having agreed to the limitation of liability vis-à-vis the employer, must be taken to have done so respecting the employer's employees. It has been characterized in two different ways: first as a negation or limitation of the duty of care; and second, as a waiver of an existing cause of action. The negation or limitation of duty of care approach looks at all the circumstances, including the contract, to determine what the common law duty between the parties was. The waiver approach assumes a standard duty of care, but assumes that the plaintiff's right to sue for that breach has been removed. Here the problem with the waiver approach was that the term "warehouseman" in the contract did not include the employees and it would be difficult to determine whether the court should imply a term including them. But voluntary assumption of risk can be grounded on a broader basis than waiver based on the contract's exclusion clause. Quite apart from the particular contract term, it could be argued that the circumstances giving rise to the tort duty, including the contract with its exemption of liability, were such that they limited the duty of care the employees owed the customer to damage under $40.

Per LA FOREST J. (dissenting in part): Two questions must be asked to determine whether a duty of care exists: 1) is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of the defendant, carelessness on its part might cause damage to the plaintiff? If so, 2) are there any considerations which ought to negative or limit a) the scope of the duty, and b) the class of persons to whom it is owed or c) the damages to which a breach of it may give rise? As the damage here was reasonably foreseeable, the first branch of the test was satisfied. Regarding the second branch, policy considerations may negate the existence of the duty. Courts must be sensitive to the impact that an imposition of tort liability would have on the contractual allocation of risk, whether the damage incurred is economic loss or property damage. Tort liability may be less likely to disrupt contractual arrangements in property damage cases than in economic loss cases. Where parties are not in contractual privity, such parties may be linked by a chain of contracts or not. The mere fact that this case involved property damage rather than economic loss could not eliminate inquiry into whether the recognition of a duty of care in these circumstances was justified on policy grounds. Although in the vast majority of property damage cases application of the foreseeability test suffices to found a duty of care, policy considerations should not be precluded.

Neither the *Warehouse Receipt Act* nor cl. 11(*b*) of the contract confirms or negates the existence of a duty owed by the warehouseman's employees; nor do they create such a duty. The Act does not apply to employees; it is limited to a "warehouseman." Accordingly, the scope of any duty a warehouseman's employees may have to the warehouseman or its customers must be determined under the common law principles of tort. The vicarious liability regime, which considers the employer to be vicariously liable for the acts of its employee, is best seen as a response to a number of policy concerns. The vicarious liability regime not only ensures that the employer guarantees the employee's primary liability, it has the broader function of transferring to the business itself the risks created by the activity of its agents.

Elimination of the employee's liability is practically compelled by the developing logic of the vicarious liability regime. In our modern economy, an employee's capacity to cause loss does not bear any relation to his or her salary. Moreover, the employer will almost always be insured against the risk of being held liable to third parties through vicarious liability: the cost of such liability is thus internalized to the profitable activity that gives rise to it. Imposing tort liability on the employee in these circumstances cannot be justified by the need to deter careless behaviour. Employees subject themselves to discipline by refusal to perform work as instructed. The critical policy concern here that would be raised by the elimination of the employees' liability is that of compensation. In the vast majority of cases eliminating the employee's liability will have no impact on the plaintiff's compensation. Nonetheless, the employer may not be available as a source of compensation. In cases where there are no "contractual overtones" concerning the plaintiff, as between the plaintiff and the negligent employee the employee must be held liable for property damage and personal injury caused to the plaintiff. As between the employee and the employer, the employer should still bear the risk even in this kind of case. Such cases can be distinguished from the present case. When a planned transaction is involved, there are foreseeable risks and thus the possibility of allocating those risks in advance. This circumstance must be taken into account, even if the plaintiff's action is in tort. Where the plaintiff has suffered injury to his or her property pursuant to contractual relations with a company, he or she can be considered to have chosen to deal *with a company*. Here the customer relied upon performance by the corporate warehouse owner, and upon the liability of that body if the services were negligently performed. It could not be regarded as relying on the employees' liability, nor could the employees be taken here to appreciate that the customer was relying on them for compensation. A plaintiff who chooses to deal with a limited company can be held to have voluntarily assumed the risk that the company will be unable to satisfy a judgment. A plaintiff should not be able to shift that risk to an employee by claiming in tort concurrently with contract. The customer and the warehouse owner allocated the risk between themselves. However, the employees had no real opportunity to decline the risk. It would be ill-advised to place the onus on employees to contract out of their tort liability, even in a collective bargaining context. Policy reasons strongly supported a finding of no duty on the employees on the facts of this case. Because of the proximity created by contract, the employer owed a duty of care to the customer and was vicariously liable for its employees' negligent acts.

For employees to be liable, specific and reasonable reliance on such employees is necessary where the law provides for the possibility of compensation through recourse to the employer. It is also necessary where the employees have no real opportunity to decline the risk. Reliance on an ordinary employee will rarely if ever be reasonable in the absence of an express or implied undertaking of responsibility by the employee to the plaintiff. Mere performance of the contract by the employee, without more, is not evidence of such an undertaking. Reliance by the customer on the employees was not reasonable here.

The employee remains liable to the plaintiff for independent torts. The liability of the employer to the plaintiff is determined under the ordinary vicarious liability rules. If the tort is related to the contract, one must resolve whether any reliance by the plaintiff on the employee was reasonable. Here the tort was related to the contract and any reliance by the customer on the employees was not reasonable.

Table of Authorities

Cases considered:

Considered by majority:

Adler v. Dickson, [1955] 1 Q.B. 158, [1954] 3 All E.R. 397 (C.A.) — *considered*

Anns v. Merton London Borough Council, [1978] A.C. 728, (sub nom. *Anns v. London Borough Council of Merton)* [1977] 2 All E.R. 492 (H.L.) — *considered*

Ataya v. Mutual of Omaha Insurance Co., [1988] I.L.R. 1-2316, 34 C.C.L.I. 307 [additional reasons at (1988), 34 C.C.L.I. 307 at 318] (B.C.S.C.) — *referred to*

B.D.C. Ltd. v. Hofstrand Farms Ltd., [1986] 1 S.C.R. 228, [1986] 3 W.W.R. 216, 1 B.C.L.R. (2d) 324, *(*sub nom. *Hofstrand Farms Ltd. v. British Columbia)* 36 C.C.L.T. 87, 33 B.L.R. 293, 26 D.L.R. (4th) 1, 65 N.R. 261 — *considered*

Beswick v. Beswick, [1966] Ch. 538, [1966] 3 All E.R. 1, affirmed [1968] A.C. 58, [1967] 2 All E.R. 1197 (H.L.) — *referred to*

Canadian General Electric Co. v. Pickford & Black Ltd., [1971] S.C.R. 41, 2 N.S.R. (2d) 497, 14 D.L.R. (3d) 372 — *distinguished*

Canadian Pacific Hotels Ltd. v. Bank of Montreal, [1987] 1 S.C.R. 711, 41 C.C.L.T. 1, 77 N.R. 161, 21 O.A.C. 321, 40 D.L.R. (4th) 385 — *referred to*

Car & General Insurance Corp. v. Seymour, [1956] S.C.R. 322, 2 D.L.R. (2d) 369 — *applied*

Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147, *(*sub nom. *Central & Eastern Trust Co. v. Rafuse)* 37 C.C.L.T. 117, 42 R.P.R. 161, 34 B.L.R. 187, 31 D.L.R. (4th) 481, 75 N.S.R. (2d) 109, 186 A.P.R. 109, 69 N.R. 321 [varied [1988] 1 S.C.R. 1206, 44 C.C.L.T. xxxiv] — *considered*

Choate, Hall & Stewart v. SCA Services Inc., 392 N.E. 2d 1045 (Mass. Sup. Ct., 1979) — *considered*

Cominco Ltd. v. Bilton, [1971] S.C.R. 413, 15 D.L.R. (3d) 60 — *referred to*

Coulls v. Bagot's Executor & Trustee Co., [1967] A.L.R. 385 (H.C.) — *considered*

Crocker v. Sundance Northwest Resorts Ltd., [1988] 1 S.C.R. 1186, 44 C.C.L.T. 225, 86 N.R. 241, 29 O.A.C. 1, 51 D.L.R. (4th) 321, [1988] R.R.A. 444 — *referred to*

Donoghue v. Stevenson, [1932] A.C. 562 (H.L.) — *referred to*

Drive Yourself Hire Co. (London) v. Strutt, [1954] 1 Q.B. 250, [1953] 2 All E.R. 1475 (C.A.) — *referred to*

Dunlop Pneumatic Tyre Co. v. Selfridge & Co., [1915] A.C. 847 (H.L.) — *referred to*

Dyck v. Manitoba Snowmobile Assn. Inc., [1985] 1 S.C.R. 589, [1985] 4 W.W.R. 319, 32 C.C.L.T. 153, 32 M.V.R. 192, 35 Man. R. (2d) 22, 18 D.L.R. (4th) 635 — *referred to*

East Kootenay Community College v. Nixon & Browning (1988), 28 C.L.R. 189 (B.C.S.C.) — *referred to*

Elder, Dempster & Co. v. Paterson, Zochonis & Co., [1924] A.C. 522 (H.L.) — *considered*

Employers Casualty Co. v. Wainwright, 473 P. 2d 181 (Colo. Ct. App., 1970) [certiorari denied August 27, 1970] — *referred to*

Greenwood Shopping Plaza Ltd. v. Beattie, [1980] 2 S.C.R. 228, 10 B.L.R. 234, 111 D.L.R. (3d) 257, 39 N.S.R. (2d) 119, 71 A.P.R. 119, [1980] I.L.R. 1-1243, 32 N.R. 163 — *distinguished*

Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.) — *considered*

ITO-International Terminal Operators Ltd. v. Miida Electronics Inc., [1986] 1 S.C.R. 752, (sub nom. *Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.*) 68 N.R. 241, 28 D.L.R. (4th) 641, 34 B.L.R. 251 [reversing in part [1982] 1 F.C. 406, 37 N.R. 396, 124 D.L.R. (3d) 33] — *considered*

J. Nunes Diamonds Ltd. v. Dominion Electric Production Co., [1972] S.C.R. 769, 26 D.L.R. (3d) 699 — *considered*

Junior Books Ltd. v. Veitchi Co., [1983] 1 A.C. 520, [1982] 3 All E.R. 201 (H.L.) — *considered*

Lawrence v. Fox, 20 N.Y. 268 (1859) — *considered*

Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986, 40 C.C.E.L. 1, 92 C.L.L.C. 14,022, 91 D.L.R. (4th) 491, (sub nom. *Lefebvre v. HOJ Industries Ltd.*) 136 N.R. 40, 53 O.A.C. 200 — *referred to*

Mayfair Fabrics v. Henley, 244 A. 2d 344 (N.J. Super. Ct., 1968) — *referred to*

Moss v. Richardson Greenshields of Canada Ltd., [1989] 3 W.W.R. 50, 56 Man. R. (2d) 230 (C.A.) — *referred to*

New Zealand Shipping Co. v. A.M. Satterthwaite & Co., [1975] A.C. 154, [1974] 1 All E.R. 1015, [1974] 1 N.Z.L.R. 505 (P.C.) — *considered*

Nielsen v. Kamloops (City), [1984] 2 S.C.R. 2, [1984] 5 W.W.R. 1, 29 C.C.L.T. 97, 26 M.P.L.R. 81, 8 C.L.R. 1, 10 D.L.R. (4th) 641, 54 N.R. 1 — *referred to*

Northwestern Mutual Insurance Co. v. J.T. O'Bryan & Co., [1974] 5 W.W.R. 322, [1974] I.L.R. 1-639, 51 D.L.R. (3d) 693 (B.C.C.A.) — *referred to*

Norwich City Council v. Harvey, [1989] 1 W.L.R. 828, [1989] 1 All E.R. 1180 (C.A.) — *referred to*

Olsson v. Dyson, 120 C.L.R. 365, [1969] A.L.R. 443 (H.C.) — *referred to*

Pacific Associates Inc. v. Baxter, [1990] 1 Q.B. 993, [1989] 2 All E.R. 159 (C.A.) — *considered*

Port Jackson Stevedoring Pty. v. Salmond & Spraggon (Australia) Pty.; "New York Star" (The), [1981] 1 W.L.R. 138, [1980] 3 All E.R. 257 (P.C.) — *referred to*

R. v. Salituro, [1991] 3 S.C.R. 654, 9 C.R. (4th) 324, 68 C.C.C. (3d) 289, 131 N.R. 161, 50 O.A.C. 125, 8 C.R.R. (2d) 173 — *considered*

R.M. & R. Log Ltd. v. Texada Towing Co. (1967), 62 D.L.R. (2d) 744, [1968] 1 Ex. C.R. 84 — *referred to*

Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297, 3 L. Ed. 2d 820, 79 S. Ct. 766 (1959) — *referred to*

Scruttons Ltd. v. Midland Silicones Ltd., [1962] A.C. 446, [1962] 1 All E.R. 1 (H.L.) — *considered*

Sealand of the Pacific Ltd. v. Robert C. McHaffie Ltd., [1974] 6 W.W.R. 724, 51 D.L.R. (3d) 702 (B.C.C.A.) — *referred to*

Smith & Snipes Hall Farm Ltd. v. River Douglas Catchment Board, [1949] 2 K.B. 500, [1949] 2 All E.R. 179 (C.A.) — *referred to*

Summitville Consolidated Mining Co. v. Klohn Leonoff Ltd. (July 6, 1989), Doc. Vancouver C880756 (B.C.S.C.) — *referred to*

Swain v. Law Society, [1983] A.C. 598, [1982] 2 All E.R. 827 (H.L.) — *referred to*

Toronto-Dominion Bank v. Guest (1979), 16 B.C.L.R. 174, 10 C.C.L.T. 256, 105 D.L.R. (3d) 347 (S.C.) — *referred to*

Trident General Insurance Co. v. McNiece Brothers Pty. (1988), 80 A.L.R. 574 (H.C.) — *considered*

Tweddle v. Atkinson (1861), 1 B. & S. 393, 121 E.R. 762 — *referred to*

Watkins v. Olafson, [1989] 2 S.C.R. 750, [1989] 6 W.W.R. 481, 39 B.C.L.R. (2d) 294, 50 C.C.L.T. 101, 100 N.R. 161, 61 D.L.R. (4th) 577, 61 Man. R. (2d) 81 — *applied*

Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd., [1980] 1 W.L.R. 277, [1980] 1 All E.R. 571 (H.L.) — *considered*

Considered by La Forest J.:

Adler v. Dickson, [1955] 1 Q.B. 158, [1954] 3 All E.R. 397 (C.A.) — *considered*

Anns v. Merton London Borough Council, [1978] A.C. 728, *(*sub nom. *Anns v. London Borough Council of Merton)* [1977] 2 All E.R. 492 (H.L.) — *applied*

Ataya v. Mutual of Omaha Insurance Co., [1988] I.L.R. 1-2316, 34 C.C.L.I. 307 [additional reasons at (1988), 34 C.C.L.I. 307 at 318] (B.C.S.C.) — *distinguished*

B.D.C. Ltd. v. Hofstrand Farms Ltd., [1986] 1 S.C.R. 228, [1986] 3 W.W.R. 216, 1 B.C.L.R. (2d) 324, *(*sub nom. *Hofstrand Farms Ltd. v. British Columbia)* 36 C.C.L.T. 87, 33 B.L.R. 293, 26 D.L.R. (4th) 1, 65 N.R. 261 — *considered*

British Columbia Automobile Assn. v. Manufacturers Life Insurance Co. (1979), 14 B.C.L.R. 237 [additional reasons at (1980), 21 B.C.L.R. 75, reversed (1981), 29 B.C.L.R. 330 (C.A.)] — *distinguished*

Canadian National Railway Co. v. Norsk Pacific Steamship Co., [1992] 1 S.C.R. 1021, 11 C.C.L.T. (2d) 1, 137 N.R. 241, 91 D.L.R. (4th) 289 — *considered*

Cattle v. Stockton Waterworks Co. (1875), L.R. 10 Q.B. 453 — *considered*

Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147, *(*sub nom. *Central & Eastern Trust Co. v. Rafuse)* 37 C.C.L.T. 117, 42 R.P.R. 161, 34 B.L.R. 187, 31 D.L.R. (4th) 481, 75 N.S.R. (2d) 109, 186 A.P.R. 109, 69 N.R. 321 [varied [1988] 1 S.C.R. 1206, 44 C.C.L.T. xxxiv] — *considered*

Cominco Ltd. v. Bilton, [1971] S.C.R. 413, 15 D.L.R. (3d) 60 — *distinguished*

Constellation Hotel Corp. v. Orlando Corp. (July 6, 1983), Doc. 717/83 (Ont. H.C.), 20 A.C.W.S. (2d) 482, reversed (January 12, 1984) (Ont. C.A.) — *considered*

Co-operators Insurance Assn. v. Kearney, [1965] S.C.R. 106, 48 D.L.R. (2d) 1 — *considered*

Dominion Chain Co. v. Eastern Construction Co. (1976), 12 O.R. (2d) 201, 1 C.P.C. 13, 68 D.L.R. (3d) 385 (C.A.) [affirmed *(*sub nom. *Giffels Associates Ltd. v. Eastern Construction Co.)* [1978] 2 S.C.R. 1346, 4 C.C.L.T. 143, 5 C.P.C. 223, 84 D.L.R. (3d) 344, 19 N.R. 298] — *considered*

Donoghue v. Stevenson, [1932] A.C. 562 (H.L.) — *considered*

Durham Condominium Corp. No. 34 v. Shoreham Apartments Ltd. (May 11, 1982) (Ont. S.C.) [unreported] — *considered*

East Kootenay Community College v. Nixon & Browning (1988), 28 C.L.R. 189 (B.C.S.C.) — *distinguished*

Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd., [1991] 4 W.W.R. 251, 53 B.C.L.R. (2d) 180, 44 C.L.R. 88, 7 C.C.L.T. (2d) 177, 1 B.L.R. (2d) 188, leave to appeal to S.C.C. granted [1992] 4 W.W.R. lxix, 68 B.C.L.R. (2d) xxxi — *referred to*

Elder, Dempster & Co. v. Paterson, Zochonis & Co., [1924] A.C. 522 (H.L.) — *referred to*

Great West Steel Industries Ltd. v. Arrow Transfer Co. (1977), 75 D.L.R. (3d) 424 (B.C.S.C.) — *considered*

Greenwood Shopping Plaza Ltd. v. Beattie, [1980] 2 S.C.R. 228, 10 B.L.R. 234, 111 D.L.R. (3d) 257, 39 N.S.R. (2d) 119, 71 A.P.R. 119, [1980] I.L.R. 1-1243, 32 N.R. 163, reversing (sub nom. *Greenwood Shopping Plaza Ltd. v. Neil J. Buchanan Ltd.*) (1979), 31 N.S.R. 135, 52 A.P.R. 135, which affirmed (1978), 31 N.S.R. (2d) 1, 52 A.P.R. 1 [additional reasons at (1978), 34 N.S.R. (2d) 217, 59 A.P.R. 217] — *distinguished*

Hamilton v. Farmers' Ltd., 31 M.P.R. 343, [1953] 3 D.L.R. 382 (C.A.) — *considered*

Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.) — *considered*

Herrington v. Kenco Mortgage & Investment Ltd. (1981), 29 B.C.L.R. 54, 125 D.L.R. (3d) 377 (S.C.) — *considered*

ITO-International Terminal Operators Ltd. v. Miida Electronics Inc., [1986] 1 S.C.R. 752, *(*sub nom. *Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.)* 68 N.R. 241, 28 D.L.R. (4th) 641, 34 B.L.R. 251 — *referred to*

J. Nunes Diamonds Ltd. v. Dominion Electric Production Co., [1972] S.C.R. 769, 26 D.L.R. (3d) 699 — *considered*

Johnson Matthey & Co. v. Constantine Terminals Ltd., [1976] 2 Lloyd's Rep. 215 (Q.B.) — *referred to*

Junior Books Ltd. v. Veitchi Co., [1983] 1 A.C. 520, [1982] 3 All E.R. 201 (H.L.) — *considered*

Kamahap Enterprises Ltd. v. Chu's Central Market Ltd. (1989), [1990] 1 W.W.R. 632, 40 B.C.L.R. (2d) 288, 1 C.C.L.T. (2d) 55, 64 D.L.R. (4th) 167 (C.A.) — *considered*

Kooragang Investments Pty. v. Richardson & Wrench Ltd., [1982] A.C. 462, [1981] 3 All E.R. 65 (P.C.) — *considered*

Leigh & Sillavan Ltd. v. Aliakmon Shipping Co., [1986] A.C. 785, [1986] 2 All E.R. 145 (H.L.) — *considered*

Lennard's Carrying Co. v. Asiatic Petroleum Co., [1915] A.C. 705 (H.L.) — *considered*

Leon Kentridge Associates v. Save Toronto's Official Plan Inc. (March 27, 1990), Conant D.C.J. (Ont. Dist. Ct.) [unreported] — *considered*

Lister v. Romford Ice & Cold Storage Co., [1957] A.C. 555, [1957] 1 All E.R. 125 (H.L.) — *considered*

Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986, 40 C.C.E.L. 1, 92 C.L.L.C. 14,022, 91 D.L.R. (4th) 491, *(*sub nom. *Lefebvre v. HOJ Industries Ltd.)* 136 N.R. 40, 53 O.A.C. 200 — *considered*

Morris v. Ford Motor Co., [1973] 1 Q.B. 792, [1973] 2 All E.R. 1084 (C.A.) — *considered*

Moss v. Richardson Greenshields of Canada Ltd., [1989] 3 W.W.R. 50, 56 Man. R. (2d) 230 (C.A.) — *applied*

Murphy v. Brentwood District Council, [1991] 1 A.C. 398, [1990] 2 All E.R. 908 (H.L.) — *considered*

New Brunswick Telephone Co. v. John Maryon International Ltd. (1982), 43 N.B.R. (2d) 469, 113 A.P.R. 469, 141 D.L.R. (3d) 193, 24 C.C.L.T. 146 (C.A.) — *considered*

Nielsen v. Kamloops (City), [1984] 2 S.C.R. 2, [1984] 5 W.W.R. 1, 29 C.C.L.T. 97, 26 M.P.L.R. 81, 8 C.L.R. 1, 10 D.L.R. (4th) 641, 54 N.R. 1 — *applied*

Northwestern Mutual Insurance Co. v. J.T. O'Bryan & Co., [1974] 5 W.W.R. 322, [1974] I.L.R. 1-639, 51 D.L.R. (3d) 693 (B.C.C.A.) — *not followed*

Norwich City Council v. Harvey, [1989] 1 W.L.R. 828, [1989] 1 All E.R. 1180 (C.A.) — *referred to*

O'Keefe v. Ontario Hydro (1980), 29 Chitty's L.J. 232 (Ont. H.C.) — *referred to*

Pacific Associates Inc. v. Baxter, [1990] 1 Q.B. 993, [1989] 2 All E.R. 159 (C.A.) — *referred to*

Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co. (1988), [1989] 1 W.W.R. 673, 30 B.C.L.R. (2d) 273, 46 C.C.L.T. 112, 54 D.L.R. (4th) 43 (C.A.) — *referred to*

Rivtow Marine Ltd. v. Washington Iron Works, [1974] S.C.R. 1189, [1973] 6 W.W.R. 692, 40 D.L.R. (3d) 530 — *considered*

Rothfield v. Manolakos, [1989] 2 S.C.R. 1259, [1990] 1 W.W.R. 408, 41 B.C.L.R. (2d) 374, (sub nom. *Manolakos v. Gohmann*) 46 M.P.L.R. 217, 1 C.C.L.T. (2d) 233, 63 D.L.R. (4th) 449, (sub nom. *Manolakos v. Vernon (City)*) 102 N.R. 249 [application for rehearing refused [1990] 1 W.W.R. lxxii, 46 M.P.L.R. 217n, 1 C.C.L.T. (2d) 233n] — *considered*

Salomon v. Salomon & Co., [1897] A.C. 22 (H.L.) — *considered*

Scruttons Ltd. v. Midland Silicones Ltd., [1962] A.C. 446, [1962] 1 All E.R. 1 (H.L.) — *considered*

Sealand of the Pacific Ltd. v. Robert C. McHaffie Ltd., [1974] 6 W.W.R. 724, 51 D.L.R. (3d) 702 (B.C.C.A.) — *applied*

Staveley Iron & Chemical Co. v. Jones, [1956] A.C. 627, [1956] 1 All E.R. 403 (H.L.) — *considered*

Summitville Consolidated Mining Co. v. Klohn Leonoff Ltd. (July 6, 1989), Doc. Vancouver C880756 (B.C.S.C.) — *applied*

Surrey (District) v. Carroll-Hatch & Associates Ltd., [1979] 6 W.W.R. 289, 14 B.C.L.R. 156, 10 C.C.L.T. 226, 101 D.L.R. (3d) 218 (C.A.) — *considered*

Toronto-Dominion Bank v. Guest (1979), 16 B.C.L.R. 174, 10 C.C.L.T. 256, 105 D.L.R. (3d) 347 (S.C.) — *distinguished*

Winterbottom v. Wright (1842), 10 M. & W. 109, 152 E.R. 402 — *not followed*

Statutes considered:

Civil Code of Lower Canada

art. 1023*considered*

art. 1029*considered*

Civil Code of Quebec, S.Q. 1991, c. 64

arts. 1444-50*considered*

Company Act, R.S.B.C. 1979, c. 59

s. 16*referred to*

s. 130*referred to*

Contracts (Privity) Act 1982, Stat. N.Z. 1982, No. 132

s. 2*considered*

s. 4*considered*

Engineers Act, R.S.B.C. 1979, c. 109

s. 10(5)*referred to*

Ministry of Correctional Services Act, R.S.O. 1990, c. M.22

s. 12*referred to*

Negligence Act, R.S.B.C. 1979, c. 298

s. 4*referred to*

Proceedings Against the Crown Act, R.S.O. 1990, c. P.27

s. 5*considered*

Property Law Act 1969, W. Aust. Acts 1969, No. 32

s. 11*referred to*

Property Law Act 1974, Queensl. Stat. 1974, No. 76

s. 55*referred to*

Warehouse Receipt Act, R.S.B.C. 1979, c. 428

s. 1 "warehouseman"*considered*

s. 2(4)*considered*

s. 13*considered*

Water Carriage of Goods Act, R.S.C. 1952, c. 291

Sched., art. IV(5)*referred to*

Words and phrases considered:

independent tort

planned transaction

warehouseman

Appeal and Cross-appeal from judgment of British Columbia Court of Appeal, [1990] 4 W.W.R. 289, 45 B.C.L.R. (2d) 1, 31 C.C.E.L. 67, 2 C.C.L.T. (2d) 161, 70 D.L.R. (4th) 51, reversing judgment of Trainor J., [1986] 4 W.W.R. 183, 2 B.C.L.R. (2d) 181, allowing customer's negligence action against warehouse employees.

***La Forest J.*, (dissenting on the cross-appeal):**

[Publisher's Note: The full-text reasons have been modified to reflect editorial revisions published in the Supreme Court Reports.]

Introduction

1 In this case, the appellant seeks to recover damages against the respondent employees for their negligence in the performance of a duty their employer undertook by contract to do. The issues are whether the employees have a duty in tort towards the appellant and, if so, whether a clause in the contract limiting the employer's liability in the performance of the duty will serve to protect the employees as well.

2 My colleague Justice Iacobucci has set out the facts and judicial history of the appeal, but for convenience I shall briefly reiterate the facts. The appellant London Drugs Limited purchased a transformer for its new warehouse facility and arranged for storage of the transformer with Kuehne & Nagel International Ltd. (KNI). London Drugs knew or can be taken to have known that KNI was a limited liability company and that KNI's employees would be responsible for carrying out the contract. The terms of storage were set forth in a standard form contract, which included a limitation of liability clause limiting the warehouseman's liability to $40. This clause having been brought to its attention, London Drugs declined to purchase extra insurance through KNI and chose instead to arrange for its own all-risk coverage. The defendant employees, Dennis Gerrard Brassart and Hank Vanwinkel, having received orders to load the transformer onto a truck which would deliver it to London Drugs' new warehouse, negligently damaged the transformer and caused damages in the amount of $33,955.41. The trial judge allowed the action against Vanwinkel and Brassart for the full amount of the damage but limited judgment against KNI to $40 in accordance with the terms of the contract. The Court of Appeal of British Columbia, sitting as a panel of five, limited judgment against both the employees and KNI to $40.

3 I have had the benefit of reading the reasons of my colleagues McLachlin and Iacobucci JJ. Both would decide this case by applying the clause in the contract limiting the liability of the employer (KNI) to the employees, McLachlin J. on the basis of a tort analysis, Iacobucci J. in terms of a contractual analysis. For reasons that will appear, however, I think the best solution would be to hold that the respondent employees did not, in the circumstances of this case, owe any duty to the appellant. Although my colleagues have given this possibility short shrift, I think it deserves more extensive examination.

4 In my view, before turning to the examination of any specific provision of the contract between the employer and the customer, it is necessary to consider the difficult issue of whether the employees had any duty of care to the appellant. Such an approach has the advantage of being more comprehensive, since it is not dependent on the specific terms of the employer's contract with the customer. The issue, was raised by the parties before all the courts that have heard the case and is the object of conflicting jurisprudence. At all events, the question of the duty of care determines whether Vanwinkel and Brassart are jointly liable with KNI for the $40 or whether KNI alone will be liable for that amount.

5 The latter point was what impelled me to write. My colleagues have ably advanced views that seem to me to be tenable and I was particularly attracted to Iacobucci J.'s view, which would go a long way towards ridding us of many of the consequences of that pestilential nuisance, privity. However, the difficulty with accepting their positions in the present context is that it would have the effect, given the manner in which the case has come to us, of barring us from subsequently dealing with the underlying issues in a comprehensive way. For what their approaches do is to focus on an incidental aspect of the matter — the fact that London Drugs and KNI inserted a clause in their contract allocating liability as between themselves. But the real issue is no different from what it would be if no such clause appeared in the contract. Ultimately what we are concerned with is whether it is appropriate to impose a duty on employees to compensate their employers or those who contract with them for the employees' negligence in carrying out an activity the contracting parties have set in motion. Reading the limiting clause as applying by implication to the employees or as restricting their tort liability is simply to reach out for a convenient device that partially solves the problem, but which depends on underlying policies applicable to the whole problem — whether the employees should be subject to a duty of care for ordinary, and so foreseeable negligence, in performing work arising out of the contract.

6 My colleagues justify their unwillingness to enter into the matter on the basis of what they perceive as the proper institutional role of the courts in modifying law and suggest that it should be left to the legislature. I do not agree. The relevant law, the doctrine of vicarious liability, is a judicial creation devised in Holmes' phrase, in response to "the felt necessities of the time". In my view, like the judges who created the doctrine, it is incumbent on present day judges to

adapt the law to new and evolving social and organizational realities. The present situation, it seems to me, is ideally suited to a principled case by case approach, subject to legislative intervention if need be to meet special situations not easily resolvable by doctrinal development. Compared to other areas, economic loss for example, into which courts have ventured without any prompting by the legislature, employee liability does not appear to raise that formidable a doctrinal task. On the other hand, a general legislative response seems inappropriate to a task that requires great sensitivity to the specific context in which a claim arises. The courts created the law; it is up to them to adapt it to meet modern needs.

7 As I mentioned, my colleagues say very little about this duty of care issue. Nor can much help be derived from the reasons in the courts below, possibly because it has so little practical importance in the present case. It means a variation of $40 in the amount granted by the Court of Appeal. Its importance in other situations, however, is far from negligible, and the manner in which my colleagues have dealt with the case precludes our taking what appears to me the proper approach to the problem in different fact situations.

8 Of the judges in the Court of Appeal, only Lambert J.A. clearly addressed the question of the employees' duty of care in the absence of a contractual limitation clause. He found that "if there were no express contract governing the storage", he would have had no hesitation in saying that the two employees were directly liable to the customer London Drugs ((1990), 45 B.C.L.R. (2d) 1, at p. 40).

9 McEachern C.J. expressly declined to address the question. He stated, at p. 28:

> **(3) Do employees owe any duty of care except to their employer?**
>
> While Mr. Baynham did not stress this argument, he cited cases such as *Sealand* and *Summitville* where the contract did not limit the employer's liability. It is unnecessary to deal with this question and I prefer to leave it to be decided, if necessary, when it arises squarely for decision.
>
> [Italics in original, emphasis added.]

Earlier in his judgment, McEachern C.J.B.C. had already expressly declined to consider the general question of the duty of care because of the existence of the limitation clause in this case (at p. 23). He did, however, apparently jump to the conclusion that the employees owed a duty of care for the purposes of his disposition of the case, but in light of his express refusal to consider the issue of the duty of care in the relevant part of his judgment and his failure to consider at any length the cases cited by counsel or the policy issues, I do not place great significance on this conclusion.

10 Wallace J.A. examined the recent English cases applying the "just and reasonable" test at length. He noted that in the absence of special circumstances that would negate or qualify their duty of care, the employees would be liable for the damage to the transformer: citing *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.). Accordingly, the question that fell to be decided was (at p. 69): what are the circumstances that would qualify or negate the *prima facie* duty of care required of employees of the warehouse? He concurred with the finding of Purchas L.J. in *Pacific Associates Inc. v. Baxter*, [1990] 1 Q.B. 993, [1989] 2 All E.R. 159 (C.A.), at p. 1011, that "this question can only be answered in the context of the factual matrix including especially the contractual structure against which such duty is said to arise". He considered that "[t]he principle that, where the relationship between the parties arises from a contract, the contractual structure may well qualify or negate any liability in tort, is well recognized" (at p. 78), and referred notably to *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, *(*sub nom. *Central & Eastern Trust Co. v. Rafuse)* 37 C.C.L.T. 117, 42 R.P.R. 161, 34 B.L.R. 187, 31 D.L.R. (4th) 481, 75 N.S.R. (2d) 109, 186 A.P.R. 109, 69 N.R. 321, in this regard. However, Wallace J.A. limited his consideration of the impact of the contractual structure to the single question of the impact of the limitation of liability clause. He did not consider any of the cases cited by counsel to which I shall later refer where the issue of the duty of care of an employee in the absence of such a clause was specifically considered.

11 Two judges in the Court of Appeal did not find a duty of care to exist. Hinkson J.A. concluded that the employees did not owe any duty of care, although he based that conclusion on the contractual limitation of liability clause. Southin J.A. found that the duty of care issue was irrelevant since she considered that the case sounded in trespass.

12 The trial judge decided that "there is no general rule that an employee cannot be sued for tort committed in the course of carrying out the very services for which the plaintiff had contracted with his employer" ((1986), 2 B.C.L.R. (2d) 181, at p. 189).

The Duty of Care Since Anns

General

13 The duty of care issue was reviewed by this Court in *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2, [1984] 5 W.W.R. 1, 29 C.C.L.T. 97, 26 M.P.L.R. 81, 8 C.L.R. 1, 10 D.L.R. (4th) 641, 54 N.R. 1. In that case Wilson J., speaking for the majority, adopted the criteria for determining the question set forth by Lord Wilberforce in *Anns v. Merton London Borough Council*, [1978] A.C. 728, (sub nom. *Anns v. London Borough Council of Merton)* [1977] 2 All E.R. 492 (H.L.). She restated in the following way the two questions that must be asked in order to determine whether a duty of care exists (at pp. 10-11):

> (1) is there a sufficiently close relationship between the parties ... so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,
>
> (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

14 I agree with McLachlin J. that *Anns*, as adopted by this Court in *Kamloops* and *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259, [1990] 1 W.W.R. 408, 41 B.C.L.R. (2d) 374, (sub nom. *Manolakos v. Gohmann)* 46 M.P.L.R. 217, 1 C.C.L.T. (2d) 233, 63 D.L.R. (4th) 449, (sub nom. *Manolakos v. Vernon (City))* 102 N.R. 249, governs this case. I agree with both my colleagues that the damage in question in this case was reasonably foreseeable and that as a result, the first branch of the *Anns* test is satisfied. In my view, the second branch of the *Anns* test is broad enough to allow for the consideration, where relevant, of the factors the English courts have considered in the context of their just and reasonable test. It is now well established that policy considerations may in fact negate the existence of the duty; see *Central Trust Co. v. Rafuse*, *supra*; *Leigh & Sillavan Ltd. v. Aliakmon Shipping Co.*, [1986] A.C. 785, [1986] 2 All E.R. 145 (H.L.) ; *Norwich City Council v. Harvey*, [1989] 1 W.L.R. 828, [1989] 1 All E.R. 1180 (C.A.); *Pacific Associates v. Baxter*, *supra*.

The Application of the Second Branch of Anns: Property Damage and Economic Loss

15 In my view, in applying *Anns* and *Rafuse*, the courts must be vigilant to guide the development of concurrent liability in such a manner as to avoid unacceptable results. In *New Brunswick Telephone Co. v. John Maryon International Ltd.* (1982), 43 N.B.R. (2d) 469, 113 A.P.R. 469, 141 D.L.R. (3d) 193, 24 C.C.L.T. 146 (C.A.), I surveyed a number of the potential difficulties and juridical solutions in the context of concurrent liability between two parties. I stated, at p. 512:

> The question may also arise regarding the application of this general approach [the concurrent application of tort and contract] to certain fact situations; for example sales of real estate by the owner as occurred in *McGrath v. Maclean et al.* [(1979), 95 D.L.R. (3d) 144, 22 O.R. (2d) 784 (C.A.)]. But if it is felt the principle advanced here should not be applied to such cases, it could be distinguished either on general policy or the particular facts of a situation on the basis of an implied term (for example caveat emptor) read into the contract having regard to the relation of the parties or on the ground that there is no duty of care under such circumstances. Such an approach has the advantage that it is based on policy or factual grounds rather than mere formalism.

16 The problems posed by the concurrent application of contract and tort in a two-party context pale in comparison with the difficulties raised by the extensive overlapping of tort and contract claims in multi-party contexts. Rules and approaches that were acceptable or at least tolerable in the relatively narrow field of tort liability that existed before the full development of the concurrent application of the two regimes of liability may need to be re-examined. The extent of overlap is obviously most acute in cases of economic loss, and the court must take due account, neither more nor less,

of the contractual context in which the alleged tort duty is said to exist; see my reasons in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, 11 C.C.L.T. (2d) 1, 137 N.R. 241, 91 D.L.R. (4th) 289. But the critical new interaction of tort and contract is not limited to cases involving economic loss. In the vast new areas in which tort applies in conjunction with contract, *Rafuse*, or in contexts with contractual overtones, *Norsk* and the case at bar, sensitive approaches will be required. The relaxation of privity by Iacobucci J. in this case is an example of that adaptation. So too is the application by McLachlin J. of the theory of voluntary assumption of risk.

17 This case involves a claim for property damage. Undoubtedly, if the case involved economic loss, the court would undertake a searching inquiry into policy concerns under the second branch of *Anns* before concluding as to the existence of a duty of care; see *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228, [1986] 3 W.W.R. 216, 1 B.C.L.R. (2d) 324, (sub nom. *Hofstrand Farms Ltd. v. British Columbia*) 36 C.C.L.T. 87, 33 B.L.R. 293, 26 D.L.R. (4th) 1, 65 N.R. 261; *Norsk*, *supra*. Since this case concerns property damage, however, the venerable authority of *Donoghue* is invoked in support of the simple and straightforward application of the fore-seeability test established in that great case. This approach harkens back to an era in which tort law divided most losses into three broad categories: personal injury, property damage and economic loss. In the first two areas, a duty of care was established based on mere foreseeability on the authority of *Donoghue*. In the third area, economic loss, an expansive reading of early cases such as *Cattle v. Stockton Waterworks Co.* (1875), L.R. 10 Q.B. 453, led to a broad exclusionary rule for pure economic loss.

18 Whatever the benefits of such a rigid approach, it has now been clearly rejected in the case of economic loss; see *Kamloops* and *Norsk*. One of the principal reasons behind the softening of the broad rule prohibiting recovery for pure economic loss is the by now oft repeated statement that the differences between property damage and economic loss have been vastly exaggerated. This view has accompanied the development of jurisprudence on economic loss since *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

19 It is important to note that comparisons between economic loss and property damage in tort cases operate on at least two planes. On one plane there is the question of the *relative social importance* of the two types of loss. In *Norsk*, Stevenson J. considered that there was no distinction to be made on this plane. At page 1173, he states:

> Some argue that there is a fundamental distinction between physical damage (personal and property damage) and pure economic loss and that the latter is less worthy of protection. Professor Feldthusen has attempted to make this argument in *Economic Negligence*, *supra*, at pp. 8-14, but I am left unconvinced. Although I am prepared to recognize that a human being is more important than property and lost expectations of profit, I fail to see how property and economic losses can be distinguished.

McLachlin J. adopted a much less trenchant position, noting only that even if pure economic loss were to be considered less deserving, as Professor Feldthusen suggests, that should not preclude recovery of such loss where justice so requires (at p. 1138). In my reasons, I did not find it necessary to comment explicitly on this question. I did find that property damage, since it is in some sense there first, was sufficient to establish deterrence in cases of contractual relational economic loss. In my view, it is unlikely that any broad comparison is possible. Property damage is more likely to occur in contexts that raise concerns other than compensation, such as safety and the desire to deter dangerous activity.

20 However, where the loss is suffered by a corporation, as in this case, I can see little reason to distinguish in social importance between the two types of loss from the perspective of *compensation*. Thus, for London Drugs, it is of little consequence that their loss of $33,000 occurred as a result of damage to a transformer rather than through, say, the late delivery of an envelope, as in *Hofstrand*. Of course, other concerns may arise that justify distinctions.

21 The second plane on which economic loss and property damage are compared in tort law is with respect to the *policy concerns they raise in the context of allowing recovery for them in courts of law based on tort principles*. The institutional limitations of courts are such that even those who adopt the position that there is no difference in social importance between the two types of damage recognize that many if not all economic loss cases pose policy problems, such as the

problem of indeterminacy, not present with the same acuity in the vast majority of property damage cases; see the reasons of Stevenson J. in *Norsk*.

22 Until now, the insight that there may be less difference between economic loss and property damage than was formerly thought has been principally used to justify limited extensions of liability in the field of economic loss, for example in cases of negligent misrepresentation, e.g., *Hedley Byrne*, or in cases involving the liability of public authorities, e.g., *Kamloops* and *Rothfield*. As we examine the different types of economic loss cases with more care, however, we are discovering additional policy concerns. What is important for present purposes is that certain of the policy concerns most evidenced in some economic loss cases *may not really have much to do with the specific nature of economic loss*; it may just be that the concern is present with particular force in such cases and less often in cases involving physical damage to property. As Professor Blom has noted, the present case requires us to apply what we have learnt from our confrontation with economic loss in property damage cases that arise in contractual contexts; see "Case Comment on *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*" (1991), 70 *Can. Bar Rev*. 156.

23 In my view, it is now clearly recognized that courts must be sensitive to the impact that an imposition of tort liability would have on the contractual allocation of risk, whether the damage incurred is economic loss or property damage. Tort liability, however, may be less likely to disrupt contractual arrangements in property damage cases. As Professor Blom notes, one reason why property damage cases are generally unproblematic from a policy perspective is that they are much less likely than economic loss cases to be associated with *planned transactions* and *contractual expectations*; see Blom, "Fictions and Frictions on the Interface Between Tort and Contract" in *Donoghue v. Stevenson and the Modern Law of Negligence* (1991), at p. 181 (hereinafter cited as "Fictions and Frictions"). As he notes, physical damage to person or property can result from being run down in the street, from fire destroying your house or from a street-cleaning machine bumping your car. Economic loss, on the other hand, very often occurs in a contractual context.

24 This has now been most clearly recognized in cases of concurrent liability. However, it has also been recognized, and for good reason, in cases involving parties who are not in contractual privity; such parties may be linked by a chain of contracts or not. I shall examine these different situations in turn.

Concurrent Application of Tort and Contract

25 The most obvious case of this interaction is undoubtedly *where tort and contract apply concurrently between two parties*. This issue arose on the facts in *J. Nunes Diamonds Ltd. v. Dominion Electric Production Co.*, [1972] S.C.R. 769, 26 D.L.R. (3d) 699, and was also considered in *Rafuse*, *supra*. In *Nunes Diamonds*, Pigeon J. used the independent tort requirement to take account of the contractual bargain between the parties. He stated, at pp. 777-78:

> Furthermore, the basis of tort liability considered in *Hedley Byrne* is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as "an independent tort" unconnected with the performance of that contract .... This is specially important in the present case on account of the provisions of the contract with respect to the nature of the obligations assumed and the practical exclusion of responsibility for failure to perform them.

26 Arguably, in light of the decision of this Court in *Rafuse*, the same result would be achieved today by first finding concurrent liability to exist in tort and contract and then finding that the contractual exclusion applied to tort liability arising from the same circumstances. It would appear that Nunes Diamonds, in drafting their exclusion of liability, relied on the inapplicability of tort in contractual situations. As Le Dain J. noted in *Rafuse*, *supra*, at p. 163, it appears to have been assumed by Pigeon J. as by the trial judge in *Nunes Diamonds* that the clause in the contract limiting liability in the cases of loss to $50 did not cover negligence. Nonetheless, I think today it is apparent that the case turned on the interaction of tort and contract. As Hinkson J.A. noted in delivering the unanimous judgment of the British Columbia Court of Appeal in *Surrey (District) v. Carroll-Hatch & Associates Ltd.*, [1979] 6 W.W.R. 289, 14 B.C.L.R. 156, 10 C.C.L.T. 226, 101 D.L.R. (3d) 218, at p. 236:

> In the *Nunes* case, the parties had by their contract agreed on the extent of the liability of the defendant in the event a breach of contract occurred. In those circumstances, it was held that it was not appropriate to rewrite the terms of the agreement between the parties to impose a greater liability than that agreed upon between the parties.

In *Dominion Chain Co. v. Eastern Construction Co.* (1976), 12 O.R. (2d) 201, 1 C.P.C. 13, 68 D.L.R. (3d) 385, Jessup J.A., writing for the majority (at p. 215), wrote that *Nunes Diamonds* was a case that stood for the proposition that a plaintiff cannot escape a contractual exclusion of liability, whether express or implied, by reliance on a concurrent liability in tort. In *Maryon*, *supra*, I noted that the point made in *Dominion Chain* and *Carroll-Hatch* was that *Nunes Diamonds* stands for the proposition that "the law of negligence will not be used to give a remedy to a person for a breach of contract for which he is absolved under the contract" (at p. 506). The reasons of Jessup J.A. were cited in *Rafuse* as being "of particular significance for subsequent consideration of the principle for which those cases [*Nunes Diamonds* and other cases which have applied *Elder, Dempster & Co. v. Paterson, Zachonis & Co.*, [1924] A.C. 522 (H.L.)] stand" (at p. 185). Both my reasons in *Maryon* and those of Hinkson J.A. in *Carroll-Hatch* were also cited with apparent approval by Le Dain J. in *Rafuse*.

27 Today, courts are perhaps readier to extend a limitation of liability for contractual breach to a tort claim arising out of the same circumstances if it is necessary to do so to prevent tort being unjustifiably used to avoid obligations and limitations freely accepted in contract. The need to impose an independent tort requirement to achieve the basic policy aim is accordingly reduced. Parties should by now be well aware of the need to include exclusions of both contractual and tort liability in most cases, however, and concurrent liability cases in which it is necessary to interpret a clause, limited on its face to contractual liability, to cover tort liability should become increasingly rare.

Parties Linked by a Chain of Contracts

28 Similar considerations arose in *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189, [1973] 6 W.W.R. 692, 40 D.L.R. (3d) 530, a case in which *there was no direct contractual relationship between the plaintiff and the defendants*. Rather, there was a *chain of contracts* linking the two parties, as in the present case. Despite the lack of contractual privity, Ritchie J., as I noted in *Norsk*, at p. 1066, expressly considered whether the tort duty he imposed would have the effect of disrupting contractual relations. He stated, at p. 1214:

> In the present case, however, I am of opinion that the failure to warn was "an independent tort" unconnected with the performance of any contract either express or implied.
>
> [Emphasis added.]

In *Kamloops*, *supra*, at p. 34, Wilson J. noted that the contractual aspects of *Rivtow* played a "major role" in the restrictive approach taken by the majority.

29 *Rivtow* was not a true concurrent liability case because of the lack of privity between Rivtow and the defendants: Rivtow had no contractual claim against the defendants. Nonetheless, it was concurrent in the broader sense that I prefer to refer to as tort liability in a contractual context or matrix; see the reasons of Purchas L.J. in *Pacific Associates*, which as I noted were concurred in by Wallace J.A. in the Court of Appeal. Many issues raised in concurrent cases like *Nunes Diamonds* and *Rafuse* must also be considered where there is no privity of contract between the plaintiff and defendant. The mere lack of privity does not justify the complete disregard of contractual concerns. In fact, since in such circumstances it is more difficult for the parties to contract out of tort liability, tort law may need to be *more* attuned to the contractual allocation of risk than in cases of concurrent liability.

30 On the other hand, it is apparent that the values protected by tort may predominate in a given context, and the nature of the damage may be a relevant consideration. This is revealed by an examination of cases involving products liability. Since *Donoghue*, it is well established that manufacturers are liable for negligence causing property damage to end users of their products: the safety concerns are obvious. When the question of recovery for economic loss in a products liability

case arises, however, the case becomes more difficult. For example, in *Rivtow*, the crux of the disagreement between the majority and the dissent turned on whether the safety concerns underlying the law on products liability for physical damage justified allowing recovery for economic loss. Laskin J. felt that safety concerns should take precedence on the facts of that case. At pages 1218-19, he stated:

> It seems to me that the rationale of manufacturers' liability for negligence should equally support such recovery in the case where, as here, there is a threat of physical harm and the plaintiff is in the class of those who are foreseeably so threatened: see Fleming, *Law of Torts*, 4th ed., 1971, pp 164-5, 444-5.
>
> The present case is concerned ... (and here I repeat myself) with economic loss resulting directly from avoidance of threatened physical harm to property of the appellant if not also personal injury to persons in its employ.

Ritchie J. gave precedence in that context to contractual concerns. He based his rejection of recovery on the fact that (at p. 1207) "liability for the cost of repairing damage to the defective article itself and for the economic loss flowing directly from the negligence, is akin to liability under the terms of an express or implied warranty of fitness and as it is contractual in origin cannot be enforced against the manufacturer by a stranger to the contract".

31 In my view, Ritchie J.'s reference to the contractual "origin" of the manufacturer's liability must be read as a conclusion that, in his opinion, the contractual aspects of that case outweighed the safety concerns. For it is clear that the manufacturer's undoubted liability for *physical* damage is also akin to liability under the terms of an express or implied warranty of fitness and is no less contractual in "origin" than liability for economic loss. Nonetheless, liability in tort undoubtedly exists in those circumstances essentially because of the safety concerns. Thus, to be precise, it is not the contractual origin but rather the concern with upsetting the contractual *bargain* struck that lies behind the majority decision in *Rivtow*. Where the concern with safety becomes more tenuous, as in a products liability economic loss case, the contractual aspects begin to predominate. The decision of the majority may also have been prompted by concerns about the difficulty of applying the minority's criteria. It would appear that an unjustified extension of recovery in a number of English cases of the *Rivtow* variety beyond those cases which truly raise safety concerns may have been a key factor in the recent overruling of *Anns* (which relied on the dissent in *Rivtow*) by the House of Lords in *Murphy v. Brentwood District Council*, [1991] 1 A.C. 398, [1990] 2 All E.R. 908 (H.L.); see I. N. Duncan Wallace, "Anns Beyond Repair" (1991), 107 *L.Q. Rev*. 228, at pp. 230-31.

32 Laskin J. was of the opinion that the safety concerns, although they might perhaps be attenuated, should still prevail. As I noted in *Norsk* (at p. 1065), however, he was most careful to exclude recovery in tort for "safe but shoddy" products and to exclude recovery in cases "where a manufactured product proves to be merely defective (in short, where it has not met promised expectations)". In such cases, tort has no role since the contractual aspects take precedence. The plaintiff should not be able to use tort law merely to improve its contractual bargain.

33 *Nunes Diamonds* was concerned with loss of property, *Rivtow* with economic loss. The fact that a particular case concerns property damage rather than economic loss, while undoubtedly relevant and important to the resolution of the case, does not preclude the consideration of the issue of the interaction of tort and contract. This is most obvious in concurrent liability cases. No one suggests that the ability of one party to exclude its tort liability by contract should be limited to its tort liability for economic loss. As the reasons of Iacobucci and McLachlin JJ. in this case indicate, it is also apparent in third party beneficiary cases. I note that Iacobucci J. in his reasons does not for a moment consider that the benefit of exclusion clauses should be limited to cases of economic loss, even though some earlier cases had drawn such a distinction, perhaps because they felt constrained by the House of Lords decision in *Scruttons Ltd. v. Midland Silicones Ltd.*, [1962] A.C. 446; see *Johnson Matthey & Co. v. Constantine Terminals Ltd.*, [1976] 2 Lloyd's Rep. 215 (Q.B. (Com. Ct.)), at p. 222; F. M. B. Reynolds, "Tort Actions in Contractual Situations" (1984-85), 11 *N.Z.U.L.R. 215*, at p. 222. Similarly, McLachlin J. does not limit the operation of the doctrine of voluntary assumption of risk to economic loss. What these holdings recognize is that there is no reason to limit the effect of the limitation of privity or of voluntary assumption of risk to economic loss because the policy reasons lying behind their application are linked, not to the nature of the loss, but to the contractual allocation of risk between the parties and the general context of the case.

Parties in a Contractual Context

34 *Norsk* raised the issue of the interaction between tort liability and contract in a different context. In *Norsk* the principal relevant contract was between the plaintiff and the property owner. (Other contracts, such as the plaintiff's contracts with its customers and suppliers, were also peripherally relevant.) Not only was there no privity of contract between the plaintiff and the defendant but the defendant's contractual arrangements were largely irrelevant (except for the potential effect of imposing liability on the defendant's insurance contracts). Despite the lack of privity and the lack of a chain of contracts linking the plaintiff and the defendant, six of the judges hearing that case agreed that the contractual allocation of risk was a relevant consideration in the imposition of tort liability in that case (see my reasons, at pp. 1125-27, and those of McLachlin J., at p. 1164). There was a three-three split as to its application on the facts of that case. Stevenson J. was the lone judge to find (implicitly) that the contractual allocation of risk was not a relevant consideration and that only the problem of indeterminacy needed to be considered in that context.

35 Policy concerns about contractual allocation of risk in cases in which tort and contract claims coexist arise regardless of whether the damage incurred is property damage or economic loss. As Professor Blom notes in his article "Slow Courier in the Supreme Court: A Comment on B.D.C. Ltd. v. Hofstrand Farms Ltd." (1986-87), 12 *Can. Bus. L.J.* 43, at p. 64:

> These problems of the relationship between the obligations undertaken by the defendant by contract, the risks assumed by the plaintiff by contract (which may be a different contract), and the tort duties and rights that may be superimposed on these contractual duties and rights, exist irrespective of whether the damage in question is physical or economic loss.
>
> [Emphasis added.]

Taylor J.A. referred to a similar idea in writing for the British Columbia Court of Appeal in *Kamahap Enterprises Ltd. v. Chu's Central Market Ltd.* (1989), [1990] 1 W.W.R. 632, 40 B.C.L.R. (2d) 288, 1 C.C.L.T. (2d) 55, 64 D.L.R. (4th) 167, at p. 170:

> Reliance on the carefulness of another is reasonably to be expected as a general rule when it is foreseeable that a person may suffer personal injury or physical property damage as a result of the carelessness of another, subject, no doubt, to exception where such reliance would not be reasonable or expected, by reason, for instance, of the existence of some special knowledge, contractual arrangements, or legal relationship.
>
> [Emphasis added.]

36 I re-emphasize that the recognition that contractual concerns must be considered in tort cases like the present is not to be interpreted as a return to the now discredited reasoning in *Winterbottom v. Wright* (1842), 10 M. & W. 109, 152 E.R. 402. It is now recognized that it would be anomalous if a person who has assumed responsibility gratuitously is subject to the legal consequences of tortious liability but a person who had assumed such responsibility under contract is not; see my reasons in *Maryon*, and *Rafuse*, at pp. 506 and 204-5. *Rafuse* establishes that tort liability cannot be excluded by the mere *presence* or *existence* of a contract in a particular situation. Undoubtedly in past cases, once a particular situation had been analyzed and a conclusion reached that contractual concerns should predominate, this conclusion was often expressed in terms of the "contractual origin" of particular duties, or in terms of the existence of a contract barring liability in tort. In my view, such phrases must be interpreted as shorthand for the conclusion reached as a result of the balancing of tort and contract concerns in a particular situation.

37 I conclude that the mere fact that this case involves property damage rather than economic loss cannot be sufficient to eliminate inquiry into whether the recognition of a duty of care in these circumstances is justified on policy grounds. Before leaving the issue of the application of *Anns* in this case, I note that my colleague McLachlin J., at p. 460, states that *Anns* permits and indeed requires the court to take account of all relevant circumstances in assessing the duty of care

which a particular defendant owes a particular plaintiff and makes no reference to the type of loss involved in the case. While I agree generally with that statement, I would underline the policy interest in stability of the law expressed notably by Lord Brandon in *Leigh and Sillavan Ltd. v. Aliakmon Shipping Co.*, *supra*, at pp. 815-16. As noted by Taylor J.A. in *Kamahap*, *supra*, in the vast majority of property damage cases, the straightforward application of the foreseeability test is sufficient to found a duty of care. Accordingly, it should only rarely be necessary to examine such cases under the second branch of *Anns*.

38 Many property damage cases occur outside of a contractual context, and as I noted, a duty of care is justified in those cases based on foreseeability. Even in property damage cases with contractual overtones, it undoubtedly makes sense in almost all cases to allow the risk of damage to accompany the property in the absence of some express contractual stipulation. In most contractual contexts, all parties are able to plan for potential tort liability for property damage based on foreseeability. For the reasons set out below, I am of the opinion that in general employees are not realistically in a position to so plan.

39 Property damage is also a criterion that has the significant advantage of being relatively easy for courts to apply. It responds to the strong policy interest in having workable rules. Even in those cases that do have contractual overtones, parties benefit greatly from clear rules attributing liability. In sum, a return to first principles will rarely be necessary in property damage cases. I shall set out below the reasons why I am of the opinion that an exception to the general rule of foreseeability should apply here.

40 I conclude that the considerations put forward in support of an application of the simple foreseeability test, while undoubtedly important, are not sufficient to preclude policy analysis in this case under the second branch of *Anns*. In today's world, in which the gradual extension of tort liability means that many losses incurred as a result of breaches of contract will give rise to a concurrent or associated claims in tort, the question of the employee's liability in cases that trigger the operation of vicarious liability needs to be examined more closely. Accordingly, I turn to an examination of the operation of vicarious liability in this case.

Vicarious Liability

41 This case raises the question of the employee's personal liability within the context of the vicarious liability regime. Under that regime, the law holds the employer liable for the misconduct of another person, his employee. Although the regime has traditionally also held the employee to be liable, the respondents and the intervener point to the arguments put forward by leading tort scholars such as John Fleming and to a number of cases which suggest that that rule should be reconsidered. They also suggest that to apply the traditional rules of vicarious liability to tort claims arising in contractual situations as a result of the recent development of concurrent liability in tort and contract would be inappropriate. The appellant, on the other hand, contends that the employees owed a duty of care to London Drugs at common law as well as by virtue of the *Warehouse Receipt Act*, R.S.B.C. 1979, c. 428.

42 I agree with Wallace J.A. (at p. 79) that neither ss. 2(4)(b) and 13 of the *Warehouse Receipt Act* nor s. 11(b) of the contract of storage confirms or negates the existence of a duty owed by the employees of the warehouseman; nor do they create a duty on the part of such employees. In my view, that statute does not apply to employees. It is limited to a "warehouseman". Accordingly, I agree with Wallace J.A. that the scope of the duty the employees of a warehouseman may, or may not, have to the warehouseman or its customers must be determined by the application of the common law principles of tort.

43 Before I examine the common law authorities on the question of employee liability, I shall explain why I think that the law, if settled as counsel for the appellant says it is, would be defective.

44 Vicarious liability is generally considered to rest on one of two logical bases; see Fridman, *The Law of Torts in Canada* (1990), vol. 2, at pp. 314-15; Atiyah, *Vicarious Liability in the Law of Torts* (1967), at pp. 6-7. The first, encapsulated by the Latin maxim *qui facit per alium facit per se*, considers the employer to be vicariously liable for the

acts of his employee because the acts are regarded as being authorized by him so that in law the acts of the employee are the acts of the employer. This first basis was termed the "master's tort theory" by Glanville Williams, "Vicarious Liability. Tort of the Master or of the Servant?" (1956), 72 *L.Q. Rev*. 522. The second approach, which is described by the maxim *respondeat superior*, attributes liability to the employer simply because the employer was the employee's superior and in consequence in charge or command of the employee. In Williams' terminology, this basis is termed the "servant's tort theory".

45 Fridman has noted how neither of the logical bases for vicarious liability succeeds completely in explaining the operation of the doctrine. As he notes, "[b]oth these maxims express not so much the true rationale of vicarious liability but an attempt by the law to give some formal, technical explanation of why the law imposes vicarious liability" (at p. 315). Lord Reid was hardly more respectful of the doctrine's supposed logical foundations; in *Staveley Iron & Chemical Co. v. Jones*, [1956] A.C. 627, [1956] 1 All E.R. 403, at p. 643, he said: "[t]he former [*respondeat superior*] merely states the rule baldly in two words, and the latter merely gives a fictional explanation of it". Even concerted attempts to establish theoretical distinctions, such as that by Professor Williams, end up by concluding that recourse to at least two theories is necessary to obtain satisfactory results in the various scenarios in which vicarious liability comes into play; see Williams, *supra*; Atiyah, *supra*, at p. 7.

46 In my opinion, the vicarious liability regime is best seen as a response to a number of policy concerns. In its traditional domain, these are primarily linked to compensation, deterrence and loss internalization. In addition, in a case like the one at bar, which involves a planned transaction or a contractual matrix, the issue of tort liability in the context of contractual relations involves a wider range of policy concerns. Alongside those respecting compensation, deterrence and loss internalization, there are important concerns regarding planning and agreed risk allocation.

47 Before I examine the policy concerns raised by the operation of vicarious liability in this case, I wish to underline that I am considering here a case in which the regime clearly operates. This case involves a situation in which no difficulties arise as to the scope of employee behaviour covered or the range of agents for whom the employer is responsible or other similar concerns. Nothing I say here should be taken as having any relevance to the question of whether the employer's liability should be extended or restricted in other types of cases.

48 The most important policy considerations lying behind the doctrine of vicarious liability are based on the perception that the employer is *better* placed to incur liability, both in terms of fairness and effectiveness, than the employee. Fleming admirably summarizes the policy concerns in the following passage from *The Law of Torts* (7th ed. 1987), at p. 340:

> Despite the frequent invocation of such tired tags as Respondeat superior or Qui facit per alium, facit per se, the modern doctrine of vicarious liability cannot parade as a deduction from legalistic premises, but should be frankly recognised as having its basis in a combination of policy considerations. Most important of these is the belief that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise; that the master is a more promising source for recompense than his servant who is apt to be a man of straw; and that the rule promotes wide distribution of tort losses, the employer being a most suitable channel for passing them on through liability insurance and higher prices. The principle gains additional support for its admonitory value in accident prevention. In the first place, deterrent pressures are most effectively brought to bear on larger units like employers who are in a strategic position to reduce accidents by efficient organisation and supervision of their staff. Secondly, the fact that employees are, as a rule, not worth suing because they are rarely financially responsible, removes from them the spectre of tort liability as a discouragement of wrongful conduct. By holding the master liable, the law furnishes an incentive to discipline servants guilty of wrongdoing, if necessary by insisting on an indemnity or contribution.

It is useful to separate out the various policy concerns identified by Fleming.

49 First, the vicarious liability regime allows the plaintiff to obtain compensation from someone who is financially capable of satisfying a judgment. As Lord Wilberforce noted in *Kooragang Investments Pty. v. Richardson & Wrench*

Ltd., [1982] A.C. 462, [1981] 3 All E.R. 65 (P.C.), at p. 68, the manner in which the common law has dealt with the liability of employers for acts of employees (masters for servants, principals for agents) has been progressive: the tendency has been toward more liberal protection of innocent third parties; see also Fridman, at pp. 315-16. The plaintiff benefits greatly from the doctrine of vicarious liability, which allows access to the deep pocket of the company, even where the company is blameless in any ordinary sense.

50 Second, a person, typically a corporation, who employs others to advance its own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise. As Lord Denning noted in *Morris v. Ford Motor Co.*, [1973] 1 Q.B. 792, [1973] 2 All E.R. 1084 (C.A.), at p. 798, the courts "would not find negligence so readily — or award sums of such increasing magnitude — except on the footing that the damages are to be borne, not by the man himself, but by an insurance company" through coverage purchased by the employer.

51 Third, the regime promotes a wide distribution of tort losses since the employer is a most suitable channel for passing them on through liability insurance and higher prices. In *Hamilton v. Farmers' Ltd.*, 31 M.P.R. 343, [1953] 3 D.L.R. 382 (N.S.S.C.), Mac-Donald J. noted, at p. 393, that the principle of vicarious liability "probably reflects a conclusion of public policy that the master should be held liable for the incidental results of the conduct of his business by means of his servants as a means of distributing the social loss arising from the conduct of his enterprises".

52 Fourth, vicarious liability is also a coherent doctrine from the perspective of deterrence. KNI is in a much better situation than Vanwinkel and Brassait to adopt policies with respect to the use of cranes, the inspection of stickers and so on in order to prevent accidents of this type. Given that it will either be held liable or its customers' insurance costs will reflect its carefulness, KNI has every incentive to encourage its employees to perform well on the job and to discipline those who are guilty of wrongdoing.

53 It is apparent that the vicarious liability regime is not merely a mechanism by which the employer guarantees the employee's primary liability. The regime responds to wider policy concerns than simply the desire to protect the plaintiff from the consequences of the possible and indeed likely incapacity of the employee to afford sufficient compensation, although obviously that concern remains of primary importance. Vicarious liability has the broader function of transferring to the enterprise itself the risks created by the activity performed by its agents.

54 The question in this case is whether the elimination of the employee's liability would significantly impact on the policies advanced by vicarious liability. In my view, it would impact favourably on the second and third considerations set out above and have negligible impact on the fourth. Again, Fleming, *supra*, at pp. 340-41, sets out the reasons why the elimination of the employee's liability is generally desirable:

55 As already noted, the master's vicarious liability does not displace the servant's personal liability to the tort victim. But this conclusion is neither self-evident nor beyond all objection. For one thing, *ordinarily it is positively desirable that the master absorb the cost as a matter of sound resource allocation rather than that he be considered merely as guaranteeing the servant's primary responsibility to pay for the damage*. For another, to hold the servant liable will either tend to overtax his financial resources (especially under modern conditions when these have become increasingly unequal to his capacity for causing great loss) or require double insurance, covering both him and his employer against the same risk. For these reasons, there is now a growing momentum in many countries for "channelling" liability to the employer alone; the employee being freed altogether from claims by third parties and liable at most to his employer for a limited contribution when this is justified on disciplinary grounds. This mostly corresponds with our own *practices* — damages are rarely collected from employees by their tort victims or indemnity sought by their employers — but except in South Australia and the Northern Territory, the popular notion that the primary responsibility should be the employer's rather than the employee's is as yet hardly reflected by the law in books. [Emphasis added.]

56 In my view, not only is the elimination of the possibility of the employee bearing the loss logically compatible with the vicarious liability regime, it is practically compelled by the developing logic of that regime. In our modern economy, an employee's capacity to cause loss does not bear any relation to his salary. As was stated by a Committee set up in

England to inquire into the implications of the case of *Lister v. Romford Ice & Cold Storage Co.*, [1957] A.C. 555, [1957] 1 All E.R. 125 (H.L.) (Atiyah, *supra*, at p. 426):

> There can ... be no doubt that if there were any real possibility of employees regularly being called upon to pay out of their own pockets damages resulting from acts of carelessness or inattention occurring in the course of their employment, a situation would be created for which some remedy would have to be provided.

The employer will almost always be insured against the risk of being held liable to third parties by reason of his vicarious liability: the cost of such liability is thus internalized to the profitable activity that gives rise to it. There is no requirement for double insurance, covering both the employee and his employer against the same risk. Shifting the loss to the employee, either by permitting a customer to act against the employee or by permitting the employer to claim an indemnity against the employee, upsets the policy foundation of vicarious liability.

57 As for deterrence, imposing tort liability on the employee in these circumstances cannot be justified by the need to deter careless behaviour. An employee subjects himself to discipline or dismissal by a refusal to perform work as instructed by the employer. These are the real external pressures felt by an employee to perform well; the odds of an employee being held personally liable remain slight. With the onus clearly on the employer to act to reduce accident costs, the employer is free to establish contractual schemes of contribution from negligent employees as an element in the employer's campaign to reduce accidents. The amounts could be better calibrated on the extent of the employee's fault and the real deterrent effect would be greater. Given the notorious reluctance of employers to sue their employees for obvious reasons, the employer is probably likely to prefer other techniques for improving job performance.

58 I conclude that for three of the four policy concerns identified, the elimination of employee liability in the context of this case would either lead to the concern being better met or would have negligible impact. The critical policy concern that would be raised by the elimination of the employee's liability in this case is related to compensation. Obviously, removing a potential defendant from the equation will reduce to some degree the plaintiff's chances of being compensated for its loss.

59 In this regard, it should first be noted that in the vast majority of cases, eliminating the possibility of shifting the loss to the employee will have no impact on the plaintiff's compensation. The plaintiff will naturally prefer to sue the employer whenever possible. Under current law, the plaintiff may wish to join one or more employees as parties to the action in order to obtain the possibility of additional discovery (provided it does not constitute an abuse of process), but in the ordinary case, the plaintiff will not look to the employee for recovery. The principal defensive weapon of employees is, of course, their impecuniousness. Second, in this case, as I outlined above, I see no reason why London Drugs' interest in compensation is any stronger than it would be if it were seeking compensation for economic loss in similar circumstances.

60 Furthermore, the decision of this Court today with respect to the application of contractual clauses excluding or limiting liability will remove one of the principal reasons to sue employees, since such an approach will no longer offer a convenient way around such a contractual clause. In light of the Court's decision today on the applicability of the contractual clause, the issue of an employee's liability will arise principally when the employer is unable to satisfy a judgment, most often because it is bankrupt.

61 Nonetheless, for one reason or another, the employer may not be available as a source of compensation. In my view, in what may be termed a "classic" or non-contractual vicarious liability case, in which there are no "contractual overtones" concerning the plaintiff, the concern over compensation for loss caused by the fault of another requires that *as between the plaintiff and the negligent employee*, the employee must be held liable for property damage and personal injury caused to the plaintiff. An example of such a case is a plaintiff who is injured by an employee while the employee, acting in the course of employment, is driving on the road. In this context, the plaintiff obviously never chose to deal with a limited liability company. I do not find it necessary here to consider the vexing question of the possible impact of clauses in the defendant's contract with a third party, i.e., in this example, a clause in the contract between the employee

and the employer, on liability to a plaintiff; see Atiyah, *An Introduction to the Law of Contract* (4th ed. 1989), at pp. 394-95; B. J. Reiter, "Contracts, Torts, Relations and Reliance" in B. J. Reiter and J. Swan, eds., *Studies in Contract Law* (1980), 235, at p. 301. *As between the plaintiff and the employee*, there is no reason to excuse the employee in such a case. Even if a contractual clause as described above could in some circumstances act to modify the tort duty, a question I expressly reserve, it could obviously never do so with respect to the duty to drive carefully.

62 However, the policy arguments set out above strongly support the idea that, *as between the employee and employer*, the employer should still bear the risk even in this kind of case. The best solution to such "classic", non-contractual, cases would probably be an indemnity regime operating between employer and employee along the lines of that which exists, as a result of judicial innovation, in Germany. Markesinis describes the regime as follows (*A Comparative Introduction to the German Law of Torts* (2nd ed. 1990), at pp. 502-3):

> The injured party's right to proceed against the tortfeasor employee can be neutralized as far as the *latter* is concerned in so far as he can rely on a principle developed by the case-law known as the 'employee's claim for exception'. This in principle places the employer under an obligation to indemnify his employee whenever the latter has been sued by the victim. The danger of disturbing manager-labour relationships, by allowing the employer to seek an indemnity from his employee is thus not only avoided, but on the contrary, the issue is resolved by placing liability squarely on the shoulders which can best carry it (see the decisions of the Supreme Court for Labour Matters in 1957 and 1959, BAG 5, 1 and BAG 7, 290).
>
> [Emphasis added.]

A more recent German case which extended the scope of the employee's immunity vis-à-vis his employer for torts against the employer thus sets forth in forceful terms the economic trends that make this evolution desirable (Bundesarbeitsgericht (Seventh Senate), judgment of 23 March 1983, BAG 42, 130, translated and reproduced in Markesinis, *supra*, at pp. 574-75):

> Following the decision of the Great Senate of the *Bundesarbeitsgericht* of 25 September 1957 (BAG 5, 1, 18) this Senate now holds that in a case where the employee's fault is 'less than grave', his liability is excluded by the employer's business risk concept, applying § 254 BGB by analogy. For this purpose normal or medium carelessness, as well as slight fault, should count as 'less than grave', as the words suggest. In view of the increased liability brought about by technological developments, to attribute business risk on a case-by-case basis as the *Bundesarbeitsgericht* has hitherto done is not an appropriate way of dealing with its liability in cases where the employee has been guilty of normal fault. Thus, damage done by an employee without intention or gross negligence while engaged on a dangerous job is one of the employer's business risks and must be borne by him alone. To allot damage done by the employee to the risks of the business, in the absence of gross negligence, is justified by the fact that it is the division of labour within the business which exposes the employee to the risks specific to his work. Division of labour and organizational structure are matters for the employer whose ownership and power of management enable him to determine how the work of the business is to be organized. The employee, on the other hand, given his subordinate position, has little or no influence on these factors which are relevant to the damage caused. Since the employer is better able to deploy technical and organizational measures to reduce the special risks of the business and to take out any necessary insurance, it is right to treat damage as a risk of the business to be borne by him alone unless it is due to the intentional or grossly negligent conduct of the employee. Another consideration is that without such division of labour the employer himself would have to perform the dangerous job and would then have to bear the cost of damage due to the negligence which is occasionally bound to occur; an instance would be the small haulier who himself takes the wheel of a truck, perhaps his only truck, and so causes damage. Division of labour within a business should not enable the business to put such risk of liability on the employee. Furthermore the extent of harm is greatly dependent on the way the business is equipped and run. In almost all sectors of the economy technological development involves the replacement of personnel by expensive machinery and other technical equipment which increases the risk of liability. As such rationalization also reduces the employer's expenditure on wages, it is right

> that he should bear the risk of the increased harm which is due to the conduct of an employee which is neither intentional nor grossly negligent.
>
> [Emphasis added.]

By finding that the employee was not liable in such a context, the court was not required to consider the question of whether the employer's duty to look after his employees required him to take out insurance.

63 The trends identified by the German court are long-term trends common to all advanced industrial economies and I find these arguments very persuasive. Establishing such an indemnity regime is probably the next logical step in the development of the theory of vicarious liability. This would essentially involve bringing legal doctrine into line with the reality of modern industrial relations. In England, the House of Lords rejected such an indemnity regime as an implied term in a contract of employment in a 3-2 decision in *Lister v. Romford Ice and Cold Storage Co.*, *supra*. The majority allowed the employer's liability insurer to recover an indemnity against the uninsured truck driver whose negligence had caused the injury and involved the employer in vicarious liability. The effect of the *Lister* decision was promptly substantially nullified by a whole series of formal and informal agreements; see Atiyah, *Vicarious Liability in the Law of Torts*, *supra*, at pp. 426-27. Although the terms of the agreements between insurers appeared to be confined to cases in which a fellow employee is injured or killed, an attempt by a plaintiff to hold the employee personally liable as a result of being subrogated to the employer's rights was rejected in *Morris v. Ford Motor Co.*, *supra*. Lord Denning M.R. underlined the injustice in finding the employee liable, at p. 798:

> If the cleaners are right in this contention — if they can thus force Roberts to pay the damages personally — it would imperil good industrial relations. When a man such as Roberts makes a mistake — like not keeping a good lookout — and someone is injured, no one expects the man himself to have to pay the damages, personally. It is rather like the driver of a car on the road. The damages are expected to be borne by the insurers. The courts themselves recognise this every day. They would not find negligence so readily — or award sums of such increasing magnitude — except on the footing that the damages are to be borne, not by the man himself, but by an insurance company. If the man himself is made to pay, he will feel much aggrieved. He will say to his employers: "Surely this liability is covered by insurance." He is employed to do his master's work, to drive his master's trucks, and to cope with situations presented to him by his master. The risks attendant on that work — including liability for negligence — should be borne by the master. The master takes the benefit and should bear the burden. The wages are fixed on that basis. If the servant is to bear the risk, his wages ought to be increased to cover it.

In *Morris*, the court was bound by the decision of the House of Lords in *Lister* with respect to the prior issue of the employee's liability to Ford. This Court has never had occasion to consider the *Lister* case on this point.

64 I do not, however, need to consider the *Lister* case for the purposes of resolving this case: the employees did not bring a claim for indemnification against their employer. I propose to rest my decision on narrower grounds, linked to the con-tactual context in which this case occurs. In the particular type of vicarious liability situation we are concerned with here, the general arguments put forward by Fleming and others to the effect that employees should not bear the loss in most cases are reinforced by a second consideration.

65 I referred earlier to classic, non-contractual, vicarious liability cases. These cases can be distinguished from those like the case at bar, that involve a planned transaction. Such cases may perhaps best be described as commercial vicarious liability claims. Professor Blom sets forth a simple definition of a planned transaction as one in which someone acquires or disposes of property of any kind or services of any kind; see "Fictions and Frictions", *supra*. As Blom notes, whenever a planned transaction is involved, there are foreseeable risks — to someone's person, land, goods, or financial interests — and thus the possibility of allocating or otherwise dealing with those risks in advance. This circumstance must be taken into account, even if the plaintiff s action is in tort. He states, at p. 159:

> Wherever there is a planned transaction there are foreseeable risks — to someone's person, land, goods, or financial interests — and thus the possibility of allocating or otherwise dealing with those risks in advance. Where the risk materializes, and there is a tort claim for the loss that results, it is relevant to ask what expectations it was reasonable to have about that risk, and what planning the victim and the negligent party could have done with regard to their respective exposures to loss or liability. In short, the proper approach to the tort claim may need to be coordinated with these contractual or contract-like features of the situation.

This Court has increasingly recognized the importance of such considerations in recent tort cases; see my reasons (at pp. 1125-27), and those of McLachlin J. (at p. 1164) in *Norsk* which hold that contractual concerns were a relevant consideration. The opinions of both my colleagues in the present case also attest to the importance of this type of consideration.

66 In my view, where the plaintiff has suffered injury to his property pursuant to contractual relations with the company, he can be considered to have chosen to deal *with a company*. Company legislation typically provides for notice and publicity of the fact that a company is under a limited liability regime; customers and creditors are thereby put on notice that in ordinary circumstances they can only look to the company for the satisfaction of their claims. In British Columbia, corporations are also required to set out their name in all contracts, invoices, negotiable instruments and orders for goods and services; see British Columbia *Company Act*, R.S.B.C. 1979, c. 59, ss. 16 and 130.

67 In my view, in contracting for services to be provided by a business corporation like KNI in the circumstances of the present case, London Drugs can fairly be regarded as relying upon performance by the corporation, and upon the liability of that body if the services are negligently performed. As Reiter, *supra*, suggests, at p. 290:

> The plaintiff did not rely, or cannot be regarded as having relied reasonably, upon the liability of any individual where the individual is acting in furtherance of a contract between plaintiff and a principal or employer of the individual: the individual defendant cannot reasonably be regarded as appreciating that he is being looked to (personally) to satisfy the expectations of the plaintiff.

Nor can Vanwinkel and Brassart be taken on the facts of this case to appreciate that the plaintiff is relying on *them* for compensation at all. As Reiter underlines, the intention to transfer the responsibility to the corporation or association is a most explicit risk allocation by contract in the three-party enterprise.

68 The distinction between voluntary and involuntary creditors is also useful in this area. As commentators have pointed out (Halpern, Trebilcock and Turnbull, "An Economic Analysis of Limited Liability in Corporation Law" (1980), 30 *U.T.L.J.* 117), different types of claimants against the corporation have differing abilities to benefit from being put on notice with respect to the impact of the limited liability regime. At one end, creditors like bond holders and banks are generally well situated to evaluate the risks of default and to contract accordingly. These "voluntary" creditors can be considered to be capable of protecting themselves from the consequences of a limited liability regime and the practically systematic recourse by banks to personal guarantees by the principals of small companies attests to that fact.

69 At the other end of the spectrum are classic involuntary tort creditors exemplified by a plaintiff who is injured when run down by an employee driving a motorcar. These involuntary creditors are those who never chose to enter into a course of dealing with the company and correspond to what I have termed as the classic vicarious liability claimant.

70 The type of situation in this case is intermediate. Clearly, London Drugs is not a voluntary creditor in the sense that it voluntarily supplied money or goods to the company. However, London Drugs is not a wholly involuntary creditor either since, as I noted, it voluntarily entered into a course of dealing with the employer company. The type of claim present here obviously involves a planned transaction and, significantly, that is true regardless of whether or not the service contract contains a limitation of liability clause. That fact merely goes to the extent of the planning.

71 The policy reason that lies behind the argument founded on limited liability is an admittedly weaker version of the rationale for the result obtained by McLachlin J. through the doctrine of voluntary assumption of risk. She points to the voluntary assumption of risk by the plaintiff in the particular contract; see McLachlin J., at p. 460; Fleming, at p. 265. I applied a not dissimilar analysis in *Norsk*, although in a very different context.

72 In similar terms, a plaintiff who chooses to enter into a course of dealing with a limited liability company can, in most cases, be held to have voluntarily assumed the risk of the company being unable to satisfy a judgment in contract or for vicarious liability. That the customer takes this risk in matters of contract has been accepted since *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.). Now that many contractual claims are brought concurrently as tort claims, the customer should not be able to shift this risk to the employee by claiming in tort. This is merely another application of the general principle I enunciated in *Maryon*, referred to with apparent approval in *Rafuse*, that the court must not let tort be used to unjustly and unjustifiably avoid obligations and limitations accepted in contract.

73 In addition, in the context of a commercial vicarious liability claim, placing liability exclusively on the employer places liability on a party that is easily able to modify its liability by contractual stipulations. In many cases of this type, this may well be an advantageous approach. As I noted in *Norsk*, at p. 1126:

> In many cases, contracting parties are not willing to insure performance; the contractual allocation of risk in this case is probably typical in that risk is allocated to the potential victim of interrupted service, who benefits from a lower price and who is best placed to take other measures to deal with accidental interruption of contractual benefits.

KNI *and London Drugs* took advantage of that possibility in this case. They used the by now well accepted application of contractual clauses to strictly limit KNI's tort and contract liability for property damage. As a result, London Drugs had the option of purchasing its own insurance or purchasing extra insurance from KNI. London Drugs found it advantageous not to require KNI to insure performance. So long as there are no concerns about unconscionability and no overriding social interest protected by tort is involved, this ability of the parties to modify their possible tort and contract liability is an unquestionable advantage. The customer *benefits* from the ability of the future defendant to contract out of its tort liability.

74 In a different case it might, for a variety of reasons, be cheaper for KNI and thus for its customers for KNI to insure directly. Even where it is not cheaper, KNI might have other reasons to insure directly. Rather than limit its liability and require its customers to purchase insurance, it could purchase liability insurance itself and add the cost onto the cost of storage. Surely, the extent of the employees' liability should not depend on whether KNI limits its liability to $40 and then offers insurance to its customers separately, or does not limit its liability to the customer and insures itself.

75 Unlike KNI, Vanwinkel and Brassait had no real opportunity to decline the risk. The intervener stressed that in the usual case, the employee will have no knowledge of how or upon what conditions the work was acquired; they only know that once it is acquired, they are required to perform it if they are directed to do so by their employer.

76 Even in those cases, such as negligent misstatement cases, that bring the employee into contact with the plaintiff and thus at least theoretically allow the employee some way to decline to accept the risk, employees are poorly situated to do so. In *Northwestern Mutual Insurance Co. v. J.T. O'Bryan & Co.*, [1974] 5 W.W.R. 322, [1974] I.L.R. 1-639, 51 D.L.R. (3d) 693 (B.C.C.A.), the court found that the employee who proffered faulty information concerning the state of the plaintiff's insurance "could have kept silent and declined to give the information" or "could have given the information with a reservation that he accepted no liability for its accuracy or otherwise (p. 701)". The court in that case thus applied to employees the same criteria as were applied to the liability of a company in *Hedley Byrne*. With respect, one imagines a rather short career for an employee hired to serve the public who kept silent and declined to give out information for fear of engaging personal liability in tort. As Reiter underlines, the court's alternative suggestion implies that the employee should preface all his remarks to clients about their insurance by saying that he was accepting no *personal* responsibility for the information while underlining that he was saying nothing about his *employer's* responsibility; see Reiter, *supra*,

at p. 291. It is unrealistic to oblige the employee to act in such an artificial manner. In most cases other than negligent misstatement, and in particular in the case at bar, the employee has no opportunity to decline the risk at all.

77 Counsel for the appellant suggested that liability should lie against the employees because they remain free to contract out of such liability. In cases where the employees are represented by a union, the onus should lie on the union to contract out of liability for its members. In other words, he argued that the employees do have an opportunity to contract out of or to decline the risk, when they negotiate their terms of employment with their employer.

78 Undoubtedly, in the vast majority of cases involving property damage, counsel's argument is compelling. However, I do not find it convincing here. I would note first that the same argument could be made with respect to the application of the contractual limitation clause to the employees, i.e., that they could have taken advantage of exceptions to privity recognized in *ITO — International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, *(*sub nom. *Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.)* 68 N.R. 241, 28 D.L.R. (4th) 641, 34 B.L.R. 251, and that since they did not, liability should follow. Both my colleagues have implicitly or explicitly rejected that contention and I agree with them.

79 For similar reasons, I think it ill advised to place the onus on employees to contract out of their tort liability. Despite suggestions going back as far as the aftermath of the *Lister* case that unions should bargain about this issue (see Atiyah, *Vicarious Liability in the Law of Torts*, *supra*, at p. 426, n. 3), it is apparent that unions and employers have more pressing concerns. It is hardly necessary to refer to any elaborate theory regarding negotiating agendas to recognize that actual employee liability occurs infrequently enough that it is unlikely to get on the collective bargaining agenda. In the interim, serious injustice to individual employees can occur.

80 Furthermore, such a rule would create an untenable situation for the majority of private sector employees who are not unionized. As counsel recognized, the idea of contracting out for these employees is highly artificial, and their only hope would be legislative action in each province. Iacobucci J. described the context in which such employees contract with their employers in the recent case of *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, 40 C.C.E.L. 1, 92 C.L.L.C. 14,022, 91 D.L.R. (4th) 491, *(*sub nom. *Lefebvre v. HOJ Industries Ltd.)* 136 N.R. 40, 53 O.A.C. 200, at p. 1003:

> The harm which the Act [the *Employment Standards Act*] seeks to remedy is that individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers. As stated by Swinton, *supra*, at p. 363:
>
> > ... the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.

Iacobucci J. went on to note, at p. 1003, that "the fact that many individual employees may be unaware of their statutory and common law rights in the employment context is of fundamental importance". At page 1004, he again refers to the fact that "most individual employees are unaware of their legal rights, or unwilling or unable to go to the trouble and expense of having them vindicated". In light of this context, I think it highly unrealistic to expect employees to employ sophisticated contractual techniques to eliminate a potential liability about which they are very likely to be entirely unaware. Furthermore, in light of the general public policy interest in collective bargaining, I can see no justification for placing unionized employees in a more onerous situation than unorganized employees with respect to the same behaviour. Placing the onus to contract out of their tort liability on the employees is unjustified in this context.

81 I conclude that policy reasons strongly support a finding of no duty for an employee on the facts of this case. It is perhaps worth noting here that many statutes contain immunity clauses that relieve Crown servants from liability in tort for acts done in good faith in the intended execution of their duties. Hogg, *Liability of the Crown* (2nd ed. 1989), at pp. 145-46, describes the situation as follows:

> ... many jurisdictions do in fact grant immunity from personal liability to many or all of their Crown servants. The common practice is to include a privative clause in a statute establishing a department or agency of government; the clause immunizes the employees within that department or agency from liability for damages for acts done in good faith in the intended execution of their duties.

Hogg's systematic survey of one jurisdiction, Ontario, revealed a total of 80 statutory immunity clauses (at p. 91, n. 55). Crown employees are also protected by what Hogg refers to as the "universality of the Crown practice of 'standing behind' Crown servants who incur tortious liability" (at p. 97). Furthermore, the risk of bankruptcy does not exist for all intents and purposes in the public sector context.

82 Iacobucci J. considers that the acceptance of the general rule advocated by the respondents would be at odds with the common law notion of vicarious liability. It has been suggested that to eliminate the employee's personal liability would eliminate the employer's tort liability, leaving only his liability in contract; see Blom, Case Comment, *supra*, at p. 174. While it is possible to find the employer negligent while exempting the employee in cases of negligent misstatement because of the special requirement of reliance, where the damage suffered is to the plaintiff's property, there is no means of imposing a duty of care exclusively on the employer. Blom concludes that the "duty of care has to be on the person who does the damage, because the employer's liability ... is only vicarious" (at p. 174).

83 It is first of all important to note that the employer's liability in contract would very likely still exist. As I noted, it is this aspect that distinguishes this type of vicarious liability case from the ordinary case, in which the employer's contractual responsibility is not engaged. In the ordinary case, the employee's tort does not lead to a breach of a contract between his employer and a customer.

84 However, for some purposes, it may be important that the employer also be vicariously liable in tort. In my view, the argument of Professor Blom gives too much weight to the word "vicarious"; it implies that that word connotes a particular set of logical consequences. As I outlined earlier, the doctrine is not primarily a logical construction. In any case, there is no logical necessity that the employer's liability in tort depend on the personal liability of the servant. The vicarious liability regime has shown great flexibility; see Atiyah, *Vicarious Liability in the Law of Torts*, *supra*. In earlier times, vicarious liability was based on an untraversable fiction that the master was sued for his own negligence in selecting and employing careless servants. That fiction has been discarded without significant loss of effectiveness. Employers have been held vicariously liable even where no individual servant could be held liable. In *Co-Operators Insurance Association v. Kearney*, [1965] S.C.R. 106, 48 D.L.R. (2d) 1, this Court found that an employer could be vicariously liable for the negligence of its employee despite the fact that the liability of the employee was eliminated by statute. In a similar manner, I think the supposed logical requirement of the employee's personal liability can also be eliminated where appropriate.

85 Furthermore, the experience in the public sector is strong evidence that the alleged logical necessity of employee liability for the operation of the vicarious liability regime is neither logical nor necessary. The general rule in Canadian Crown liability statutes which adopt the English model is that the liability of the servant is a precondition of the liability of the Crown; see, for example, *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, s. 5. This approach may be a result of the fact that Crown liability developed initially through the liability of its agents. As a result, to achieve the desired end result of employer (Crown) liability and employee immunity, the immunity statutes typically expressly preserve the vicarious liability of the Crown itself. Hogg, *supra*, observes, at p. 146:

> If the clause does not expressly preserve the vicarious liability of the Crown itself, the clause will immunize the Crown as well; the general rule is that the liability of the servant is a precondition of the vicarious liability of the master. But such clauses can be drafted so as to preserve the vicarious liability of the Crown, and this practice, which is common, is the only defensible one, because it leaves the injured victim with recourse against the Crown.

As Hogg notes (at p. 91, n. 55), most of the immunity clauses in statutes establishing ministries expressly preserved the Crown's vicarious liability; see, for example, *Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22, s. 12.

86 In my view, the negligent act of the employee can be attributed to the company for the purposes of applying the vicarious liability regime in this context. Because of the proximity created by contract, the company owes a duty of care to the customer and is vicariously liable for the negligent acts of its employees. As Atiyah notes, *Vicarious Liability in the Law of Torts*, *supra*, at pp. 381-83, from the practical point of view, it is generally quite immaterial in tort law whether a corporation is treated as liable because it has itself committed a tort, or whether it is liable because its employees, acting in the course of their employment, have done so.

87 It should be noted, however, that for the purposes of the problem that arose in *Lenard's Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705 (H.L.), the fault in this case is not that of the comparty nor is the tort that of the company. In that case, the question was whether the appellant shipping company was entitled to limit its liability under the provisions of the Merchant Shipping Acts which afforded a defence where the loss occurred without its "fault or privity". The Lord Chancellor, Viscount Haldane, set down the general principle of direct corporate liability to the effect that such fault or privity can be established against the corporation where the fault is that of "somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself (at pp. 713-14). In order to prove actual fault or privity of the corporation, it remains necessary to prove that a directing mind and will of the corporation acted or committed a fault.

Canadian Cases

88 As I turn to the authorities, which the appellant contends clearly support a finding of a duty on the facts of this case, it is appropriate to recall the words of Lord Atkin in *Donoghue v. Stevenson*, *supra*, at p. 582:

> ... I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House.

Far from finding that the cases uniformly support the appellant's argument, I am comforted by the fact there has also been considerable support for the approach I am suggesting in Canadian cases and academic writing. My colleague lacobucci J. refers briefly to a number of Canadian cases. With respect, I do not find that they support his conclusion that a duty is unquestionably owed in this context or a conclusion that a simple foreseeability test is sufficient to ground liability.

89 I begin by noting that it is perhaps the lack of cases that is most striking. Seen by today's light, it is apparent that a straightforward application of the foreseeability test established by *Donoghue* would lead to employee liability in virtually all cases of property damage in this type of context. That this situation was the logical outcome of *Donoghue*, however, was not realized until much later because of an earlier avatar of the privity rule. Prior to *Donoghue*, it was generally considered that the case of *Winterbottom v. Wright*, *supra*, established a rule of privity to the effect that if A owed a contractual duty to B, C could not sue A in tort for conduct constituting a breach of the contract; see Fleming, *supra*, at p. 465. As noted by Reynolds, *supra*, it was not until the famous "Himalaya" case of *Adler v. Dickson*, [1955] 1 Q.B. 158, [1954] 3 All E.R. 397 (C.A.), soon to be reinforced by *Scruttons Ltd. v. Midland Silicones Ltd.*, supra, that it became apparent that the result of *Donoghue v. Stevenson* was that employees, agents or sub-contractors, *who had previously been protected by the privity of contract rule*, would now be liable to the other contracting party in cases of damage to person or property. It is perhaps worth noting that as recently as the *Nunes Diamonds* case, the plaintiff apparently did not even attempt to bring an action against the employee personally. With the recent confirmation of the fact that many breaches of contract will also constitute negligence in tort and the extension of tort recovery into the area of economic loss at least in some cases, the scope of *prima facie* tort liability in contractual contexts has greatly increased. As a result, the number of cases involving employee liability has increased in recent years.

90 On the cross-appeal, Vanwinkel and Brassait relied on the authority of *Sealand of the Pacific Ltd. v. Robert C. McHaffie Ltd.*, [1974] 6 W.W.R. 724, 51 D.L.R. (3d) 702 (B.C.C.A.). There the plaintiff engaged McHaffie Ltd., a firm of naval architects, to carry out the design work for improvements to an oceanarium. Robert McHaffie, the principal of the

company, recommended that the plaintiff use a product called zonolite which was to be supplied by another company. Zonolite proved to be totally unsuitable and extensive repairs were required. The plaintiff brought a number of actions, including actions against the company for breach of contract and in tort for negligent misstatement and against Robert McHaffie personally in tort for negligent misstatement. The company's liability in contract was clear. In tort, it was held not liable on the basis of *Nunes Diamonds*: since the negligent misstatement occurred in the course of carrying out its contract with the plaintiff, the negligence could not be seen as an independent tort unconnected with the performance of that contract as required by Pigeon J.'s test in *Nunes Diamonds*.

91 On the issue of McHaffie's personal liability in tort as an employee, Seaton J.A. concluded as follows, at p. 706:

> An employee's act or omission that constitutes his employer's breach of contract may also impose a liability on the employee in tort. However, this will only be so if there is breach of a duty owed (independently of the contract) by the employee to the other party. Mr. McHaffie did not owe the duty to Seal and to make inquiries. That was a company responsibility. It is the failure to carry out the corporate duty imposed by contract that can attract liability to the company. The duty in negligence and the duty in contract may stand side by side but the duty in contract is not imposed upon the employee as a duty in tort.

The *Sealand* court noted that Robert McHaffie did not undertake to apply his skill for the assistance of Sealand. Rather, Robert McHaffie did exercise, or rather fail to exercise, his skill as an employee of the company. It was with McHaffie Ltd. that Sealand contracted and it was upon the skill of McHaffie Ltd. that it relied. The court held that it would not hold an individual employee liable personally unless there is a breach of duty owed independently of the contract by the employee to the other party.

92 Two questions, which it is convenient to deal with immediately, arise in light of the subsequent history of *Sealand*: first, whether the case was overruled by this Court in *Rafuse*; second, whether the holding in the case should be limited to the area of negligent misstatement.

93 The question whether *Sealand* still stands in light of the decision of this Court in *Rafuse* has arisen in a number of cases. Its continuing applicability to employees has been doubted in light of *Rafuse*; see *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.* (1988), [1989] 1 W.W.R. 673, 30 B.C.L.R. (2d) 273, 46 C.C.L.T. 112, 54 D.L.R. (4th) 43 (C.A.), at p. 297, or rejected (*Ataya v. Mutual of Omaha Insurance Co.*, [1988] I.L.R. 1-2316, 34 C.C.L.I. 307 (B.C.S.C.)). In my opinion, while the rejection of McHaffie *Ltd.'s* tort liability would fall to be reconsidered in the light of *Rafuse, Rafuse* was not concerned with the questions raised by employee torts. The question whether a customer can bring a claim in tort against an *employee* is a very different question from whether there exists concurrent liability in tort and contract *between contracting parties*, i.e., in this case, between customer and employer. The independent tort requirement established by Pigeon J. in *Nunes Diamonds* has been criticized for its application to the question of the concurrent application of tort and contract in relations between two parties and the *Rafuse* case reconsidered this point. *Rafuse*, however, has no bearing on the question of the liability of employees; see Stieber, Annotation to *East Kootenay Community College v. Nixon & Browning* (1988), 28 C.L.R. 189, at p. 190.

94 In *Summitville Consolidated Mining Co. v. Klohn Leonoff Ltd.* (July 6, 1989), Doc. Vancouver C880756 (B.C.S.C.), a case in which the plaintiff sued three employees, none of whom was a director or officer of the employer company, for negligence in the performance of duties undertaken by their employer in a contract with the plaintiff, Gibbs J. held as follows, at pp. 4-5:

> The *Rafuse* case is of doubtful relevance or application to the issues on this application. It addresses the right to pursue concurrent remedies in tort and in contract as between the parties to the contract. It does not deal with the right, or the absence of such right, in one party to the contract to sue the employees of the other party to the contract in tort, while, at the same time pursuing the employer in both contract and tort. It is difficult to understand how *Rafuse* came to be regarded as somehow being determinative, or persuasive, in the application of the *London Drugs* principle.

I agree with this statement. The application of the independent tort theory to employees was not overruled by *Rafuse*, which dealt exclusively with situations involving two parties.

95 On the second question, the case of *Toronto-Dominion Bank v. Guest* (1979), 16 B.C.L.R. 174, 10 C.C.L.T. 256, 105 D.L.R. (3d) 347 (S.C.), can be read for the proposition that *Sealand* is limited to cases of negligent misstatement. In my view, however, that case is weak authority for that proposition. The case is distinguishable on its facts from the present case, as it concerned a bank manager with whom the plaintiffs by counterclaim had extensive personal dealings. More importantly, however, the case must be interpreted in light of the arguments made by the parties.

96 Mr. and Mrs. Guest had given a mortgage to the Toronto-Dominion Bank as security for advances to a company of which Mr. Guest was a principal. The Toronto-Dominion Bank initiated an action for foreclosure against the company. The Guests counterclaimed and in their counterclaim, the Guests apparently made allegations of negligence and fraud against the manager and the bank and against the manager alone. The trial judge referred a single question of law to be determined on a motion, namely, whether a bank manager could be held personally liable to a customer in damages *for tortious acts or omissions* falling within the scope of the manager's employment. The motions judge noted that difficulties arose because the cause of action alleged in the counterclaim was "by no means clear" (at p. 259). However, he noted statements in the pleadings alleging fraudulent, improper and malicious behaviour by the manager.

97 Against such an apparently broad pleading by the Guests, the bank apparently argued that the employee's immunity would extend to all claims in tort, including, for example, cases of theft or conversion (see p. 259). The bank thus argued that the *Sealand* principle should extend to ah torts, including intentional torts (see p. 262). This argument was reflected in the question set forth by the order of the trial judge, which the motions judge rephrased as the question whether *any alleged act or omission* of the manager within the scope of her employment could render her liable personally in damages to the bank's customers.

98 Not surprisingly, the judge rejected the bank's rather extraordinary argument. Unfortunately, he did not consider the intermediate possibility that a duty of care should be excluded in all cases of ordinary *negligence*, while tortious liability for *intentional* torts would remain. Faced with the bank's very broad argument, he chose to severely limit the scope of the *Sealand* case to negligent misrepresentation. He did not give separate consideration to whether *Sealand* should merely be limited to cases of negligence. In my view, the apparently narrow scope given to the *Sealand* case by the judge in *Guest* should not be taken as a considered rejection of its application to other cases of negligence; he was principally concerned to reject the very broad contention of the bank in that case. He did not attempt to logically justify his narrow reading of *Sealand*; he countered the bank's argument that limiting *Sealand* to negligent misstatement was illogical by referring to "venerable authority on both sides of the Atlantic against the contention that logic alone directs the path of the law" (at p. 264). In my view, there is no lack of logical justification for holding employees liable for intentional torts and gross negligence, while finding no duty of care for ordinary negligence. On the other hand, as Irvine appears to suggest, there is little reason to limit the application of *Sealand* to negligent misrepresentation; see Irvine, Case Comment: *Surrey v. Carroll-Hatch & Associates and Toronto-Dominion Bank v. Guest* (1979), 10 *C.C.L.T.* 266, at p. 273.

99 The argument for limiting the principle to negligent misstatement is founded essentially on the special requirement of reliance which exists in cases of negligent misrepresentation. In such cases, the duty of care is not imposed on every person who can foresee the risk that his negligent words may cause harm to another. It is argued that, although the employee would be liable if foreseeability were the only criterion, the employee does not meet the other criteria set forth in *Hedley Byrne*. In my view, there is no reason, in cases raising the issue of employee liability for negligence, to limit the requirement of reliance to cases involving negligent misrepresentation. The reasons why the imposition of liability does not make sense are a result of the analysis of the situation of the employee and the policies underlying vicarious liability. While it may be doctrinally easier to justify an exemption of liability for negligent misstatement, there are no policy reasons why the exemption should be so limited. Reliance has been found to be relevant by this Court in cases not involving negligent misrepresentations; see *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, *supra*.

100 *Sealand* has been generally well received by academic commentators: Blom, "The Evolving Relationship Between Contract and Tort" (1985), 10 *Can. Bus. L.J.* 257, at pp. 273-74; Blom, "Fictions and Frictions", *supra*, at pp. 185-86n; Blom, Case Comment, *supra*, at p. 173; Reiter, *supra*. The evolution of Professor Blom's thinking in this area is particularly revealing. He began by making a sharp distinction between negligent misrepresentation cases and those involving physical damage to person or property which he considered to be "radically different": while the absence of a duty could be justified in the former type of case owing to the requirement that the defendant undertake the responsibility, in the latter case, liability was clear: "The Evolving Relationship Between Contract and Tort", *supra*, at pp. 273-74. In his later writing, however, Professor Blom has noted that, while it may be doctrinally easier to justify the absence of a duty in *Hedley Byrne* type cases because of the clearly established requirement of reliance and the fact that the customer's reliance can arguably be said to be on the employer but not on the employee as an individual, policy reasons do not support any such limitation of the principle; see "Fictions and Frictions", at pp. 185-86n. In his case comment on the Court of Appeal decision in the present case, he concludes that even if there were no contractual clause limiting liability, a finding that the employees should have no duty makes sense for reasons similar to those I set out above. He states, at pp. 173-74:

> Suppose that the warehousing contract had left Kuehne & Nagel's liability unlimited. Even then, would it have been light to impose the same unlimited liability on the employees? They would never have been handling $40,000 transformers if it had not been part of their job. The employer is being paid to assume the risk of damage to the transformer, but except in the most theoretical sense the employees are not. They are selling their labour, not a form of insurance. The risk of doing $40,000 worth of damage is imposed on them, but as employees (and here their position would be different from independent contractors) they are badly placed to arrange things financially to cope with that risk. They can get their employer to include them as insureds under its liability policy, but then suing them is indistinguishable from suing the employer; it is the same insurance.

101 Reiter, *supra*, considers that the result in *Sealand* is justified by the principle of limited liability. In contracting for services to be provided by a business corporation or association, a plaintiff can fairly be regarded as relying upon performance by the corporation or association, and upon the liability of that body if the services are purveyed negligently. He says, at p. 290:

> It is true that the contract between Sealand and McHaffie Ltd. did not provide explicitly for the exculpation of McHaffie in respect of personal liability: but the very object of taking the contract in the corporate name is as cogent an explanation of the intended limitation on risk exposure as any express clause could be. There should be no need for any such express provision excluding liability in third parties acting in furtherance of one contractor's obligations under the contract: the matter is less one of contractual exclusion of liability than of the existence of contractual relations negativing the legal preconditions of tort liability.

This limited liability principle applies equally to all cases of negligence and not just to cases of negligent misrepresentation.

102 In *Moss v. Richardson Greenshields of Canada Ltd.*, [1989] 3 W.W.R. 50, 56 Man. R. (2d) 230 (C.A.), the court achieved a result similar to *Sealand*, even though the cases involved alleged negligent acts rather than negligent misrepresentation. The plaintiff Moss was an investor. The defendants were a brokerage firm and an employee stockbroker of the firm. The contract between Moss and the firm limited the firm's liability to cases of gross negligence. The plaintiff sued the employee Davies to recover the amount of a trading loss incurred allegedly through Davies' negligent act.

103 Huband J.A., writing for himself and Philp J.A., did not find it necessary to consider whether the employee could claim the benefit of the limitation provision in the contract between the plaintiff and his employer. He said, at p. 56:

> In my view, there is no separate cause of action that would enable Moss to successfully sue Davies. The contract was with Richardson. The essence of the complaint is a breach of that contract. Moss' cause of action, if any, is against Richardson, and there is no independent cause of action in negligence against the defendant Davies.
>
> [Emphasis added.]

Huband J.A. also noted that in that case, the employee's acts or omissions related solely to the work he was doing as an employee of Richardson, for Moss. No one else was or could be affected (at p. 57). In his concurring reasons, Twaddle J.A. concluded that although the law imposes a duty of care on a stockbroker in some circumstances, it did not do so in the circumstances of that case. Any duty of care that existed was contractual, whether the employer's duty to the plaintiff or Davies' duty to his employer. He explicitly noted that "[w]hat this case is all about is the contractual obligation of care owed by the defendant Richardson" (at p. 62).

104 I think that the language in the *Moss* decision to the effect that tort liability is excluded because of the contractual *nature* or *essence* of the claim should be read as shorthand for a conclusion that contractual aspects dominate in that context and that it does not make sense, in the context of that case, to allow the contractual aspects to be circumvented by an action in tort against an employee. In my view, *Rafuse* establishes that Moss's complaint against *Richardson Greenshields* (the employer) could presumably be brought in either tort or contract, so its "essence" cannot be said to be contractual unless the plaintiff chooses to argue the case in contract only. If Moss is alleging breach of the contract by Richardson Greenshields, the action is contractual; if Moss is alleging that Richardson Greenshields fell below the standard of care of the reasonable stockbroker, the claim is in tort. Of course, it may be very difficult for the plaintiff to win in tort against a defendant like Richardson Greenshields since the case will typically involve economic loss: various policy issues will be raised including the possibility that tort liability would unduly interfere with the contractual bargain and allocation of risk. Nonetheless, a tort action is not excluded by virtue of the mere existence of a contract. Accordingly, to the extent that the court relied on *Charlesworth and Percy on Negligence* for the finding that a stockbroker's duty is "primarily in contract" (at p. 55), I think it must be doubted in the light of *Rafuse*. However, the fact that concurrent liability may exist with respect to Richardson Greenshields does not invalidate the finding that the employee is not liable.

105 The conclusion that no cause of action in tort lies against Davies, although expressed in terms of the action being of a contractual *nature*, is undoubtedly the product of balancing of the importance of the values protected by tort and those protected by contract in the particular context of the case. It can be justified as an application of the principle of limited liability. Rather than finding the essence of a particular complaint to be contractual, it might be more appropriate to find that the alleged tort liability exists in a contractual context, and that contractual concerns predominate.

106 In the early eighties a number of claims in negligence against employees were struck out on motions in Ontario. In *Durham Condominium Corp. No. 34 v. Shoreham Apartments Ltd.*, Ont. H.C., April 23, 1982, 14 A.C.W.S. (2d) 155, unreported, the judge held that the claimant was limited to a contractual claim against the company; see also *O'Keefe v. Ontario Hydro* (1980), 29 Chitty's L.J. 232 (Ont. H.C.). The *Durham* case was followed by Hughes J. in *Constellation Hotel Corp. v. Orlando Corp.* (July 6, 1983), Doc. 717/83 (Ont. H.C.), 20 A.C.W.S. (2d) 482. The action in that case arose from an allegation of faulty construction of a parking garage annexed to the premises of the plaintiff. Bradstock Reicher & Partners Ltd. was an engineering company employed by the plaintiff under a written contract and Hans Reicher, a professional engineer, was its employee and represented it during the work. The pleadings contained allegations of breach of contract and negligence in the performance of the contract against both the company and Reicher personally. The motion judge considered notably the cases of *Nunes Diamonds* and *Sealand*. He considered himself bound by the holding in *Durham*.

107 On appeal, the Court of Appeal of Ontario specifically found that the issue was whether an action could be brought against a limited company with which the plaintiff has a contract and also against the *principal officer* of the company who is alleged to have acted negligently in the course of performing the contract and in breach of his duty to the plaintiff; see *Constellation Hotel Corp. v. Orlando Corp.*, Houlden, Goodman and Cory JJ.A., January 12, 1984,

unreported, endorsement reproduced at 2 C.P.C. (2d) 24. The court noted that there was no allegation of an independent tort. On the narrow issue of the liability of a principal officer, the court set aside the order of the motion judge and allowed the issue to go to trial on the ground that the "law on this point is far from clear".

108 A more recent Ontario case, *Leon Kentridge Associates v. Save Toronto's Official Plan Inc.*, Ont. Dist. Ct., Conant Dist. Ct. J., No. 301678/87, March 27, 1990, rejected the personal liability of corporate officers for their negligent misrepresentations. The case concerned a non-profit corporation (STOP) formed to oppose the construction of a domed stadium in downtown Toronto in an area locally known as "the railway lands". The individual defendants Bossons and Martini were officers and directors of STOP. The plaintiff Kentridge was retained by STOP as a planning consultant in 1986 in connection with hearings before the Ontario Municipal Board. Kentridge dealt only with the individual defendants Bossons and Martini on behalf of STOP.

109 Kentridge worked for STOP for a period, then was told to stop work. When the corporation received a $50,000 anonymous donation, Kentridge recommenced work only after receiving assurances from the two defendants that he would be treated in the same manner as the corporation's law firm. Kentridge later learned that the whole of the $50,000 was paid to the law firm as part payment of its account. He took the position that he was "short changed" because he received less fair treatment than the lawyers. At the time of the lawsuit, STOP had been dissolved. Kentridge claimed from the individual defendants his "fair share" of the $50,000 because of the representations upon which he relied and resumed his work.

110 The court had no difficulty in finding that the elements of negligent misrepresentation existed. Accordingly, the judge turned to consider whether the defendants could be held to be personally liable for misstatements made in exercising their duties as directors and officers of STOP. The court explicitly referred to the limited liability principle precluding the personal liability of the defendant directors. The judge considered that the defendant directors acted as officers and directors of STOP and not in their personal capacity:

> As a result, in my view the plaintiff herein is entitled to sue in either contract or in tort. However, on the facts, I find the defendant directors acted as officers and directors of STOP and not in their personal capacity.
>
> [Emphasis added.]

In my view, it would be unjust for *officers* to benefit from an exclusion of liability for torts committed by them, while ordinary warehouse employees are held personally liable for torts committed by them.

111 In *Summitville*, *supra*, Gibbs J., after finding that *Sealand* had not been overruled in *Rafuse* as I outlined above, went on to consider the question of the liability of the three employees. He underlined that they were not, like the individual defendant in *Sealand*, a sole proprietor. Nor was there a personal relationship and special reliance on the skill of a particular employee. He considered that the plaintiff's alleged reliance on the particular employees was insufficient; the mere fact that the employees had come into contact with the plaintiff as a result of being designated by their employer to do on-site work was insufficient. At page 9, he stated:

> Klohn Leonoff [the employer] is not an "incorporated pocketbook" kind of sole proprietorship. It is a large organization in the engineering services field. Persons who contract with it must do so in the reliance that competent personnel will be assigned from a large staff. There is not that close personal relationship approaching dependence which is evident in cases where the employees have been held personally liable in tort.

In my view, Gibbs J. was correct in finding that it is in this type of context that a finding of no duty is most easily justified.

112 Despite the academic approval of *Sealand*, the courts, particularly in B.C., have not always followed the approach taken in that case. A case to which I referred earlier and which was decided at practically the same time as *Sealand, Northwestern Mutual Insurance Co. v. J. T. O'Bryan & Co.*, reveals the confusion that reigns in this area. In *Northwestern*, the plaintiff was a partial insurer of a warehouse; O'Bryan Ltd. was an insurance broker in charge of placing shares of

the pooled insurance coverage and Thibeau was an employee of O'Bryan. Northwestern had repeatedly asked O'Bryan to be removed from the risk on a particular building. After numerous efforts by Northwestern to have itself removed from the risk, Thibeau informed Northwestern that it was off the risk. The information was wrong because Thibeau had mistakenly looked at the wrong file. After a fire broke out and damaged the building, Northwestern was required to pay its proportionate share. It sued O'Bryan in contract and Thibeau in tort and succeeded in both actions.

113 On the issue of Thibeau's liability, the argument in the case appears to have turned largely on whether Thibeau could be brought within the well-known principle set out by Lord Reid in *Hedley Byrne*, at p. 486:

> A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require.

Hedley Byrne was a case involving the liability of companies. The defendants were merchant bankers. Despite the general reference to a "reasonable man", great care must be taken in extending its principles to employees without due regard for the differences in context. The court in *Northwestern* simply concluded that Thibeau "could have kept silent and declined to give the information" or "could have given the information with a reservation that he accepted no liability for its accuracy or otherwise". Furthermore and unsurprisingly, the court concluded that the relationship was not casual but rather commercial: an employee, when acting as such, will rarely be outside of a commercial context. Little or no consideration was given to the fact that Thibeau was an employee. Unlike a company or Lord Reid's reasonable man, however, an employee is under a pre-existing contractual obligation to perform his work obligation to his employer. In many cases, that work obligation will involve making representations of various kinds to the public. In that context, as I noted earlier, it is not realistic to consider that the ordinary employee is in a similar situation to the defendant in a *Hedley Byrne* situation, i.e., entirely free to decline to make any representation at all or, alternatively, free to decline any tort liability.

114 The other lower court cases cited by the appellant are not compelling. In *British Columbia Automobile Assn. v. Manufacturers Life Insurance Co.* (1979), 14 B.C.L.R. 237 (S.C.), an actuary employed by Manulife was held personally liable for careless advice given to a Manulife client. Manulife had made an admission to the effect that, to the extent that the actuary was found to be responsible for any loss suffered by the plaintiff, Manulife was liable as principal and the issue of the employee's duty of care was not addressed at length. In my view, the intervener rightly distinguished that case as one in which the result turned upon evidence of actual reliance on a particular designated person and upon the professional relationship between the client and the professional actuary. In *Herrington v. Kenco Mortgage & Investments Ltd.* (1981), 29 B.C.L.R. 54, 125 D.L.R. (3d) 377 (S.C.), a principal of a mortgage brokerage firm, who carelessly misrepresented the value of a mortgage in which the plaintiff subsequently invested, was held personally liable for injury resulting from that advice.

115 *East Kootenay Community College v. Nixon & Browning*, *supra*, was another case involving a professional engineer (Loh) who was the principal of Loh Associates. The defendant Loh Associates negligently prepared certain plans that were used by the defendant architects (Nixon & Browning). As a result, certain corrective work had to be carried out, resulting in a delay in completion of the plaintiff's college campus facility. At trial judgment was given against the architects and Loh Associates with the architects being held entitled to indemnity in the third party proceedings against the engineers. On an application to settle formal judgment, the question was raised whether the individual third party C.Y. Loh was personally liable to indemnify certain defendants.

116 The case is easily distinguished from the case at bar. It concerns an employee who was both a professional and a principal of a company. Furthermore, in finding liability to exist, the court relied on the statutory regime applicable

to engineers in British Columbia; see *Engineers Act*, R.S.B.C. 1979, c. 109. That regime required that an engineer stamp or seal plans that he, in his capacity as professional engineer, prepared or had prepared under his direct supervision, restricted engineering work to companies with professional engineers on staff, and provided, in s. 10(5), that professional engineers who are employed by corporations "individually shall assume the functions of and be held responsible as professional engineers". The court explicitly noted that Loh's seal was affixed to the plans.

117 In *Ataya v. Mutual of Omaha Insurance Co.*, *supra*, the judge relied on the decision of the trial judge in the present case. Again, the case is clearly distinguishable on its facts, since the defendant employee was both a principal and owner of the defendant company. The judge referred to "numerous cases" finding employees liable in negligence for faults committed by them in carrying out their employer's contractual duty to a plaintiff, but cited only the decision at trial in the present case as authority for that proposition. In light of what the judge apparently considered to be an established principle of employee liability, the judge confined his inquiry to the question of whether an employee who is also the proprietor of the incorporated business should be treated any differently than an ordinary employee. Concluding that he should not be treated differently, he accordingly found the individual plaintiff liable. The authority of the *Sealand* case was questioned in light of *Rafuse*; as I stated earlier, *Rafuse* did not specifically consider the issue of employee torts.

118 It remains for me to consider the two cases involving employees decided by this Court and cited by the appellant.

119 The first case, *Greenwood Shopping Plaza Ltd. v. Beattie*, [1980] 2 S.C.R. 228, 10 B.L.R. 234, 111 D.L.R. (3d) 257, 39 N.S.R. (2d) 119, 71 A.P.R. 119, [1980] I.L.R. 1-1243, 32 N.R. 163, arose as a result of the destruction of a substantial proportion of the Greenwood Shopping Plaza by a fire originating shortly after certain welding operations in the service bay building of the Canadian Tire associate store in the shopping centre. I have adapted the following summary of the relevant parts of the case from the judgment of Hart J.A. on a related appeal (1979), 31 N.S.R. (2d) 135, aff'g (1978), 31 N.S.R. (2d) 1 (S.C.T.D.).

120 The Greenwood Shopping Plaza was owned by Greenwood Shopping Plaza Ltd. (hereinafter "Greenwood"). Neil J. Buchanan Ltd. (hereinafter "Buchanan Ltd.") was the operator of a franchised associate store of Canadian Tire Corporation Ltd. (and this store was co-managed by Neil J. Buchanan and Robert Walker Beattie). Roy Vincent Pettipas was a welder by trade. On the night of the fire, he had been welding some tire storage racks under the general direction of Beattie in the service bay area of the associate store shortly before the fire broke out. Blair Douglas MacMurtery was an employee of Buchanan Ltd. who was assisting Pettipas in the welding operation.

121 Several of the tenants of the shopping centre whose premises were destroyed by the fire, namely, Eatons, Simpsons-Sears, Metropolitan Stores, Greenwood Pharmacy and Wade's Groceteria, were the initial plaintiffs. They brought action against Buchanan Ltd., Canadian Tire, Beat-tie, Pettipas and MacMurtery for the damages they suffered as a result of the fire, claiming negligence by the defendants, their servants and agents. The defendants denied liability and joined Greenwood as a third party claiming that the fire was caused by Greenwood, its servants, agents and contractors as a result of the negligent installation and maintenance of the electrical system provided to the premises leased by Buchanan Ltd. from Greenwood.

122 Greenwood then brought action against Neil J. Buchanan, Buchanan Ltd., Canadian Tire, Beattie, Pettipas and MacMurtery claiming that the defendants caused the fire by negligence and seeking damages for the loss of the shopping centre buildings and rentals during the period of reconstruction. The defendants denied liability and claimed indemnity against any liability incurred as a result of the fire, since they alleged that the fire was caused by faulty electrical installations by Greenwood. They also pointed to clauses 14 and 15 of their lease with Greenwood which required the owner to insure the buildings against fire without right of subrogation, and claimed that Greenwood's actions were therefore barred.

123 The issue of whether the employees owed a duty of care was not considered by this Court and I do not consider that the decision of this Court is authority with respect to the duty of care question. Leave was granted on the narrow issue of whether the employees who were not parties to the lease and insuring agreement in clauses 14 and 15 of the lease,

could claim the benefit of those provisions; see *Greenwood*, *supra*, at pp. 235-36. The branch of the *Greenwood* case that involved the question of the duty of care never reached this Court. In fact, none of the courts hearing the *Greenwood* case found, simultaneously, that the employees owed a duty and that they were liable.

124 The initial plaintiffs, who were tenants of the shopping plaza, had not entered into a course of dealing with Buchanan Ltd. Accordingly, unlike Greenwood, they could be assimilated to "classic", or "non-contractual", plaintiffs. Finding the employees liable towards such plaintiffs is defensible on policy grounds, as I noted above. The employees in *Greenwood* did not claim an indemnity from their employer, nor did they bring a claim in negligence against their employer with respect to its failure to contract adequately to protect them from ultimate liability. Accordingly, the Court did not have occasion to consider the issues raised in *Lister*.

125 It should be underlined that Greenwood, the sole plaintiff that did have a contractual link (the lease) with Buchanan Ltd., was prevented from recovering against the employees in both the trial court and the Court of Appeal by the application of the lease term to protect the employees. Accordingly, the issue of the duty of care to a co-contractant of the employer did not need to be squarely faced by those courts since recovery was in any case not allowed on a contractual analysis. It was only in this Court, by which time the duty of care question was no longer at issue, that the lower courts were considered to have erred on the application of the clause.

126 This analysis is reinforced by the cursory examination of the issue of an employee's duty of care in both the trial court ((sub nom. *Greenwood Shopping Plaza v. Neil J. Buchanan Ltd.*) (1978), 31 N.S.R. (2d) 1, 59 A.P.R. 1), and the Court of Appeal ((1979), 31 N.S.R. (2d) 135, 52 A.P.R. 135). In both sets of reasons, consideration of the employee's situation occurs *after* the company's liability has been established. Thus, in the Court of Appeal, the passage immediately preceding the consideration of whether the employees were negligent reads as follows, at p. 159:

> In my opinion the trial judge did not err in reaching the conclusion that the fire was caused by the escape of effluent from the welding operation and that Buchanan Limited was liable for the damages resulting from the fire by virtue of the negligence of its employees.

It is not clear from the reasons of the Court of Appeal whether the duty of care issue was even argued. The second and third grounds of appeal were to the effect that the trial judge had erred in finding that the two employees were "guilty of negligence" and the main thrust of the argument, in so far as it is possible to determine from the very brief reasons, appears to have been related to either the standard of care or to whether the employee occupied a position of responsibility with respect to the carrying out of the welding operations (at p. 159). The critical question of whether even an admittedly negligent employee with undeniable responsibility for carrying out a particular operation should bear *personal* liability for damage is not clearly addressed.

127 The trial judge (at p. 40) found that two of the three employees involved were liable, after having determined that the employer was liable. As I noted, he applied the contractual clause to the employees, thereby precluding liability. Given this solution, it was not necessary for the judge to consider any of the policy factors bearing on the question of employee liability and I can only assume they were not drawn to his attention.

128 As a result of the peculiar structure of the *Greenwood* case, I do not find it to be strong authority on the issue of an employee's duty of care. In any case, in my view, it can be distinguished from the present case. It involved an intrinsically dangerous activity. As a result, the case raised serious concerns about the safety of the plaintiffs and the general public, concerns that are largely absent from the present case. Those concerns arguably justified a special duty on employees to all plaintiffs, with an indemnity regime as a corrective. In the case at bar, safety concerns are in my view sufficiently looked after through the imposition of liability on the employer, through the employer's power to discipline and dismiss, through the operation of statutory schemes of occupational health and safety and through the employee's self-interest in his personal safety. The imposition of liability cannot be justified here by concern over safety.

129 In *Cominco Ltd. v. Bilton*, [1971] S.C.R. 413, the plaintiff brought an action for damages against the defendant tug boat master, alleging that he was negligent in his performance of a contract whereby his employer had agreed to transport the plaintiff's goods by water from Vancouver to Port McNeill, B.C. The scows in which the goods were carried sank at their mooring at Port McNeill booming ground with the result that the plaintiff's goods were lost or damaged. The trial judge dismissed the action. He took the view that when the contract for carrying is between the carrier and the owner of the goods, the master employed by the carrier is not liable to the owner of the goods for the negligent carrying as he is under no duty of care to the owner of the goods. The plaintiff appealed to this Court. The appeal was dismissed.

130 Admittedly, this Court did not adopt the trial judge's reasons. Rather, it found another route to deny the tug boat master's liability. Although it found that liability theoretically existed under *Donoghue*, the majority apparently applied a stricter than usual causality test, requiring that the plaintiff prove that the tug boat master's negligence was a "probable cause" of the loss, and held that the plaintiff had not discharged this burden.

131 *Cominco* predates *Anns* and the adoption of *Anns* by this Court in *Kamloops*, It has been followed only once in over twenty years; the case in question did not even involve the question of employee liability; see *Great West Steel Industries v. Arrow Transfer Co.* (1977), 75 D.L.R. (3d) 424 (B.C.S.C.). Today suit is rarely taken against the master or crew because they are amply protected by modern Himalaya clauses; see Tetley, *Marine Cargo Claims* (3rd ed. 1988), at p. 261. Policy considerations, which are now an explicit part of the tort analysis, were not considered in *Cominco* with respect to the question of the tug boat master's duty of care; the duty of care is founded purely on *Donoghue* foreseeability. Like some other cases that predate *Anns* (see Wilson J.'s reference to *Rivtow* in *Kamloops*, at pp. 32-33), it may well be that *Cominco* will need to be reconsidered by a full panel of this Court.

132 In any case, I do not find the case to be controlling here. For one thing, the case did not involve the vicarious liability regime. The owner of the tug boat was in no way concerned by the litigation, apparently as a result of an "arrangement" between the plaintiff and that company; see *Cominco*, *supra*, at p. 416. As Ritchie J. noted, if the action had been brought against the employer, other considerations might have applied (at p. 430).

133 I would limit the application of the *Cominco* case to the context of maritime cases. Maritime law has long provided that a ship master is a very special type of employee, with a far wider range of autonomy and responsibilities than the employees in this case. In earliest times, as noted by Tetley, the master was usually owner or part owner of the ship and was a proper defendant whenever cargo was lost or damaged; see Tetley, *supra*, at p. 261. As the reasons of Spence J. (dissenting on the issue of causality) make clear, ship masters are subject to specific rules, inapplicable to other employees. He stated, at p. 434:

> Although the mate and the deckhand were not the defendant Bilton's employees and therefore he cannot become liable for their acts on the basis of the maxim *respondeat superior*, nevertheless, they were under his direct orders and were acting on his direct orders. I am of the opinion that the physical acts of the mate and the deckhand were as much the acts of the defendant Bilton as if he had done them himself.

Furthermore, the widespread recourse to Himalaya clauses as a matter of course means that the problem has been largely resolved in the maritime context.

134 In light of the specific characteristics of a ship master, I think that even if the case is considered to have some relevance outside the area of maritime law, I would assimilate a ship master to a professional employee for the purposes of employee liability. The majority judgment of Ritchie J. justified the application of *Donoghue* on the grounds that the tug boat master was "temporarily in control of the appellant's cargo"; I would interpret that language as being limited to circumstances in which the employee has a level of autonomy in his activities equal to that of a ship master. I note that even in such circumstances, Ritchie J. apparently applied a stricter than usual causality test, requiring the plaintiff to prove that the master's negligence was a "probable cause" of the loss (at p. 430). As I noted, he rejected the master's liability on causality grounds.

The Test: Reliance, Undertakings and Insurance

135 In my view, a requirement of specific and reasonable reliance on the defendant employees is justified in this type of case. I find it to be a necessary condition for recovery in cases of employee negligence where the law provides for the possibility of compensation through recourse to the employer and where, accordingly, the plaintiff's interest in compensation for its loss caused by the fault of another is substantially looked after. I also find it to be necessary in cases in which the defendant has no real opportunity to decline the risk.

136 In my view, there is no reason to limit the requirement of reasonable reliance to employee torts involving negligent misrepresentation. In the case of negligent misrepresentations, the requirement of reasonable reliance exists in part to respond to policy concerns about potentially indeterminate liability in the context of negligent words and economic loss. Here, the policy concerns are different, but a requirement of reasonable reliance is equally justified in light of my analysis of the situation of the employees in this case and the policies underlying vicarious liability. Reliance has been found to be relevant to findings of proximity by this Court in cases not involving negligent misrepresentations; see *Hofstrand*, *supra*.

137 Reliance on an ordinary employee will rarely if ever be reasonable. In most if not all situations, reliance on an employee will not be reasonable in the absence of an express or implied undertaking of responsibility by the employee to the plaintiff. Mere performance of the contract by the employee, without more, is not evidence of the existence of such an undertaking since such performance is required under the terms of the employee's contract with his employer. It may well be, as Blom argues, "Fictions and Frictions", at p. 179, that the further one moves away from a wholly commercial type of case, the more scope there is for asserting reasonable reliance on something less than promises. This case, at any rate, is wholly commercial. With respect for those of a contrary opinion, I find any reliance by London Drugs on Vanwinkel and Brassart was certainly not reasonable in this case.

138 Iacobucci J. declines to decide whether reliance is relevant in cases like the present. However, he finds that even if it were relevant, it is necessary to distinguish between reliance on careful behaviour and reliance on the defendant's pocketbook. With respect, I do not find Iacobucci J.'s distinction between reliance on conduct and reliance on the pocketbook persuasive. The obvious truth that customers naturally hope that the employees of their co-contractant will do the job right is insufficient to constitute reasonable reliance. The very purpose of a corporation is to separate out conduct and pocketbook, to allow some to contribute capital and share in profit, and to allow others to contribute work, generally for a fixed return. Vicarious liability is a recognition of that fact. The cases cited generally by Iacobucci J. in support of the distinction, *Hedley Byrne, Junior Books Ltd. v. Veitchi Co.*, [1983] 1 A.C. 520, [1982] 3 All E.R. 201 (H.L.), and *Hofstrand*, deal with the issue of reliance only with respect to a defendant limited company; the issue of the separation between conduct and pocketbook, between corporation and employee, simply does not arise in those contexts.

139 The distinction also does not explain the decided cases. In cases involving employee torts, the conduct is clearly the employee's; nonetheless, in cases such as *Sealand*, only the company was found liable. That conclusion was based on the fact that reliance was only justified on the company. To limit the consideration of reliance to reliance on conduct would require a finding that an employee owed a duty as a precondition to company liability in tort in every case of employee torts where reliance is relevant. Far from abstaining from commeriting on cases such as *Sealand, Moss* and *Summitville*, Iacobucci J. adopts a distinction that, as I understand it, rejects the very basis of those decisions.

140 Furthermore, Iacobucci J. merely uses the conduct/pocketbook distinction to find that "reliance, as it may be used here, goes to the existence of a duty of care owed and not to liability for breach of a duty of care" (at p. 407). He approves a passage in which Professor Blom rejects the approach of Hinkson J.A., in which a *contractual limitation clause* has the effect of eliminating proximity in tort. With respect, I agree that Hinkson J.A.'s approach is not convincing. While a limitation clause may be a factor in evaluating the expectations of the parties, it is not sufficient, in and of itself, to *eliminate* a duty of care. My approach, however, does not rely on the contractual clause.

141 Iacobucci J. rejects a "blanket rule" that would eliminate the employees' duty of care for acts committed in the course of employment and in the course of contract performance by the employer. I do not take issue with that finding. Unlike my colleague, however, I do not consider that it suffices to justify a duty of care here. In effect, Iacobucci J. contends that the mere fact that employees are sometimes held liable suffices to justify liability in this case. With respect, I disagree. To find that employees are not always exempt from liability does not lead logically to the conclusion that they must be liable in this case.

142 While the respondents' argument was indeed at times cast in broader terms than it perhaps needed to be, the intervener contended at times for a rule limited to employees in situations characterized by "relational contracts" and a number of its arguments were addressed to employees who are primarily labourers and subject to a collective agreement. For example, it emphasized in its factum that this is not a case of reliance upon the specialized skills of a particular employee. In my view, to reject the respondents' blanket rule is insufficient to resolve the duty of care issue in this case.

143 I note first that the question of employee liability in the context of the specific facts of the *Sealand* case does not arise for decision here. *Sealand* involved the question of the liability of a principal of a one-person company. Such cases raise problems, such as the potential confusion in the mind of the plaintiff as to the identity of his or her co-contractant, which do not exist in the present case. Unlike the case here, the employee in that case may well be responsible for the taking on of the contract and for the organization of the work. As I noted, in *Constellation*, the Ontario Court of Appeal found the precise issue in *Sealand* to be "far from clear". Small companies and particularly one-person companies are increasingly available to professionals. It may be legitimate in such cases to require the principal employee to at least draw the attention of the client to the fact that he desires to take advantage of the corporate vehicle to limit his personal liability as an employee. On the other hand, it may make sense to establish the limited liability principle as a general principle and allow for individual exceptions to the rule as policy judgments in particular sorts of situations. I would thus decline to express an opinion on the *Sealand* case as one of general application to such situations.

144 A related issue is the status of professional employees, or alternatively, skilled employees. It raises many of the same concerns as the one-person company so a number of the considerations I outlined in the previous paragraph are relevant here. As the intervener correctly noted, this case does not raise the question of employee duties of care in the context of a unique professional relationship. In some cases, such as *British Columbia Automobile Association*, professional employees have been found personally liable; in others, such as *Moss*, they have not. Academic commentators have disagreed about the desirability of limiting any rule to nonprofessional employees; see McCamus and Maddaugh, "Some Problems in the Borderland of Tort, Contract and Restitution", in *Special Lectures of the Law Society of Upper Canada: Torts in the 80s* (1983), at p. 290; Caplan and Schein, "Caught in a Cross-Fire: The Erring Employee in the Borderland of Contract and Tort" (1987), 8 *Advocates' Q.* 243, at p. 255. Like the specific problem raised in *Sealand*, the problem is one of great practical importance, since such employees are much more likely to have sufficient assets to make proceedings against them attractive to plaintiffs. In fact, most of the reported cases concern employees who are principals, as in *Sealand*, or professionals, as in *Moss*. The question of reliance on a particular individual in such cases may give rise to difficulties because it may be the reputation of one person that attracts work to a firm while others may end up doing the work. It is particularly important in cases involving professionals to distinguish between mere reliance in fact and *reasonable* reliance on the employee's pocket-book. Unlike this case, in which it clearly makes no sense to impose upon the employee an obligation to insure against property loss, such cases raise with particular acuity the question of whether in effect requiring double insurance by both the firm and the employee makes sense in that context. Ultimately, the question of the reasonableness of the plaintiff's reliance may depend essentially on the answer to that question. Such an approach would avoid difficult definitional questions concerning whether a particular employee is "skilled" or a "professional". Without the benefit of argument on that problem and others that may be raised in the context of professional or skilled employees, I do not find it necessary or appropriate to decide that issue here. I note that leave to appeal has been granted ([1992] 2 S.C.R. vi) in *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*, [1991] 4 W.W.R. 251, 53 B.C.L.R. (2d) 180, 44 C.L.R. 88, 7 C.C.L.T. (2d) 177, 1 B.L.R. (2d) 188 (C.A.), where these issues may well arise.

145 Subject to consideration by this Court of the arguments put forward by Fleming and others with respect to employee liability generally under the vicarious liability regime, the employee also remains liable to the plaintiff for his independent torts. The employer may also be vicariously liable for some independent torts in accordance with the general rules for establishing the employer's liability. The term "independent tort" has been used with different meanings in different contexts. I should make clear that by independent tort in this context I mean a tort that is unrelated to the performance of the contract. It is not necessary in this case to consider the question of the definition of independent tort at length, since the tort in question was obviously not unrelated to the performance of the contract between London Drugs and KNI. Furthermore, since it is very likely that the only time a plaintiff will need to allege an independent tort is when the company is unable to satisfy a judgment, it can be expected that the issue will not arise with great frequency. The following remarks may, however, help guide the application of this concept.

146 It is first of all necessary to distinguish the use of the term independent tort here from other meanings that have been given to the term. The term has also been used in the context of the development of concurrent liability to refer to a tort that exists in the context of a contractual relationship between two parties; see *Rafuse*, *supra*, at p. 205. If I agree by contract to wash a motorcar and also agree that I will be liable for any damage to the car while it is in my possession, the car owner has a claim in contract for such damage however caused. He also has an "independent" claim intort in the sense referred to in *Rafuse*: if the damage results from my not taking reasonable care (in this case, a different standard than the contractual standard agreed to, although that is not a necessary condition for tort liability), he can claim in tort. In this sense, characterizing a tort as an "independent tort" is simply an affirmation that the mere existence of a contract does not preclude tort liability; it also refers to the fact that the tort action must rely on a duty of care in tort and not, for example, on a higher standard of care created by a particular contract.

147 The car owner's claim in tort in this car example would not be, however, independent in the sense set forth in *Sealand* or in the sense I am referring to here. In cases of employee torts, as I stated, an independent tort is one that is unrelated to the performance of the contract. What the independent tort requirement recognizes in the context of employee torts is that the risks assumed by the plaintiff as a result of contracting with a limited liability company need not extend to the whole range of negligent acts or omissions of the employee. A plaintiff may be considered to have assumed one risk and not another; see Fleming, at p. 273. The independent tort test recognizes the limits of the plaintiff's voluntary assumption of risk by recognizing that the employee's tortious behaviour must be linked to the contract.

148 The existence of limits to the plaintiff's voluntary assumption of risk also applies to the nature of the employee's conduct. Where the employee is guilty of serious and wilful misconduct (such as an intentional tort or gross negligence), liability is justified on policy grounds. The plaintiff cannot be held to have voluntarily accepted the risk of such behaviour by employees by virtue of contracting with a limited liability company. Although the plaintiffs interest in compensation and the employer's residual ability to deter even intentional torts may justify imposing liability on the employer under the vicarious liability regime for some torts of this nature, there is no reason to excuse the employee. The employer is not better situated than the employee to deter intentional torts. It is not fair to attribute losses caused by an employee's intentional tort to the employer merely because he employs the employee to advance his own interest. There is no reason to distribute losses that occur as a result of intentional torts; on the contrary, the loss should be concentrated as much as possible on the guilty party.

149 Where the employee is guilty of only ordinary negligence, however, the courts should not strain to apply a highly technical definition to the limits of the notion of performance of the contract. The test of tort liability being "unrelated to the contract" should be applied with due regard to the policy concerns involved in the operation of the vicarious liability regime.

150 The plaintiff's voluntary assumption of risk may also be circumscribed with respect to the type of interest at stake. This Court has rejected rigid analysis based on the nature of the injury suffered by the plaintiff. Obviously, however, the type of injury incurred is of the first importance. Where the plaintiff s interest is more compelling than the one put forward in the present case, it may be appropriate to find that a duty does exist under the second branch of *Anns*. In

cases of personal injury, for example, the mere fact of contracting with a limited liability company may not be construed as an acceptance of risk of personal injury being satisfied by the company only. Of course, if the plaintiff accepts a limitation of liability-against the company, a suit against an employee will not be allowed as a method of circumventing that limitation; if the limitation is unconscionable, it should be struck down on that ground rather than avoided through use of the doctrine of privity; see Waddams, *The Law of Contracts* (2nd ed. 1984), at p. 213. Where there is no such express limitation clause, however, the employee would likely be liable to the plaintiff. As I noted earlier, there are strong arguments that as between the employee and the employer, the latter should bear sole responsibility in such a case through the operation of an indemnity regime; however, the plaintiff's claim to compensation and the safety concerns would obviously be paramount in such a context and the employee would, it seems to me, very likely be under a duty of care.

151 An independent tort may fall within or outside the range of the employer's liability under the vicarious liability regime. An employee's tort may be independent of the performance of the plaintiff's contract, while still occurring in the course of the employee's duty as interpreted in the cases. Such an act would therefore attract the operation of the vicarious liability regime. Alternatively, if the employee injures the plaintiff while driving on the weekend to his or her cottage, the tort is both independent and would not attract the operation of the vicarious liability regime, since it occurred outside the scope of the employee's course of employment.

152 It may be helpful to set out an appropriate approach to cases of this kind. The first question to be resolved is whether the tort alleged against the employee is an independent tort or a tort related to a contract between the employer and the plaintiff. In answering this question, it is legitimate to consider the scope of the contract, the nature of the employee's conduct and the nature of the plaintiff's interest. If the alleged tort is independent, the employee is liable to the plaintiff if the elements of the tort action are proved. The liability of the company to the plaintiff is determined under the ordinary rules applicable to cases of vicarious liability. If the tort is related to the contract, the next question to be resolved is whether any reliance by the plaintiff on the employee was reasonable. The question here is whether the plaintiff reasonably relied on the eventual legal responsibility of the defendants under the circumstances.

153 In this case, as I noted, the tort was related to the contract and any reliance by the plaintiff on Vanwinkel and Brassart was not reasonable.

Disposition

154 I would dismiss the appeal, allow the cross-appeal and dismiss the action against the employees, with costs throughout.

***Iacobucci J.*:**

155 This appeal and cross-appeal [from [1990] 4 W.W.R. 289, 45 B.C.L.R. (2d) 1, 31 C.C.E.L. 67, 2 C.C.L.T. (2d) 161, 70 D.L.R. (4th) 51, reversing [1986] 4 W.W.R. 183, 2 B.C.L.R. (2d) 181] raise two principal issues: (1) the duty of care owed by employees to their employer's customers, and (2) the extent to which employees can claim the benefit of their employer's contractual limitation of liability clause.

I. Facts

156 The facts are not complicated. On August 31, 1981, London Drugs Limited (hereinafter "appellant") delivered a transformer weighing some 7,500 pounds to Kuehne and Nagel International Ltd. (hereinafter "Kuehne & Nagel") for storage pursuant to the terms and conditions of a standard form contract of storage. The transformer had been purchased from its manufacturer, Federal Pioneer Limited, and was to be installed in the new warehouse facility being built by the appellant. The contract of storage included the following limitation of liability clause:

> LIABILITY - Sec. 11(*a*) The responsibility of a warehouseman in the absence of written provisions is the reasonable care and diligence required by the law.

(*b*) The warehouseman's liability on any one package is limited to $40 unless the holder has declared in writing a valuation in excess of $40 and paid the additional charge specified to cover warehouse liability.

157 With full knowledge and understanding of this clause, the appellant chose not to obtain additional insurance from Kuehne & Nagel and instead arranged for its own all-risk coverage. At the time of entering into the contract, the appellant knew, or can be assumed to have known, that Kuehne & Nagel's employees would be responsible for moving and upkeeping the transformer.

158 On September 22, 1981, Dennis Gerrard Brassait and Hank Vanwinkel (hereinafter "respondents"), both employees of Kuehne & Nagel, received orders to load the transformer onto a truck which would deliver it to the appellant's new warehouse. The respondents attempted to move the transformer by lifting it with two forklift vehicles when safe practice required it to be lifted from above using brackets which were attached to the transformer and which were clearly marked for that purpose. While being lifted, the transformer toppled over and fell causing damages in the amount of $33,955.41.

159 Alleging breach of contract and negligence, the appellant brought an action for damages against Kuehne & Nagel, Federal Pioneer Limited, and the respondents. In a judgment rendered on April 14, 1986, Trainor J. of the Supreme Court of British Columbia held that the respondents were personally liable for the full amount of damages, limiting Kuehne & Nagel's liability to $40 and dismissing the claim against Federal Pioneer Limited. On March 30, 1990, the majority of the Court of Appeal allowed the respondents' appeal and reduced their liability to $40. The appellant was granted leave to appeal to this Court on December 7, 1990, [1990] 2 S.C.R. viii. The respondents have cross-appealed in order to argue that they should be completely free of liability. A written intervention was made by the General Truck Drivers & Helpers Local Union No. 31, the union authorized to negotiate the collective agreement with Kuehne & Nagel which, at all material times, governed the respondents' employment relationship.

II. Judgments in the Courts Below

A. Supreme Court of British Columbia (1986), 2 B.C.L.R. (2d) 181

160 Trainor J. held that Federal Pioneer Limited was not negligent in its manufacturing and packaging of the transformer. On the other hand, he found the respondent employees negligent in their handling of the transformer, but limited Kuehne & Nagel's vicarious liability to $40 in accordance with the limitation of liability clause found in the contract of storage. According to the trial judge, the main issue was whether this clause also limited the respondents' liability to $40.

161 After a review of the relevant jurisprudence, the trial judge held that there is no general rule in British Columbia barring an employee from being sued for a tort committed in the course of carrying out the very services for which the plaintiff had contracted with his or her employer. This was said in answer to the respondents' argument that they should be given the protection of the limitation of liability clause since their negligence was not an "independent tort" in itself, but rather negligence in the very course of performing the contract between their employer and the appellant.

162 An alternative submission at trial was that the respondents could benefit from the clause in question since the appellant, in the circumstances of this case, had impliedly consented to the limitation of liability extending to the conduct of Kuehne & Nagel's employees. The circumstances relied on were the appellant's knowledge that employees would be handling its transformer, its knowledge and acceptance of the limitation of liability clause, and its decision to purchase its own insurance. In essence, the argument was that the appellant had voluntarily accepted the risk of damage flowing from the respondents' negligence and should accordingly bear the cost of the damages. While the trial judge expressed sympathy for this submission, he felt that accepting it would require rewriting the contract; a course "not open to me".

163 Accordingly, Trainor J. held that the limitation of liability clause in the contract was not available to the respondents who were thus liable for the full amount of damages caused to the transformer.

B. Court of Appeal of British Columbia (1990), 45 B.C.L.R. (2d) 1

164 The Court of Appeal, sitting exceptionally as a panel of five, reversed the judgment against the respondents by a four-to-one majority. With the exception of Hinkson J.A. (who was silent on the issue), all justices acknowledged that privity of contract was a major obstacle to the respondents' claim to the benefit of the limitation of liability clause. However, using different approaches, the majority concluded that the respondents' liability was nonetheless limited to $40. McEachern C.J.B.C. and Wallace J.A. adopted what has been referred to as a "tort analysis". Writing separate reasons, they were of the opinion that the duty of care owed by the respondents to the appellant was, in all the circumstances, qualified so as to limit the amount of recovery to $40. Preferring a "contract analysis", Lambert J.A. implied a term in s. 11(b) of the contract of storage which extended the limitation of liability to the respondents and then apparently applied the agency/unilateral contract exception to the doctrine of privity. For his part, Hinkson J.A. concluded that the respondents did not owe any duty of care towards the appellant and he would have imposed no liability whatsoever on them. Finally, Southin J.A., in dissent, said the present action was in trespass to goods, not in negligence, and accordingly the appellant could recover against the respondents for the cost of repair to its transformer.

165 Because of the importance of the issues involved in this case and the variety of approaches taken by the members of the Court below, a fuller discussion of the reasons of the Court of Appeal is warranted.

(1) Reasons of McEachern C.J.B.C.

166 McEachern C.J.B.C. began his reasons with an analysis of the doctrine of privity of contract as it applies in this area of law. He reviewed the authorities, in particular *Scruttons Ltd. v. Midland Silicones Ltd.*, [1962] A.C. 446, [1962] 1 All E.R. 1 (H.L.), *New Zealand Shipping Co. v. A.M. Satterthwaite & Co.; "Eurymedon" (The)*, [1975] A.C. 154, [1974] 1 All E.R. 1015, [1974] 1 N.Z.L.R. 505 (P.C.), and the decisions of this court in *Greenwood Shopping Plaza Ltd. v. Beattie*, [1980] 2 S.C.R. 228, 10 B.L.R. 234, 111 D.L.R. (3d) 257, 39 N.S.R. (2d) 119, 71 A.P.R. 119, [1980] I.L.R. 1-1243, 32 N.R. 163, and *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, *(sub nom. Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.)* 68 N.R. 241, 28 D.L.R. (4th) 641, 34 B.L.R. 251. He distinguished the case at bar from *The Eurymedon* and from *ITO — International Terminal Operators* on the basis that the bills of lading in those cases clearly defined the "commercial intention" of the parties and the courts therein were simply giving effect to this intention by permitting non-party stevedores to rely on limitation of liability clauses. In the case at bar, however, McEachern C.J.B.C. felt there was no ascertainable commercial intention with respect to s. 11 of the contract of storage. Moreover, there was no evidence to support a finding of trust or agency. McEachern C.J.B.C. disagreed with the approach of Lambert J.A. who implied a term into the contract extending the benefit of the clause to the respondents. According to him, there were no pleadings or evidence in support of such an interpretation. Accordingly, he felt bound by the decision of this Court in *Greenwood Shopping Plaza*, *supra*, to hold that the respondents were without the protection of the contract.

167 Having said this, McEachern C.J.B.C. embarked upon a tort analysis. At the outset, he stated that the respondents were "clearly under a duty to take reasonable care of the [appellant's] transformer under the law as it existed both before and after *Donoghue*" (p. 22). The real question was whether this duty, or the consequences of its breach, should be modified in this case. The Chief Justice held that *Anns v. Merton London Borough Council*, [1978] A.C. 728, *(sub nom. Anns v. London Borough Council of Merton)* [1977] 2 All E.R. 492 (H.L.), applied by this court in *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2, [1984] 5 W.W.R. 1, 29 C.C.L.T. 97, 26 M.P.L.R. 81, 8 C.L.R. 1, 10 D.L.R. (4th) 641, 54 N.R. 1, is sufficient authority to conclude that it is necessary to look at all the circumstances before deciding the nature and consequences of a breach of the duty of care, if any, which an employee owes to his or her employer's contractual partner. The "most significant fact" in this case, according to McEachern C.J.B.C, was that the respondents were acting in a contractual setting in which the appellant had voluntarily agreed with their employer that the latter would exercise reasonable care and diligence and that the right of recovery for a breach would be limited to $40. In his words, the parties established their "own law for this transaction". In the Chief Justice's opinion, a contract between two parties may be relevant in determining tort rights and duties arising within the contractual matrix. He stated it would be unreasonable

to conclude that the appellant relied on Kuehne & Nagel's obligation under the contract for the first $40 of any damage, looking to the respondents for the balance. Further, it would be unreasonable to expect the respondents to be aware that they might be relied upon beyond the extent to which their employer's liability was limited. Finally, it is reasonable that the appellant's remedy for the respondents' tort should be no greater than that which the appellant agreed would be imposed upon their employer. In view of these circumstances, McEachern C.J.B.C. would limit the respondents' liability to $40.

(2) Reasons of Hinkson J.A.

168 The reasons of Hinkson J.A. are limited to the issue of whether the respondents owed a duty of care to the appellant. Hinkson J.A. reviewed the jurisprudence starting with *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), and *Anns*, *supra*, placing considerable attention on recent English decisions which, in his words, have given "fresh consideration" to what is involved in the "concept of proximity". In particular, he relied on *Junior Books Ltd. v. Veitchi Co.*, [1983] 1 A.C. 520, [1982] 3 All E.R. 201 (H.L.), where Lord Roskill said this concept "must always involve, at least in most cases, some degree of reliance" (p. 546), and on two Court of Appeal decisions in which a factor of "just and reasonable" has been, apparently, added to the analysis: *Norwich City Council v. Harvey*, [1989] 1 W.L.R. 828, [1989] 1 All E.R. 1180 (C.A.), and *Pacific Associates Inc. v. Baxter*, [1990] 1 Q.B. 993, [1989] 2 All E.R. 159 (C.A.).

169 Hinkson J.A. conceded that, in most cases, employees such as the respondents would owe a duty of care to their employer's contractual partners. However, he added that there was no element of reliance in the case at bar. The appellant voluntarily accepted the risk of damage to its transformer and took steps to protect itself through its own policy of insurance. Hinkson J.A. concluded that the circumstances of the case did not disclose that there existed "such a close and direct relationship of proximity" between the appellant and the respondents as to give rise to a duty of care by the latter to the former. He added that in all the circumstances, it would not be "just and reasonable" to hold that the respondent employees owed a duty of care to the appellant. Accordingly, he would have imposed no liability on the respondents for the damages to the transformer.

(3) Reasons of Lambert J.A.

170 Lambert J.A. agreed with McEachern C.J.B.C. and Wallace J.A. that the respondents' liability should be limited to $40; however, he refused to undertake an "adventurous and perilous tort analysis" in order to reach this conclusion. He began by stating that Kuehne & Nagel and the respondents owed a duty of care to the appellant. In his opinion, an express or implied contract for services brings the customer, on the one hand, and the employer and employees, on the other, into a relationship of "sufficient proximity" to lay the foundation for a duty of care on the part of both the employer and the employee to the customer. Besides mere proximity, many factors will determine whether a duty of care arises in the end; in particular, reliance by the customer on the employer and/or employees. According to Lambert J.A., reliance can be assumed in most cases involving direct physical damage to persons or property.

171 Lambert J.A. held that the respondents' duty of care is unaffected by the presence of the limitation of liability clause in the contract of storage. According to him, ss. 2(4)(b) and 13 of the *Warehouse Receipt Act*, R.S.B.C. 1979, c. 428, support the view that the clause was intended only to limit the extent of liability consequent upon a breach of duty of care, rather than to limit or negate the scope of that duty. This clause should not be used as evidence that the appellant assumed the risk of damage and released the respondents from their duty of care. In addition, Lambert J.A. reviewed and criticized what he calls the "just and reasonable test", sometimes used by English courts to deny the existence of a duty of care which proximity and foreseeability of damage would otherwise bring into effect. He does not think that this test should be applied in Canada because it would "introduce into tort law a subjective factor which is unnecessary and which ... would produce haphazard, idiosyncratic and unpredictable results" (p. 54). In any event, this test cannot operate to remove a duty of care that has long been recognized, such as the duty in the case at bar. Finally, Lambert J.A. claims that the second part of the *Anns* approach, which asks whether there are circumstances which ought "to negative, or to reduce or limit ... the damages to which a breach of it [the *prima facie* duty] may give rise", refers to heads of damage

and does not suggest that it is possible to modify the normal rules for the assessment of damages by putting a monetary limit on damages for negligence. In his opinion, the concept of a $40 duty of care is unknown to the law.

172 Having said this, Lambert J.A. held that the respondents were entitled to benefit from the limitation of liability clause according to well established principles of contract law. He reviewed the jurisprudence dealing with the doctrine of privity of contract and with the implication of contracual terms. In his view, it was necessary to imply a term in the contract in order to avoid the "commercial absurdity" brought about by the rights of contribution of the respondent employees against their employer, Kuehne & Nagel, pursuant to s. 4 of the *Negligence Act*, R.S.B.C. 1979, c. 298. According to him, if the respondents are found fully liable it is conceivable that they could then commence an action against Kuehne & Nagel for contribution of half the damages awarded to the appellant (i.e. $16,977.70). Such a result would render the limitation of liability clause in the contract of storage wholly ineffective; a result neither party intended. Accordingly, Lambert J.A. implied a term in s. 11(b) of the contract of storage to the effect that the liability of Kuehne & Nagel's employees would also be limited to $40. Having implied such a term, he concluded that the agency exception to the doctrine of privity, developed in *The Eurymedon*, *supra*, and applied in *ITO — International Terminal Operators*, *supra*, applied so as to prevent the appellant from recovering more than $40 from the respondents (at p. 65).

(4) Reasons of Wallace J.A.

173 Like McEachern C.J.B.C, Wallace J.A. disposed of this case largely on the basis of tort law principles. After a review of English jurisprudence, Wallace J.A. stated that in order to determine whether a duty of care exists in a particular case, two approaches may be taken: (1) the *Anns*, *supra*, approach where, once you find there to be a *prima facie* duty of care, based on proximity and foreseeability, the surrounding circumstances must be examined to determine if the duty is negated or qualified in its nature or scope; or (2) the approach followed in *Pacific Associates Inc. v. Baxter*, *supra*, and *Norwich City Council v. Harvey*, *supra*, of considering three essential criteria to the existence of a duty of care: proximity, reliance and whether it is "just and reasonable" to impose such a duty. According to Wallace J.A., the end result is the same regardless of the approach taken: "a consideration of all the circumstances to determine whether a duty of care should fairly be imposed upon the alleged wrongdoer, and if so, its scope and its consequences" (at p. 77). He asserts that when the parties have come into a relationship of proximity because of a contract, the terms of that contract are among the circumstances that determine the existence and scope of the duties of care to be discharged by the parties.

174 In the case at bar, Wallace J.A. noted that by expressly agreeing to limit its claim to $40, the appellant assumed the risk of any damage in excess of that sum. In his opinion, it could not be inferred that the appellant intended to retain a right to claim in tort against the respondents for the full amount of any loss, particularly since they were performing the very services which their employer, Kuehne & Nagel, was bound to provide under the contract. These circumstances were said to limit the scope of the respondents' duty of care to the same extent as the duty their employer owed, namely, to $40. Wallace J.A. did not find privity of contract to be a bar to his finding. He notes that while third parties, such as the respondents, cannot benefit from a contract unless they fall within one of the established exceptions, the existence and nature of a contract nevertheless "provides the matrix or structural background which creates the common law duties, privileges, rights and obligations of a third party whose conduct is affected by such a contractual arrangement" (p. 81).

(5) Dissenting Reasons of Southin J.A.

175 Southin J.A. agreed with McEachern C.J.B.C.'s reasons on the issue of privity of contract. She added that the limitation of liability clause in question is not a "landlubber's version of a Himalaya clause" so as to permit the respondents to rely on this Court's decision in *JTO — International Terminal Operators*, *supra*. Southin J.A. also expressed the view that there is no doctrine of "vicarious immunity" in the common law.

176 Differing from her colleagues, she took the view that the notion of duty of care was irrelevant in the case at bar since the appellant's action was founded on trespass to goods. In her opinion, "the modern tort of negligence, all-devouring monster though it is, has not swallowed up the tort of trespass" (p. 92). She held that the tort of trespass does not require any consideration of modern notions of duty of care. Southin J.A. thus concluded that the respondents

were liable for trespass to goods by dropping the transformer and that the appellant may recover the cost of repair. In closing, Southin J.A. added: "I regret to have had to come to this conclusion because the result is, to my mind, in a moral sense, unjust" (p. 92).

III. Issues

177 The cross-appeal raises the following question:

> (1) Did the respondents, acting in the course of their employment and performing the very essence of their employer's contractual obligations with the appellant, owe a duty of care to the appellant?

If so, it is not disputed before this Court that the respondents were negligent in their handling of the appellant's transformer. In other words, the finding of the trial judge that the respondents breached their duty of care is not contested. Moreover, it is not disputed that it is the respondents' negligence which was the cause of the damages to the transformer and that these damages amount to $33,955.41. The next question which is raised by the appeal would thus become one of the appropriate liability for this breach, namely:

> (2) Can the respondents obtain the benefit of the limitation of liability clause contained in the contract of storage between their employer and the appellant so as to limit their liability to $40?

For reasons that follow, I am of the opinion that both questions should be answered in the affirmative. By so concluding, both the cross-appeal and the appeal should therefore be dismissed.

IV. Analysis

A. Duty of Care

178 The trial judge impliedly held that the respondents owed a duty of care to the appellant in the handling of the transformer, adding that in British Columbia there is no general rule that an employee cannot be sued for a tort committed in the course of carrying out the very services for which the plaintiff had contracted with his or her employer. McEachern C.J.B.C. stated without qualification that the respondents were "clearly under a duty to take reasonable care of the [appellant's] transformer under the law as it existed both before and after *Donoghue*" (p. 22). Lambert J.A., while embarking on a more in-depth analysis of the question, came to the same conclusion again without much difficulty. Wallace J.A., for his part, held that the respondents owed a "*prima facie* duty of care" to the appellant based on the *Donoghue v, Stevenson*, *supra*, principle. Southin J.A. did not address the issue directly as she felt the appellant's cause of action was in trespass, rather than in negligence.

179 As noted earlier, Hinkson J.A. was alone in concluding that the respondents owed no duty of care to the appellant. He came to this conclusion by referring to a number of English authorities which, in his view, qualify the two-stage approach of Lord Wilberforce in *Anns*, *supra*, by importing notions of reliance, justness and reasonability (as well as the established requirement of foreseeability) in the determination of whether or not a duty of care arises in a particular situation. In his view, there was no duty of care mainly because of an absence of reliance on the part of the appellant and also because it would not be "just and reasonable" to hold otherwise.

180 In arguing that they did not owe any duty of care to the appellant, the respondents rely in part on the approach suggested by Hinkson J.A. They argue that the concept of "neighbourhood (or proximity)" cannot be reduced to the simple principle that factual foreseeability of damage creates, without more, a duty of care. The respondents offer a list of English decisions showing some discontent with the approach set out in *Anns* and suggesting alternative interpretations of the proper "test" to be applied. It is submitted that many factors, besides foreseeability of damage, must be taken into account when determining the existence of a duty of care, namely, the reasonable expectations of the parties, reliance, the nature of the damage suffered and the existence of a pre-existing commercial agreement. Like Hinkson J.A., the respondents submit there is no reliance in the case at bar. But their argument does not end there. They submit that,

as a general rule, an employee acting in the course of his or her employment and performing the essence of his or her employer's contractual obligations with a "third party" does not owe an "independent duty of care" to that "third party". In such a case, it is argued, the third party — or customer — should have no cause of action against the employee in negligence. The respondents offer some cases to support this principle and submit that it is sensible in light of what they call modern economic, employment and legal conditions. In particular, they claim the "central element" of reliance is almost always absent between individual employees and their employer's customers.

181 For its part, the appellant relies on the decision of *Anns*, *supra*, to support a finding that the respondents were under a duty of care. Moreover, the appellant claims that the conclusion of Hinkson J.A. is contrary to the terms of the contract of storage, the provisions of the *Warehouse Receipt Act*, s. 2(4), the common law of bailment and the decisions of this Court in *Greenwood Shopping Plaza*, *supra*, *Canadian General Electric Co. v. Pickford & Black Ltd.*, [1971] S.C.R. 41, 2 N.S.R. (2d) 497, 14 D.L.R. (3d) 372, and *Cominco Ltd. v. Bilton*, [1971] S.C.R. 413, 15 D.L.R. (3d) 60.

182 In my opinion, the respondents unquestionably owed a duty of care to the appellant when handling the transformer. I arrive at this conclusion with as little difficulty as the judges in the courts below. I do not base my conclusion on the terms of the contract of storage or on s. 2(4) of the *Warehouse Receipt Act* but on well established principles of tort law. In all the circumstances of this case, it was reasonably foreseeable to the respondent employees that negligence on their part in the handling of the transformer would result in damage to the appellant's property. In sum, there was such a close relationship between the parties as to give rise to a duty on the respondents to exercise reasonable care.

183 I find it unnecessary for the purposes of this appeal to consider the numerous English authorities which have, according to some, given "fresh consideration" to what is involved in determining whether a duty of care exists in a particular situation. I say this because, to borrow the words of McEachern C.J.B.C, the respondents were "clearly under a duty to take reasonable care of the [appellant's] transformer under the law as it existed both before and after *Donoghue*". We are not here dealing with the type of factual situation in which concerns about the breadth of traditional principles have arisen. A conclusion that the respondents owed no duty of care to the appellant would clearly be recognizing a new immunity where none existed before.

184 As already mentioned, absence of reliance on the part of the appellant is a crucial factor according to Hinkson J.A. and the respondents. Hinkson LA. made the following comments (at p. 35):

> Normally, the owner expects the warehouseman and its employees to use reasonable care in handling and storing its goods. The warehouseman and its employees know that if the goods are damaged the owner will suffer loss. Thus, the requirements of foreseeability and proximity can be said to have been met with the result that the warehouseman and its employees owe to the owner a duty of care.

However, he then goes on to find that because the appellant knew about the limitation of liability clause and chose to obtain its own insurance, it was "not relying on the warehouseman and its employees not to damage the transformer" (p. 36). Assuming, *arguendo*, that "reliance" is relevant in the case at bar, I am of the view that Hinkson J.A. misapplied this concept.

185 When reliance is used in cases such as *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.), *Junior Books*, supra, and *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228, [1986] 3 W.W.R. 216, 1 B.C.L.R. (2d) 324, *(*sub nom. *Hofstrand Farms Ltd. v. British Columbia)* 36 C.C.L.T. 87, 33 B.L.R. 293, 26 D.L.R. (4th) 1, 65 N.R. 261, in order to determine the existence of a duty of care, it is concerned with the relationship between the plaintiff's position and the tortfeasor's conduct, not with the relationship between the plaintiff's position and the tortfeasor's pocketbook. In other words, reliance, as it may be used here, goes to the existence of a duty of care owed and not to liability for breach of a duty of care. In this respect, I agree with the following passage taken from Professor Joost Blom's commentary in (1991), 70 *Can. Bar Rev*. 156, at p. 168:

> Probably the line taken by Hinkson J.A. presents the most serious problems. It seems unrealistic to say, as he did, that by agreeing to a virtual exclusion of liability in a case like this, you remove potential wrongdoers from "proximity" with yourself because you give up reliance on their taking reasonable care. As McEachern C.J.B.C. pointed out, the nuisance of having your goods damaged, and the cost of making an insurance claim and paying the deductible, are strong reasons for saying that you do rely. Saying, "I will not look to you for damages if there is an accident" is not the same thing as saying, "Go ahead and be as careless as you want with my property."
>
> [Emphasis added.]

186 Having said this, I wish simply to add what has already become evident by my conclusion. There is no general rule in Canada to the effect that an employee acting in the course of his or her employment and performing the "very essence" of his or her employer's contractual obligations with a customer does not owe a duty of care, whether one labels it "independent" or otherwise, to the employer's customer. Our law of negligence has long since moved away from a category approach when dealing with duties of care. It is now well established that the question of whether a duty of care arises will depend on the circumstances of each particular case, not on pre-determined categories and blanket rules as to who is, and who is not, under a duty to exercise reasonable care. There may well be cases where, having regard to the particular circumstances involved, an employee will not owe a duty of care to his or her employer's customer. Indeed, the respondents have provided this Court with a series of decisions where this conclusion appears to have been reached: see *Sealand of the Pacific Ltd. v. Robert C. McHaffie Ltd.*, [1974] 6 W.W.R. 724, 51 D.L.R. (3d) 702 (B.C.C.A.); *Moss v. Richardson Greenshields of Canada Ltd.*, [1989] 3 W.W.R. 50, 56 Man. R. (2d) 230 (C.A.); *Summitville Consolidated Mining Co. v. Klohn Leonoff Ltd.* (July 6, 1989), Doc. Vancouver C880756 (B.C.S.C.); and *R.M. & R. Log Ltd. v. Texada Towing Co.* (1967), 62 D.L.R. (2d) 744, [1968] 1 Ex. C.R. 84.

187 However, this does not mean that this is the necessary result in all factual situations. Abstaining from commenting on the conclusions reached in the cases cited, I find nothing in any of them, nor have I found anything else, which supports the type of blanket rule advocated by the respondents. At best, these decisions simply confirm that the question of whether a duty of care arises between an employee and his or her employer's customer depends on the circumstances of each particular case. The mere fact that the employee is performing the "very essence" of a contract between the plaintiff and his or her employer does not, in itself, necessarily preclude a conclusion that a duty of care was present.

188 As conceded by the respondents, there are many decisions in which a duty of care was found to exist: see, for example, *Northwestern Mutual Insurance Co. v. J.T. O'Bryan & Co.*, [1974] 5 W.W.R. 322, [1974] I.L.R. 1-639, 51 D.L.R. (3d) 693 (B.C.C.A.); *Toronto-Dominion Bank v. Guest* (1979), 10 C.C.L.T. 256, 16 B.C.L.R. 174, 105 D.L.R. (3d) 347 (S.C.); *East Kootenay Community College v. Nixon & Browning* (1988), 28 C.L.R. 189 (B.C.S.C.); and *Ataya v. Mutual of Omaha Insurance Co.*, [1988] I.L.R. 1-2316, 34 C.C.L.I. 307 (B.C.S.C.). In concluding discussion of this issue, I would add that the acceptance of the general rule advocated by the respondents would be at odds with the common law notion of vicarious liability. This principle, which has been well developed through years of jurisprudence, has as part of its very core the recognition that in many cases employees *do* owe duties of care to third parties, such as their employer's customers.

189 As the respondents owed a duty of care to the appellant in their handling of the transformer, I would accordingly dismiss the cross-appeal.

B. Limitation of Liability Clause

190 Accepting the finding of the trial judge that the respondents breached their duty of care thereby causing damages fixed at $33,955.41 to the appellant, I must now consider whether they are allowed to benefit from the limitation of liability clause found in the contract of storage between their employer, Kuehne & Nagel, and the appellant. The majority of the Court of Appeal reached a conclusion favourable to the respondents on this issue by using two different approaches (1) by implying a term in the contract extending the protection of s. 11(b) of the contract of storage to the respondents

and by applying the exception to the doctrine of privity set out in *The Eurymedon* and *ITO — International Terminal Operators* (Lambert J.A.'s contract analysis); and (2) by taking into account the "contractual matrix" between Kuehne & Nagel and the appellant, including the limitation of liability clause, so as to qualify the respondents' duty of care and their ensuing liability to $40 (McEachern C.J.B.C. and Wallace J.A.'s tort analysis).

(1) Arguments of the Parties

191 The appellant argues that the respondents should not benefit, in any way, from a limitation of liability clause contained in a contract to which they are not parties. In its submissions, the appellant strongly, if not exclusively, relies upon the doctrine of privity of contract and upon its application by this Court in *Canadian General Electric*, *supra*, *Greenwood Shopping Plaza*, *supra*, and *ITO-International Terminal Operators*, *supra*. It is submitted that these decisions have unequivocally established the legal principles to be applied in determining whether a tortfeasor may rely upon a limitation of liability clause in a contract to which the tortfeasor is not a party. The appellant submits that, in so doing, this Court has repeatedly rejected attempts to abrogate or weaken the doctrine of privity of contract. In particular, it is argued that contractual protection can be extended to non-contracting parties only in limited circumstances where the facts support a finding of agency or trust. In the present case, the appellant states that there exists no evidence which would allow this Court to make such a finding. Accordingly, it is submitted that the majority of the Court of Appeal has abandoned "longstanding, established and fundamental principles of law" in affording contractual protection to the respondents.

192 More specifically, the appellant argues that, while Lambert J.A. was correct in adopting a contractual analysis, he erred in implying into the contract a term which included the respondents. On the other hand, the appellant claims that McEachern C.J.B.C. and Wallace J.A. erred in their emphasis upon the contractual relationship between the appellant and Kuehne & Nagel when considering the nature and extent of the duty of care owed by the respondents. It is submitted that such reasoning is unfounded in Canadian law and is bound to create uncertainty. Furthermore, it represents an unwarranted and unnecessary intrusion in the area of tort law. The appellant submits that to use a duty of care (tort) analysis to import contractual limitations into tort law is another attempt to circumvent the rigidity of the doctrine of privity. According to the appellant, any departure from this doctrine should be brought upon by the legislature and not by the courts. In any event, it is submitted that the application of the duty of care analysis is inappropriate in the case at bar as the foundation of liability against the respondents is the tort of trespass to goods, as advanced by Southin J.A. in dissent. In conclusion, the appellant challenges the "starting point" of the judges in the courts below to the effect that it is unjust to hold the respondent employees personally liable in the case at bar. In particular, it notes that the respondents were negligent, that more substantive injustice has been done in this case and others by a departure from orthodox and fundamental principles, and that adequate protection for employees exists within the current framework of the common law.

193 For their part, the respondents submit that they are entitled to benefit from the limitation of liability clause and suggest three alternative ways to arrive at such a result. First, they argue for a judicial reconsideration, or a relaxation of, the doctrine of privity of contract as it applies to the case at bar. It is submitted that this doctrine, in the facts of the present case, is radically out of step with commercial reality, with the expectations of the parties and with the way in which the parties allocated the risk of loss or damage. The respondents argue that employees can, without consideration and without invoking traditional exceptions such as trust or agency, claim the benefit of their employer's contractual limitation of liability when: (1) there is a contractual limitation of liability between their employer and another party; (2) a loss occurs during the employer's performance of its contractual obligations to that third party; and (3) the employees are acting in the course of their employment when the loss occurs. Second, the respondents submit that they can benefit from the clause in question by implying a term into the contract and by relying on the decisions in *The Eurymedon*, *supra*, and *ITO — International Terminal Operators*, *supra*, in the manner suggested by Lambert J.A. And third, the respondents adopt similar arguments to those advanced in the reasons of McEachern C.J.B.C. and Wallace J.A. and submit that the contractual setting between Kuehne & Nagel and the appellant, including the limitation of liability clause, has the effect of limiting the respondents' liability to the appellant. In this sense, it is suggested that the respondents should be

allowed to benefit from the clause, albeit indirectly, via a duty of care (tort) analysis. They argue that such an analysis is not irrelevant as suggested by Southin J.A. in dissent and by the appellant. Rather, the respondents submit it is the principles of trespass, not negligence, that are inapplicable to the facts of this case.

(2) Approach to be Taken Herein

194 In my opinion, it is unnecessary to embark upon the type of tort analysis suggested by the respondents in order to arrive at the result that justice mandates in the case at bar. I do not say this because I disagree in principle with the reasoning of McEachern C.J.B.C. and Wallace J.A., and of my colleague Justice McLachlin, on which I refrain from expressing any opinion, but rather because I believe that a more direct approach is both available and preferable. The respondents are seeking the benefit of s. 11(b) of the contract of storage between their employer and the appellant in order to limit the liability that would otherwise attach to their breach of duty; in other words, in order to downwardly modify the assessment of damages currently fixed at $33,955.41. The appellant has never argued, understandably in the circumstances of this case, that s. 11(b) of the contract of storage was not wide enough to cover the respondents' negligence, that it had not been brought to the appellant's attention prior to the execution of the contract, or that it would be unconscionable to permit the respondents to rely on the limitation clause. The main obstacle to the respondents' claim, as pointed out by the appellant, is the doctrine of privity of contract. The judges below were well aware of the difficulty presented by this doctrine and chose different routes to deal with it: the trial judge and Southin J.A., in dissent, simply applied the doctrine; Lambert J.A. applied a recognized exception to privity; and McEachern C.J.B.C. and Wallace J.A. circumvented the doctrine by resorting to a tort analysis.

195 For my part, I prefer to deal head-on with the doctrine of privity and to relax its ambit in the circumstances of this case. Some may argue that the same result can (and should) be reached by using a number of approaches which are seemingly less drastic and/or allegedly more theoretically sound, such as the one advanced in the Court of Appeal by McEachern C.J.B.C. and Wallace J.A., or the "no duty" approach advocated by my colleague, Justice La Forest, and authors such as B. J. Reiter, "Contracts, Torts, Relations and Reliance", in B. J. Reiter and J. Swan, eds., *Studies in Contract Law* (1980), 235, or the doctrine of "vicarious immunity" allegedly adopted by the House of Lords in *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, [1924] A.C. 522.

196 In this respect, I have had the opportunity to read the reasons of my colleague McLachlin J. in the case at bar but, with respect, cannot agree with her characterization of my reasons or with her approach to the questions raised herein. Except for a rigid adherence to the doctrine of privity of contract, I do not see any compelling reason based on principle, authority or policy demonstrating that this Court, or any other, must embark upon a complex and somewhat uncertain "tort analysis" in order to allow third parties such as the respondents to obtain the benefit of a contractual limitation of liability clause, once it has been established that they breached a recognized duty of care. In my view, apart from privity of contract, it is contrary to neither principle nor authority to allow such a party, in appropriate circumstances, to obtain the benefit *directly* from the contract (i.e. in the same manner as would the contracting party) by resorting to what may be referred to as a "contract analysis". The main obstacle to such an approach resides in the fact that the party relying on the limitation of liability clause is not a party to the contract, not in the alleged principle that if one starts in tort, one must end in tort.

197 I accept the respondents' submission that this is both the time and the case for a judicial reconsideration of the rule regarding privity of contract as applied to employers' contractual limitation of liability clauses. Furthermore, I find wide support for the contract approach I adopt, including my view as to how a contractual limitation of liability clause may become relevant in a tort case such as the present one (i.e. as a juridical reason affecting the consequences — *liability* — of the breach of a duty of care), both in the jurisprudence and in a number of commentaries dealing specifically with the case at bar: see *Dyck v. Manitoba Snowmobile Assn. Inc.*, [1985] 1 S.C.R. 589, [1985] 4 W.W.R. 319, 32 C.C.L.T. 153, 32 M.V.R. 192, 35 Man. R. (2d) 22, 18 D.L.R. (4th) 635 ; *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186, 44 C.C.L.T. 225, 86 N.R. 241, 29 O.A.C. 1, 51 D.L.R. (4th) 321, [1988] R.R.A. 444; *ITO-International Terminal Operators*, *supra*; W. J. Swadling, "Privity, Tort and Contract: Exempting the Careless Employee" (1991), 4

Journal of Contract Law 208, at p. 229; and J. Swan, "Privity of Contract and Third Party Beneficiaries: the Selective Use of Precedent" (1991), 4 *Journal of Contract Law* 129, at pp. 133-34.

198 In my view, the respondents were third party beneficiaries to the limitation of liability clause found in the contract of storage between their employer and the appellant and, in view of the circumstances involved, may benefit directly from this clause notwithstanding that they are not a signing party to the contract. I recognize that such a conclusion collides with privity of contract in its strictest sense; however, for reasons that follow, I believe that this Court is presented with an appropriate factual opportunity in which to reconsider the scope of this doctrine and decide whether its application in cases such as the one at bar should be limited or modified. It is my opinion that commercial reality and common sense require that it should.

199 Before proceeding with my analysis I wish to state that, in view of the approach I adopt, it will be unnecessary for me to determine whether or not the respondents' liability is, as argued by Southin J.A. in dissent, governed by the law of trespass and not the law of negligence. Indeed, as I am of the opinion that the respondents owed a duty of care and that they may benefit from the limitation of liability clause without resorting to a tort analysis, a conclusion that they are liable in trespass rather than in negligence would change nothing in the disposition of this appeal. I must add, however, that I have some doubts as to the correctness of the conclusions of law made by Southin J.A. on this matter. In this respect, I would adopt the comments made by Professor Swadling, *supra*, at pp. 221-23 of his commentary.

200 I will now turn to the heart of the present appeal, namely, privity of contract and third party beneficiaries. In dealing with this issue, I would like briefly to review what is understood by the doctrine of privity of contract, the decisions that support it, the reasons behind the doctrine, criticisms of the doctrine, and its treatment in other jurisdictions. I shall then go on to discuss previous decisions of this Court on the matter before turning to the doctrine in the circumstances of this appeal.

(3) The Doctrine of Privity of Contract and Third Party Beneficiaries

(a) Introduction

201 The doctrine of privity of contract has been stated by many different authorities sometimes with varying effect. Broadly speaking, it stands for the proposition that a contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it: see, for example, *Anson's Law of Contract* (25th ed. 1979), at p. 411, cited by McIntyre J. for this Court in *Greenwood Shopping Plaza Ltd.*, *supra*, at p. 236; G. H. Treitel, *The Law of Contract* (8th ed. 1991), at pp. 523-75; *Cheshire, Fifoot and Furmston's Law of Contract* (12th ed. 1991), at pp. 450-68; and *Chitty on Contracts* (25th ed. 1983), vol. I, at pp. 662-91. It is now widely recognized that this doctrine has two very distinct components or aspects. On the one hand, it precludes parties to a contract from imposing liabilities or obligations on third parties. On the other, it prevents third parties from obtaining rights or benefits under a contract; it refuses to recognize a *jus quaesitum tertio* or a *jus tertii*. This latter aspect has not only applied to deny complete strangers from enforcing contractual provisions but has also applied in cases where the contract attempts, either expressly or impliedly, to confer benefits on a third party. In other words, it has equally applied in cases involving third party beneficiaries. This appeal is concerned only with the second aspect of privity, and particularly with its application to third party beneficiaries. Nothing in these reasons should be taken as affecting in any way the law as it relates to the imposition of obligations on third parties.

202 The decisions most often cited in Canadian courts in support of the doctrine of privity are: *Tweddle v. Atkinson* (1861), 1 B. & S. 393, 121 E.R. 762; *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] A.C. 847 (H.L.); *Scrutions Ltd. v. Midland Silicones Ltd.*, *supra*; *Canadian General Electric*, *supra*; and *Greenwood Shopping Plaza*, *supra*. As confirmed by these and other decisions, privity of contract is an established principle of contract law. It is not, however, an ancient principle. As noted by this Court in *Greenwood Shopping Plaza*, at p. 237, the doctrine "has not always been applied with the rigor which has developed during modern times". Indeed, many have noted earlier decisions in the English common law which have allowed third party beneficiaries to enforce contracts made for their benefit: see, for example, the review

of the history by Windeyer J. in *Coulls v. Bagot's Executor & Trustee Co.*, [1967] A.L.R. 385 (H.C.), at pp. 407-9; R. Flannigan, "Privity — The End of an Era (Error)" (1987), 103 *L.Q. Rev.* 564, at pp. 565-68; and *Carver's Carriage by Sea* (13th ed. 1982), at pp. 241-47. It is generally recognized that the law in this respect was not "settled" until the mid-nineteenth century. It is also accepted that there are certain exceptions to the doctrine of privity such as trust and agency: see *Greenwood Shopping Plaza*, *supra*, at pp. 238-41 and *JTO — International Terminal Operators*, *supra*, at pp. 784-94.

203 Closely related to the doctrine of privity, but conceptually distinct, is the rule that consideration for a promise must move from the person entitled to sue or rely on that promise. Both rules have been used in the past, sometimes in an interchangeable manner, in order to deny third parties the right to enforce contractual provisions made for their benefit. There is some debate in academic circles, supported by *obiter dicta*, as to whether or not privity and consideration are really distinct concepts. For our purposes, however, I find it unnecessary to consider this question. I proceed on the basis that the major obstacle to the respondents' claim, as stated by the appellant, is that they are not a party to the contract from which they seek to obtain a benefit.

204 The reasons behind the doctrine of privity have received very little judicial attention. Professor Treitel offers perhaps the most often cited (and debated) justifications for this doctrine in his treatise *The Law of Contract*, *supra*, at pp. 527-28. Maintaining a certain distance, he claims that the denial of third party rights under a contract may be justified for four reasons: (1) a contract is a very personal affair, affecting only the parties to it; (2) it would be unjust to allow a person to sue on a contract on which he or she could not be sued; (3) if third parties could enforce contracts made for their benefit, the rights of contracting parties to rescind or vary such contracts would be unduly hampered; and (4) the third party is often merely a donee and a "system of law which does not give a gratuitous promisee a right to enforce the promise is not likely to give this right to a gratuitous beneficiary who is not even a promisee".

205 Professor Atiyah in *The Rise and Fall of Freedom of Contract* (1979) offers an economic explanation for the doctrine (at p. 414):

> There is a sense in which the new doctrine of privity was an important development in the law at a time of increasing complexity in multilateral commercial relationships. The appearance of middlemen in all sorts of commercial situations served to separate the parties at either end of the transaction, and it was generally accepted that no privity existed between them. Economically, this may have served a useful purpose, in that it encouraged the development of a more market-based concept of enterprise liability. But on some occasions the results were not only economically dubious but socially disastrous.

Other possible justifications include preventing the promisor from being subject to double recovery and avoiding a floodgate of litigation brought about by third party beneficiaries.

(b) Criticisms of the Doctrine

206 Few would argue that complete strangers to a contract should have the right to enforce its provisions. When it comes to third party beneficiaries, however, the doctrine of privity of contract has received much criticism in this century by law reformers, commentators, and judges. To date, three major law reform bodies in the Common-wealth have examined the doctrine; each has recommended its abolition.

207 In 1937, the Law Revision Committee of the United Kingdom in its *Sixth Interim Report*, noting the difficulties created by privity of contract, recommended that it be abolished subject to three provisos: (1) no third party right can be acquired unless given by the express terms of the contract; (2) the promisor should be entitled to raise against the third party any defence that would have been valid against the promisee; and (3) the parties to the contract should retain the right to cancel it at any time, unless the third party has received notice of the agreement and has adopted it. The English Parliament has yet to legislate in this area and the whole matter is once again before the law reformers of that country: Law Commission, *Twenty-fifth Annual Report: 1990* (Law Comm. No. 195), para. 2.14. The Commission recently published a Consultation Paper in which it makes the provisional recommendation that a reform to the law

of privity should be made in order to allow third parties to enforce contractual provisions made in their favour: Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties*, Consultation Paper No. 121 (1991).

208 In New Zealand, a similar recommendation was made in the 1981 *Report on Privity of Contract* of the New Zealand Contracts and Commercial Law Reform Committee following a review of the problems created by a strict adherence to privity of contract and of the legal techniques sometimes used to avoid unjust results. The many recommendations of the Committee, including a reference to limitation of liability clauses and third parties, were implemented in the *Contracts (Privity) Act 1982*, Stat. N.Z., No. 132.

209 In Canada, the Ontario Law Reform Commission in its 1987 *Report on Amendment of the Law of Contract* recommended, persuasively in my view, the enactment of a general legislative provision to the effect that "contracts for the benefit of third parties should not be unenforceable for lack of consideration or want of privity" (at p. 71). The Commission, in the chapter of its *Report* entitled "Third Party Beneficiaries and Privity of Contract", offered the following general reasons for its recommendation: (1) the present state of the law is very complex and uncertain; (2) the traditional justifications for the doctrine of privity (only those in privity should be allowed to sue; consideration gives the right to sue; and preventing double recovery) are largely unfounded; (3) the doctrine impairs the enforcement of sensible commercial and personal arrangements made on a daily basis; (4) exceptions to the doctrine have developed with no rational basis except to avoid the application of the doctrine; (5) it is difficult, if not impossible, to reconcile the exceptions with the doctrine; (6) the exceptions are of limited use in many situations; (7) the possibility remains that meritorious claims will be defeated by the application of the doctrine; (8) the doctrine has been subject to legislative inroads as well as academic and judicial criticism; (9) many jurisdictions around the world (United States, New Zealand, Western Australia, Queensland and Quebec) have recognized third party rights by abolishing or modifying the doctrine of privity. The Commission concluded its canvass of the reasons for reform with the following comments (at pp. 67-68):

> Abolishing the present third party beneficiary rule would, we believe, render the law more consistent internally, and more understandable by lay persons. As was pointed out previously, the courts have been able to circumvent the doctrine of privity by one legal device or another when the desired result was the enforcement of the promise by the third party beneficiary. The present state of the law, with its anomalies and unjustified distinctions, cannot and should not continue.
>
> We note the clear trend in other jurisdictions permitting third parties to enforce contracts made for their benefit. From the discussion of the law in other jurisdictions, it should be apparent that there is almost universal agreement among those who have considered the question that the existing privity of contract rule must be abandoned. In the United States, through common law developments and legislative reform, the privity of contract rule has been rendered virtually obsolete. In Ontario, there are significant areas of the law where this rule no longer holds sway. We believe that the time has come for Ontario to recognize that the doctrine of privity of contract is no longer appropriate as a general principle of contract law.
>
> It is the firmly held view of the Commission that the privity of contract rule should be abolished.

210 The Commission opted for a reform based on the enactment of a general provision abolishing the doctrine, rather than detailed legislation. This approach was considered to be more flexible, permitting courts to fashion principles on a case by case basis in order to enforce third party rights where justice required such a result. Moreover, it would avoid the many difficulties facing the drafter of specific legislation. It is apparent throughout the *Report* that the reform was also directed towards third parties seeking to enforce limitation of liability clauses made for their benefit.

211 While noting that legislative reform along the lines mentioned above would be most welcome in this area of the law, many commentators have noted that uniform reform is unlikely in Canada owing to our present constitutional framework: see, for example, S. M. Waddams, "Contracts — Carriage of Goods — Exemptions for the Benefit of Third Parties" (1977), 55 *Can. Bar Rev*. 327, at p. 333; S. M. Waddams, "Third Party Beneficiaries in the Supreme Court of Canada" (1981), 59 *Can. Bar Rev*. 549, at p. 556; and L. C. Reif, "A Comment on *ITO Ltd. v. Miida Electronics Inc*. —

The Supreme Court of Canada, Privity of Contract and the Himalaya Clause" (1988), 26 *Alta. L. Rev*. 372, at p. 382. Despite the difficulty in the way of uniform legislative reform, Professor Reif is of the opinion that "the legislatures are still the most appropriate sites for any substantial amendment to the principle" since courts are limited in their response to "sporadic and factually limited opportunities" (p. 382). While this may be true, it does not mean that this Court should refuse to assist in the evolution of the common law when faced with appropriate circumstances.

212 Most of the specific criticisms of the doctrine of privity and its application to third party beneficiaries have come from commentators. Some have questioned the application of the doctrine in general terms, that is, in its application to cases where a third party is attempting to enforce a contractual provision either by suit or by a defence to a suit, while others have dealt exclusively with the question of third party beneficiaries and limitation of liability (or exemption or exclusion) clauses. See, for example, A. L. Corbin, "Contracts for the Benefit of Third Persons" (1930), 46 *L.Q. Rev*. 12; S. M. Waddams, "Contracts — Carriage of Goods — Exemptions for the Benefit of Third Parties", *supra*; S. M. Waddams, "Third Party Beneficiaries in the Supreme Court of Canada", *supra*; S. M. Waddams, *The Law of Contracts* (2nd ed. 1984), at pp. 200-16; *Carver's Carriage by Sea*, *supra*, at pp. 241-64; M. Tedeschi, "Consideration, Privity and Exemption Clauses; Port Jackson Stevedoring Pty. Ltd. v. Salmond and Spraggon (Australia) Pty. Ltd." (1981), 55 *Aust. L.J*. 876; J. Swan and B. J. Reiter, "Developments in Contract Law: The 1979-80 Term" (1981), 2 *Sup. Ct. L. Rev*. 125; W. J. Swadling, "Privity, Tort and Contract: Exempting the Careless Employee", *supra*; J. Swan, "Privity of Contract and Third Party Beneficiaries: the Selective Use of Precedent", *supra*; R. Flannigan, "Privity — The End of an Era (Error)", *supra*; J. N. Adams and R. Brownsword, "Privity and the Concept of a Network Contract" (1990), 10 *Legal Studies* 12; G. Battersby, "Exemption Clauses and Third Parties" (1975), 25 *U.T.L.J*. 371; G. Battersby, "Exemption Clauses and Third Parties: Recent Decisions" (1978), 28 *U.T.L.J*. 75; B. Coote, *Exception Clauses* (1964), at pp. 117-36; J. Livermore, *Exemption Clauses and Implied Obligations in Contracts* (1986), at pp. 175-207. See also the articles cited by McIntyre J. in *ITO — International Terminal Operators*, *supra*, at p. 783 dealing specifically with the application of the rule to "*Himalaya* clauses".

213 These comments and others reveal many concerns about the doctrine of privity as it relates to third party beneficiaries. For our purposes, I think it sufficient to make the following observations. Many have noted that an application of the doctrine so as to prevent a third party from relying on a limitation of liability clause which was intended to benefit him or her frustrates sound commercial practice and justice. It does not respect allocations and assumptions of risk made by the parties to the contract and it ignores the practical realities of insurance coverage. In essence, it permits one party to make a unilateral modification to the contract by circumventing its provisions and the express or implied intention of the parties. In addition, it is inconsistent with the reasonable expectations of all the parties to the transaction, including the third party beneficiary who is made to support the entire burden of liability. The doctrine has also been criticized for creating uncertainty in the law. While most commentators welcome, at least in principle, the various judicial exceptions to privity of contract, concerns about the predictability of their use have been raised. Moreover, it is said, in cases where the recognized exceptions do not appear to apply, the underlying concerns of commercial reality and justice still militate for the recognition of a third party beneficiary right.

214 There have been numerous calls from the judiciary for a reconsideration of the doctrine of privity and its refusal to allow third party beneficiaries to enforce provisions made for their benefit. Lord Denning has probably been the most outspoken, if not the least subtle, in this respect. In cases such as *Smith & Snipes Hall Farm Ltd. v. River Douglas Catchment Board*, [1949] 2 K.B. 500, [1949] 2 All E.R. 179 (C.A.), at p. 514 [K.B.], *Drive Yourself Hire Co. (London) v. Strutt*, [1954] 1 Q.B. 250, [1953] 2 All E.R. 1475 (C.A.), at pp. 272-75 [Q.B.], *Adler v. Dickson*, [1955] 1 Q.B. 158, [1954] 3 All E.R. 397 (C.A.), at p. 183 (a case involving an exemption of liability clause and an action against employees), *Midland Silicones*, *supra*, at pp. 483-89 (a case involving a limitation of liability clause and stevedores) and in his Court of Appeal judgment in *Beswick v. Beswick*, [1966] Ch. 538, Lord Denning questioned the accuracy and necessity of the "fundamental principle" that no one who is not a party to a contract can sue or be sued on it or take advantage of the stipulations or conditions that it contains, He has been quick to note that the principle is far from being an ancient one and that there are judicial ways to avoid its application when desired. However, his efforts have been largely ignored, and sometimes criticized, by the English judiciary.

215 But often judges have expressed similar discontent and have called for a reconsideration of the doctrine prohibiting a third party from enforcing contractual provisions made for his or her benefit: *Beswick v. Beswick*, [1968] A.C. 58, [1967] 2 All E.R. 1197 (H.L.), at p. 1201 per Lord Reid; *Olsson v. Dyson*, 120 C.L.R. 365, [1969] A.L.R. 443 (H.C.), at pp. 392-93 per Windeyer J.; *Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd.*, [1980] 1 W.L.R. 277, [1980] 1 All E.R. 571 (H.L.), at pp. 588-89 per Lord Keith and at p. 591 per Lord Scarman; *Swain v. Law Society*, [1983] A.C. 598, [1982] 2 All E.R. 827 (H.L.), at p. 611 *per* Lord Diplock. Lord Scarman's comments are particularly forceful:

> I respectfully agree with Lord Reid that the denial by English law of a jus quaesitum tertio calls for reconsideration. In *Beswick v Beswick*, Lord Reid, after referring to the Law Revision Committee's recommendation that the third party should be able to enforce a contractual promise taken by another for his benefit, observed: "If one had to contemplate a further long period of Parliamentary procrastination, this House might find it necessary to deal with this matter." The committee reported in 1937; *Beswick v Beswick* was decided in 1967. It is now 1979; but nothing has been done. If the opportunity arises, I hope the House will reconsider *Tweddle v Atkinson* and the other cases which stand guard over this unjust rule.

216 More recently, the High Court of Australia was faced with an opportunity in which to reconsider the doctrine of privity. The majority of the Court accepted the invitation made by those calling for reform. It strongly criticized the doctrine and permitted a third party beneficiary to enforce a provision in an insurance contract notwithstanding that it was not a party to the contract and had provided no consideration, and that neither agency nor trust (nor any other exception) was applicable: *Trident General Insurance Co. v. McNiece Brothers Pty.* (1988), 80 A.L.R. 574.

217 Trident General Insurance Co. had entered into a contract of insurance with Blue Circle Southern Cement Ltd., a limestone crushing plant, with respect to its operation. The contract, among other things, attempted to extend certain benefits of coverage to third parties such as contractors and subcontractors. Following an accident in which a third party was held liable (McNiece Bros. Pty. Ltd.), Trident refused coverage on the ground that said party was not privy to the contract of insurance and had given no consideration. Notwithstanding that the facts could not support an agency argument and that trust had not been pleaded, the lower courts allowed McNiece's claim under the insurance policy thus creating, in effect, a new exception to the doctrine of privity. Trident appealed to the High Court of Australia making arguments very similar to ones made by the appellant in the case at bar; namely, that the High Court should confirm and apply "fundamental", "settled" and "established" contract principles relating to privity of contract and consideration, and asking that courts reject any judicial developments outside the scope of existing exceptions to the doctrine. These submissions were, in essence, accepted by three members of the High Court: Brennan, Deane and Dawson JJ. Each wrote individual dissenting reasons in which they defended the orthodox doctrine of privity and rejected attempts at judicial reform. However, a majority of the High Court (Mason C.J. and Wilson, Toohey and Gaudron JJ.) decided to examine the propriety of the rule denying third party beneficiary rights and held that this was an appropriate case in which to relax the rule. In the end, Trident's appeal was dismissed and McNiece was permitted to obtain the benefit of a contract to which it was not a party without resorting to notions of agency or trust.

(c) Treatment in Other Jurisdictions

218 As long ago as 1937, the English Law Revision Committee observed in its *Sixth Interim Report* that "the common law of England stands alone among modern systems of law in its rigid adherence to the view that a contract should not confer any rights on a stranger to the contract, even if the sole object may be to benefit him" (para. 48). This observation is still appropriate today, although it may be said that the common law of England has, for better or worse, found allegiance in Canada.

219 I need not engage in a thorough review of how third party beneficiary questions are dealt with in other jurisdictions or systems of law; that has been done on a number of occasions: see, for example, M. A. Millner, "*Ius Quaesitum Tertio*: Comparison and Synthesis" (1967), 16 *Int'l & Comp. L. Rev*. 446; A. J. Waters, "The Property in the Promise: A Study of the Third Party Beneficiary Rule" (1985), 98 *Harv. L. Rev*. 1109; S. P. de Cruz, "Privity in America: A Study in Judicial

and Statutory Innovation" (1985), 14 *Anglo-American L. Rev*. 265; D. M. Walker, *The Law of Contracts and Related Obligations in Scotland* (2nd ed. 1985), at pp. 454-60; A. L. Corbin, *Corbin on Contracts*, 1 vol. ed. (1952), at pp. 723-82; and Ontario Law Reform Commission, *Report on Amendment of the Law of Contract*, *supra*, at pp. 55-65. I will simply take this opportunity to note what is obvious to anyone considering the issue, that is, that many jurisdictions have recognized, in varying degrees, that third party beneficiaries to a contract are entitled to enforce contractual provisions made for their benefit without necessarily resorting to notions such as agency or trust.

220 For example, in Quebec, the general principle of privity of contract (*relativité des contrats*) endorsed in art. 1023 of the *Civil Code of Lower Canada* is qualified by art. 1029 so as to permit contracting parties to stipulate in favour of third parties. Courts have interpreted this latter provision as giving to the third party a right, under certain circumstances, to enforce a contract made for his or her benefit. Such an interpretation is now codified in arts. 1444 to 1450 of the amendments to the Quebec *Civil Code*, S.Q. 1991, c. 64, which were recently passed by the National Assembly.

221 In a similar vein, while Scottish law adheres to the general rule that persons who are not parties to a contract cannot sue upon it, it nevertheless recognizes an exception when a *jus quaesitum tertio* has been created; that is, a right vested in and secured to a third party in and by a contract between two other parties. If an intention to confer a benefit on a third party can be gathered from the terms of the contract and the conduct of the parties, a *jus quaesitum tertio* will arise and the third party will have a right to enforce the contractual provision.

222 As stated above, in New Zealand, the *Contracts (Privity) Act 1982* abolishes to a very large extent the doctrine of privity of contract. Section 4 of the Act states that when a promise contained in a contract confers, or purports to confer, a benefit on a third party, the promisor shall be under an obligation, enforceable at the suit of the third party, to perform the promise. Section 2 of the Act defines "benefit" as including, *inter alia*, any immunity and any limitation or qualification of an obligation to which a person (other than a party to the contract) is or may be subject. Similar statutory inroads on privity include Western Australia's *Property Law Act, 1969*, W. Austl. Acts 1969, No. 32, s. 11, and Queensland's *Property Law Act 1974*, Queensl. Stat. 1974, No. 76, s. 55.

223 Finally, in the United States, third party rights are now recognized in every State, to a varying degree, by common law, uniform statutory legislation and/or specific state legislation. See, for example, §§ 302-315 of the *Restatement of Law (Second): Contracts 2d*. Ever since the cornerstone decision of the New York Court of Appeal in *Lawrence v. Fox*, 20 N.Y. 268 (1859), there has emerged what Professor Corbin refers to as a "trend" in the law, both judge-made and statutory, recognizing that third party beneficiaries are entitled, as a general rule, to enforce contractual provisions made for their benefit. The decision of the Massachussetts State Supreme Court in *Choate, Hall & Stewart v. SCA Services, Inc.*, 392 N.E.2d 1045 (1979), demonstrates that this trend has apparently now swept the entire country.

(d) Previous Decisions of This Court

224 As mentioned above, the appellant in its argument places considerable if not exclusive reliance on the decisions of this Court in *Canadian General Electric*, *supra*, *Greenwood Shopping Plaza*, *supra*, and *ITO — International Terminal Operators*, *supra*. From these decisions it is submitted that a tortfeasor's liability cannot be excluded, limited or modified by the terms of a contract to which he or she is not a party absent facts that can support a finding of trust or agency.

225 In *Canadian General Electric*, *supra*, an owner of goods brought an action against a firm of stevedores for negligence in the stowing of certain heavy electrical equipment belonging to the plaintiff on board a steamship destined for the Republic of Ghana. Writing reasons for the Court, Ritchie J. began by finding that the stevedoring company owed a duty of care to the owner of the goods, because in carrying out the work which it had undertaken for the shipowners, the stevedores should have had the owner of the goods in contemplation as a person affected by their acts. One argument raised by the firm of stevedores was that, even if they were in breach of this duty, their liability would be nonetheless limited in accordance with the provisions of the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291, Schedule, Article IV(5), which were incorporated in the contracts of carriage between the owner of the goods and other parties, as evidenced by certain bills of lading. In response to this argument, Ritchie J. made the following observations (at pp. 43-44):

> ... as the stevedoring company is a complete stranger to the contract of carriage it would not be affected by any provisions for limitation of liability or otherwise contained in the bills of lading and if the respondent was in breach of its duty to take reasonable care of the goods which it was stowing in the ship, it must accept the normal consequences of its tort. The law in this regard is, in my opinion, correctly stated in the reasons for judgment of the majority of the House of Lords in *Midland Silicones v. Scruttons Limited*, where the relevant cases are fully discussed.
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> [Emphasis added.]

226 It is important to note that the provisions of the *Water Carriage of Goods Act* relied on by the stevedoring company only made the "carrier" and the "ship" beneficiaries of a limited liability. There was no "*Himalaya* clause" involved as this expression is commonly understood. In other words, the limitation of liability clause contained in the contracts of carriage (i.e. the provisions of the *Water Carriage of Goods Act* incorporated by reference) did not confer, nor did it attempt to confer, any benefits whatsoever on the stevedoring company. There was no specific reference to stevedores and the terms "carrier" and "ship" could not be interpreted as including stevedores according to jurisprudence: see *Midland Silicones*, *supra*, and *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959). In sum, nothing in the contracts expressly or impliedly limited the liability of *the stevedoring company*. The firm of stevedores was not a third party beneficiary under the contracts but rather a "complete stranger" who was attempting to acquire a benefit (i.e. a limitation of liability) from contracts which did not even acknowledge its existence. Accordingly, while *Canadian General Electric* confirms the doctrine of privity to the extent that a stranger cannot obtain a benefit from a contract to which he or she is not a party, it says nothing about the aspect of the doctrine which refuses to recognize a third party beneficiary right.

227 Much of the same can be said about *Greenwood Shopping Plaza*, *supra*. In that case, employees of a company which was leasing premises in a shopping centre, while acting in the course of their employment, negligently caused a fire which destroyed part of the shopping centre. The lease between the owner of the centre and the company included in paragraphs 14 and 15 the provisions which dealt with the insurance of the demised premises. Although neither party to the contract took any steps towards the performance of the insurance undertakings, both were partially insured. Following the fire, an action was brought against the company and its employees on behalf of the owner of the shopping centre for the recovery of its uninsured loss and on behalf of its fire insurers by way of subrogation for moneys paid. The company, even though it was vicariously liable for the negligence of its employees, was held to be protected from liability through the provisions of the lease. The sole question before this Court, as stated by McIntyre J., was the following (at pp. 235-36):

> ... whether the respondents, held to have been guilty of negligence which caused the loss, but not parties to the lease and the insuring agreement in paras. 14 and 15, may claim the benefit of those provisions and thereby receive the same protection as that afforded to the company, their employer, who was otherwise equally liable with them for their negligence.

228 McIntyre J. answered the question in the negative by resorting to the doctrine of privity of contract. He noted that while certain exceptions to this doctrine had developed, such as agency and trust, on the limited evidence before this Court none was available to permit the employees to claim the benefit from the provisions of the lease.

229 I should like to make four observations concerning this decision. First, the contract involved in *Greenwood Shopping Plaza* was a lease of premises rather than a contract for services such as a contract of storage. The contract was between a lessor (the owner of the shopping centre) and the lessee (the company) and the intervention of the lessee's employees was not at all necessary for the execution of this agreement. It was irrelevant to any aspect of this agreement, especially to paragraphs 14 and 15, whether the lessee had any employees and whether they would be present on the leased premises. Second, the provisions of the contract which the employees were seeking to obtain a benefit from in *Greenwood Shopping Plaza* were not general limitation of liability clauses. Rather they were stipulations containing mutual undertakings by the lessor and the lessee with respect to insurance of the premises and the granting of subrogation rights. Third, it was inferentially observed that there was little, if any, evidence to support a finding that the parties to

the contract intended to confer a benefit on the employees by the provisions of the lease relied on. This appears from the comments made by McIntyre J. in the context of his analysis of both the agency exception (at pp. 238-39) and the trust exception (at p. 240) and, more clearly, in the following closing observations (at pp. 240-41):

> It must also be observed that the clear and precise words of paras. 14 and 15 limit the application of the insurance provisions to the parties to the lease, the appellant and the company. Courts must, in cases of this sort, be wary against drawing inferences upon vague and scanty evidence, where the result would be to contradict the clear words of a written agreement and where rectification is not sought or may not be had.
>
> [Emphasis added.]

Finally, and closely related to the preceding comment, there is the fact that, as in *Canadian General Electric*, *supra*, the parties seeking to obtain benefits from the contract in *Greenwood Shopping Plaza* were viewed as complete strangers and not third party beneficiaries. This appears clearly from the wording of the provisions in question as noted by McIntyre J. in the underlined passage reproduced above.

230 In sum, the decision of this Court in *Greenwood Shopping Plaza*, while containing certain general statements relating to privity of contract, involved a contract and provisions which are different from the contract and provision in the case at bar. More importantly, however, is the fact that that case was not decided with reference to third party beneficiaries and with the aspect of privity denying a *jus tertii*, but rather with reference to complete strangers to a contract. Accordingly, *Greenwood Shopping Plaza*, like *Canadian General Electric*, is of limited use in a determination of whether third party beneficiary rights should be recognized in certain limited circumstances.

231 I now come to *ITO — International Terminal Operators*, *supra*. In that case, Mitsui O.S.K. Lines Ltd., a carrier, entered into a contract of carriage with Miida Electronics Inc. to carry some of the latter's electronic calculators from Japan to Montreal. The bill of lading contained what has become known as a "*Himalaya* clause" by which the carrier Mitsui sought to extend expressly the benefit of a limitation of liability to those it employed in connection with the shipment and unloading of the cargo, including stevedores. The carrier arranged for the goods to be picked up on arrival and stored at the port on a short-term basis by ITO-International Terminal Operators, a stevedoring and cargo-handling company. The contract between Mitsui and ITO stated that the stevedoring company was to be an express beneficiary of all limitation of liability provisions in its bills of lading. Many cartons of calculators were stolen from ITO's shed and Miida brought an action against both the carrier and the stevedoring company. The action was dismissed at trial. The Federal Court of Appeal dismissed the owner's appeal against the carrier but allowed its appeal against ITO. Both ITO and the owner appealed to this Court.

232 One of the issues raised was the effect of the "*Himalaya* clause" in the bill of lading, particularly, whether such clauses are to be recognized as a feature of Canadian maritime law. McIntyre J., writing for the majority, began by noting that the major obstacle to the recognition of the "*Himalaya* clause" was the common law doctrine of privity of contract. However, observing that academic writers had revealed a gap between contractual theory and commercial reality in refusing to recognize such clauses, that exceptions to the doctrine had been inferentially recognized in *Greenwood Shopping Plaza*, *supra*, and that the "route" left open by Lord Reid in *Midland Silicones* (i.e. the four-part "agency test") had been applied by Lord Wilberforce, speaking for the majority of the Privy Council, in *The Eurymedon*, *supra*, a case later affirmed in the Privy Council in *Port Jackson Stevedoring Pty. v. Salmond & Spraggon (Australia) Pty.; "New York Star" (The)*, [1981] 1 W.L.R. 138, [1980] 3 All E.R. 257, McIntyre J. held that "*Himalaya* clauses" could be effective in Canadian maritime law. His conclusion was largely based on the reasoning of Lord Wilberforce in *The Eurymedon* and the latter's application of Lord Reid's agency "four-step" exception to the doctrine of privity, especially the fourth step which involves the use of the concept of a unilateral contract in order to show consideration moving from the stevedores to the owner of goods. McIntyre J. stressed that he was not resorting to a general third party right (or *jus tertii*) in order to dispose of the matter; however, he did not foreclose the possibility that such a right might one day be recognized. His comments in this respect merit citation (at pp. 787-88):

> Of interest on this point is the thirteenth edition of Carver, *Carriage by Sea* (1982), in which is found a different approach to the question of liability of stevedores and other agents of the carrier. The learned author rejects the proposition that the concept of the *jus tertii* is unknown to the common law and refers to early authorities which support its application. In essence, the view is expressed that there is nothing wrong in principle or authority with the clear application of the principle of *jus tertii*. There is nothing offensive, it is argued, in a contract of affreightment in giving effect to that which was intended by the parties. The essence of the proposition advanced by the learned author may be found at vol. 1, p. 262, where he says, at paragraph 410:
>
> > **Importance of the Himalaya Clause**
> >
> > It will be a happy day when the *Himalaya Clause* and *The Eurymedon* have run their full course. The *Himalaya Clause* has proved to have been a most effective dyke to stem the tide threatening to overwhelm the barrier against incursion on shipowners' pockets of perils of the sea. But exceptions of perils of the sea can be preserved more thoroughly by simpler and more rational means once it was generally apparent that the fundamental principle of *jus tertii* covers all. It is clearly the available protective principle to apply now to ensure that the will of the parties to a contract of affreightment can simply be secured by saying in the bill of lading what that will is.
> >
> > An omnibus clause, of *Himalaya* vintage, could be devised, but it need no longer go into awkward concepts, which vary as between one country and another such as those of undisclosed agency and deemed (which means non-existent *de facto*) trusts.
> >
> > England does not stand alone in this matter; the real need to preserve, and possibly improve, the clause at this time stems also from the views already expressed by courts in Australia, Canada and the United States.
>
> *It may be that this approach offers a more rational solution to the problem than that outlined by Lord Wilber-force, which compresses the facts into a contractual mould in order to preserve the common law principle of privity in a situation in which it would appear that it is being rejected. Be that as it may, 1 leave open for another day consideration of the Carver proposal, and I would follow the approach of Lord Wilberforce expressed in the case of The "Euryinedon".*
>
> [Emphasis added.]

McIntyre J. went on to find that the clause in question applied to the stevedoring company and that they were protected from liability.

233 Several points about *ITO — International Terminal Operators*, *supra*, warrant mention. First, unlike *Canadian General Electric*, *supra*, and *Greenwood Shopping Plaza*, *supra*, this case involved third party beneficiaries. The bill of lading expressly extended the benefit of a limitation of liability on third parties such as stevedores, which is the essence of a "*Himalaya* clause". In this sense, the stevedoring company was not a complete stranger to the contract of carriage but rather a third party beneficiary. While this fact was insufficient in itself to allow the third party to rely on the clause as a means of defence, it demonstrates that *ITO — International Terminal Operators* was concerned with a different aspect of the doctrine of privity from the two earlier decisions; the aspect which is involved in the case at bar.

234 Second, the majority of this Court in *ITO — International Terminal Operators* in recognizing the "*Himalaya* clause" took into consideration factors such as: commercial reality, the need for a definite establishment of risks in order to secure the respective needs for insurance, the situation in other jurisdictions, the need to promote uniformity and certainty in this area of law, and the true intention of the parties.

235 Third, and perhaps most importantly, while McIntyre J. opted for a recognition of the "*Himalaya* clause" within the current framework of the doctrine of privity and the traditional exception of agency, he nonetheless left open "for another day" the consideration of whether an approach simply recognizing a *jus tertii* would be a more rational solution to the problem faced by third party beneficiaries. Although his comments in this respect were made in a context different from

that in the case at bar, I see nothing in the "Carver proposal" nor in the reasons of the majority in *ITO — International Terminal Operators* which would prevent this Court from accepting McIntyre J.'s invitation, albeit in a different factual setting.

236 It appears from the foregoing that the three decisions of this Court relied upon by the appellant do not completely and clearly dispose of the issue under consideration. Put another way, there is nothing in any of them which precludes this Court from adopting the approach I shall set out in the following part of these reasons.

(4) The Doctrine of Privity and the Present Appeal

237 None of the traditional exceptions to privity is applicable in the case at bar. As noted by the appellant, there is no evidence to support a finding of agency or trust, and these matters were not fully argued before the courts below. While the respondents rely to a certain extent on the approach taken by Lambert J.A. in the Court of Appeal, I must say that I have much difficulty in supporting a conclusion that the approach described in *The Eurymedon*, *supra*, and *ITO — International Terminal Operators*, *supra*, is applicable to the facts of this case. Rather than artificially extending recognized exceptions beyond their accepted limits, I prefer approaching this matter on the basis that privity of contract would otherwise apply so as to preclude the respondents from obtaining the benefit of the limitation of liability clause. The questions I now need to address are whether this doctrine should be relaxed in the circumstances of this case and, if so, on what basis.

(a) Should the Doctrine of Privity be Relaxed?

238 Without doubt, major reforms to the rale denying third parties the right to enforce contractual provisions made for their benefit must come from the legislature. Although I have strong reservations about the rigid retention of a doctrine that has undergone systematic and substantial attack, privity of contract is an established principle in the law of contracts and should not be discarded lightly. Simply to abolish the doctrine of privity or to ignore it, without more, would represent a major change to the common law involving complex and uncertain ramifications. This Court has in the past indicated an unwillingness to sanction judge-made changes of this magnitude: see, for two recent examples, *Watkins v. Olafson*, [1989] 2 S.C.R. 750, [1989] 6 W.W.R. 481, 39 B.C.L.R. (2d) 294, 50 C.C.L.T. 101, 100 N.R. 161, 61 D.L.R. (4th) 577, 61 Man. R. (2d) 81, at pp. 760-61 [S.C.R.], and *R. v. Salituro*, [1991] 3 S.C.R. 654, 9 C.R. (4th) 324, 68 C.C.C. (3d) 289, 131 N.R. 161, 50 O.A.C. 125, 8 C.R.R. (2d) 173, at pp. 665-70 [S.C.R.].

239 McLachlin J.'s comments in *Watkins v. Olafson*, at pp. 760-61, speaking for the Court, are worth repeating:

> This branch of the case, viewed thus, raises starkly the question of the limits on the power of the judiciary to change the law. Generally speaking, the judiciary is bound to apply the rules of law found in the legislation and in the precedents. Over time, the law in any given area may change; but the process of change is a slow and incremental one, based largely on the mechanism of extending an existing principle to new circumstances. While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.
>
> There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree. Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.

> Considerations such as these suggest that major revisions of the law are best left to the legislature. Where the matter is one of a small extension of existing rules to meet the exigencies of a new case and the consequences of the change are readily assessable, judges can and should vary existing principles. But where the revision is major and its ramifications complex, the courts must proceed with great caution.

240 This Court has also recognized, however, that in appropriate circumstances courts have not only the power but the duty to make incremental changes to the common law to see that it reflects the emerging needs and values of our society: *R. v. Salituro*, at pp. 669-70. It is my view that the present appeal is an appropriate situation for making such an incremental change to the doctrine of privity of contract in order to allow the respondents to benefit from the limitation of liability clause.

241 As we have seen earlier, the doctrine of privity has come under serious attack for its refusal to recognize the right of a third party beneficiary to enforce contractual provisions made for his or her benefit. Law reformers, commentators and judges have pointed out the gaps that sometimes exist between contract theory on the one hand, and commercial reality and justice on the other. We have also seen that many jurisdictions around the world, including Quebec and the United States, have chosen from an early point (as early as the doctrine became "settled" in the English common law) to recognize third party beneficiary rights in certain circumstances. As noted by the appellant, the common law recognizes certain exceptions to the doctrine, such as agency and trust, which enable courts, in appropriate circumstances, to arrive at results which conform with the true intentions of the contracting parties and commercial reality. However, as many have observed, the availability of these exceptions does not always correspond with their need. Accordingly, this Court should not be precluded from developing the common law so as to recognize a further exception to privity of contract merely on the ground that some exceptions already exist.

242 While these comments may not, in themselves, justify doing away with the doctrine of privity, they nonetheless give a certain context to the principles that this Court is now dealing with. This context clearly supports in my view some type of reform or relaxation to the law relating to third party beneficiaries. Again, I reiterate that any substantial amendment to the doctrine of privity is a matter properly left with the legislature. But this does not mean that courts should shut their eyes to criticisms when faced with an opportunity, as in the case at bar, to make a very specific incremental change to the common law.

243 At this point, it is useful to recall briefly the salient facts with which this Court is seized. The appellant entered into a contract with Kuehne & Nagel for certain services, namely, the storing of its transformer. When the contract was signed, the appellant knew that it contained a clause limiting the liability of the "warehouseman" to $40. It also knew, or can be assumed to have known, that Kuehne & Nagel employed many individuals and that these employees would be directly involved in the storing of the transformer. The appellant chose not to obtain additional insurance from Kuehne & Nagel and instead arranged for its own all-risk coverage. When the damages to the transformer occurred, the respondents, two of Kuehne & Nagel's employees, were acting in the course of their employment and were performing services directly related to the contract of storage. The appellant is now seeking to recover the full amount of damages from these employees since it can only obtain $40 from the employer. As a defence to such a claim, the respondents are attempting to obtain the benefit of the limitation of liability clause.

244 There are few principled reasons for upholding the doctrine of privity in the circumstances of this case. Maintaining the alleged *status quo* by itself is an unhelpful consideration since I am considering whether or not a relaxation, or change, to the law should be made. Similarly, most of the traditional reasons or justifications behind the doctrine are of little application in cases such as this one, when a third party beneficiary is relying on a contractual provision as a defence in an action brought by one of the contracting parties. There are no concerns about double recovery or floodgates of litigation brought by third party beneficiaries. The fact that a contract is a very personal affair, affecting only the parties to it, is simply a restatement of the doctrine of privity rather than a reason for its maintenance. Nor is there any concern about "reciprocity", that is, there is no concern that it would be unjust to allow a party to sue on a contract when he or she cannot be sued on it.

245 Moreover, recognizing a right for a third party beneficiary to rely on a limitation of liability clause should have relatively little impact on the rights of contracting parties to rescind or vary their contracts, in comparison with the recognition of a third party right to sue on a contract. In the end, the most that can be said against the extension of exceptions to the doctrine of privity in this case is that the respondent employees are mere donees and have provided no consideration for the contractual limitation of liability.

246 The doctrine of privity fails to appreciate the special considerations which arise from the relationships of employer-employee and employer-customer. There is clearly an identity of interest between the employer and his or her employees as far as the performance of the employer's contractual obligations is concerned. When a person contracts with an employer for certain services, there can be little doubt in most cases that employees will have the prime responsibilities related to the performance of the obligations which arise under the contract. This was the case in the present appeal, clearly to the knowledge of the appellant. While such a similarity or closeness might not be present when an employer performs his or her obligations through someone who is not an employee, it is virtually always present when employees are involved. Of course, I am in no way suggesting that employees are a party to their employer's contracts in the traditional sense so that they can bring an action on the contract or be sued for breach of contract. However, when an employer and a customer enter into a contract for services and include a clause limiting the liability of the employer for damages arising from what will normally be conduct contemplated by the contracting parties to be performed by the employer's employees, and in fact so performed, there is simply no valid reason for denying the benefit of the clause to employees who perform the contractual obligations. The nature and scope of the limitation of liability clause in such a case coincides essentially with the nature and scope of the contractual obligations performed by the third party beneficiaries (employees).

247 Upholding a strict application of the doctrine of privity in the circumstances of this case would also have the effect of allowing the appellant to circumvent or escape the limitation of liability clause to which it had expressly consented. This Court warned against such a practice in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, *(*sub nom. *Central & Eastern Trust Co. v. Rafuse)* 37 C.C.L.T. 117, 42 R.P.R. 161, 34 B.L.R. 187, 31 D.L.R. (4th) 481, 75 N.S.R. (2d) 109, 186 A.P.R. 109, 69 N.R. 321. There, Le Dain J. in speaking for the Court made the following statement of principle (at p. 206):

> A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence.

248 I appreciate that this Court was dealing with a somewhat different factual situation in *Central Trust* since it was addressing the general question of concurrent or alternative liabilities in tort and contract as between two parties to a contract. It was not concerned specifically with the right of a contracting party to bring an action in tort against the employees of the other party, at the same time as suing that other party in contract and tort. However, the concern expressed by Le Dain J., that is, the fundamental unilateral alteration of one's contract, remains entirely applicable to the case at bar. Let me explain.

249 In making the above "qualification" to concurrent or alternative liability, Le Dain J. was largely influenced by the majority judgment of Pigeon J. in *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, [1972] S.C.R. 769, 26 D.L.R. (3d) 699. In this respect, I think it would be useful to reproduce the passages from *Central Trust*, *supra*, which reveal what Le Dain J. had in mind when he spoke of circumventing or escaping one's contractual limitation of liability. He reviewed *Nunes Diamonds* in the following manner (at pp. 162-63):

> The trial court and the Court of Appeal were of the opinion that there had not been misrepresentation for which D.E.P. was liable. The majority of this Court appear also to have been of this view but, assuming that there had been a misrepresentation, they held that there could not be liability in tort for it because of the existence of the contract. Pigeon J., with whom Martland and Judson JJ. concurred, said the following at pp. 777-78:

> Furthermore, the basis of tort liability considered in *Hedley Byrne* is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as "an independent tort" unconnected with the performance of that contract, as expressed in *Elder, Dempster & Co. Ltd. v. Peterson, Zochonis & Co., Ltd.*, [[1924] A.C. 522], at p. 548. This is specially important in the present case on account of the provisions of the contract with respect to the nature of the obligations assumed and the practical exclusion of responsibility for failure to perform them.

> It appears to have been assumed by the majority, as had been held by the trial judge, that the clause in the contract limiting liability in the case of loss to $50 did not cover negligence and also that the clause respecting representations did not apply to representations made after the contract was entered into. Pigeon J. said that if D.E.P. were to be liable in tort, despite the limitation of liability in the contract, it would effect a fundamental alteration of the contract.

250 Le Dain J. went on to examine the House of Lords decision of *Elder, Dempster*, *supra*, in order to elucidate what Pigeon J. meant by an "independent tort unconnected with the performance of [the] contract". This decision is of particular interest in the case at bar because of the similarity of legal issues involved therein, namely, the reliance by a third party on a contractual limitation of liability. Of course, I recognize that *Elder, Dempster* may be interpreted in many different ways and that the House of Lords has later expressed disapproval with at least one of these interpretations (i.e. vicarious immunity): *Midland Silicones*, *supra*. However, in clarifying the comments made by Pigeon J. in *Nunes Diamonds*, this Court chose to adopt one particular meaning of *Elder, Dempster* in *Central Trust* (at p. 164) which is very helpful in understanding the concern expressed by Le Dain J.:

> What [*Elder, Dempster*] decided in essence was that the contractual exclusion of liability for bad stowage in the bill of lading could not be circumvented by reliance on a liability in tort where the act or omission complained of was one connected with the performance of the contract. This appears from the speech of Viscount Finlay, cited by Pigeon J. in *Nunes Diamonds*, where, referring to the contention that the shipowners had a liability in tort that was unaffected by the exclusion of liability in the bill of lading [because they were not privy to the contract], he said at p. 548:
>
> > This contention seems to me to overlook the fact that the act complained of was done in the course of the stowage under the bill of lading, and that the bill of lading provided that the owners are not to be liable for bad stowage. If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading, the case would have been different. But when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach, whatever the form of the action and whether owner or charterer be sued. It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect of all stowage, by suing the owner of the ship in tort.

251 In a similar fashion, it would be absurd in the circumstances of this case to let the appellant go around the limitation of liability clause by suing the respondent employees in tort. The appellant consented to limit the "warehouseman's" liability to $40 for anything that would happen during the performance of the contract. When the loss occurred, the respondents were acting in the course of their employment and performing the very services, albeit negligently, for which the appellant had contracted with Kuehne & Nagel. The appellant cannot obtain more than $40 from Kuehne & Nagel, whether the action is based in contract or in tort, because of the limitation of liability clause. However, resorting to exactly the same actions, it is trying to obtain the full amount from the individuals ("warehousemen") who were directly responsible for the storing of its goods in accordance with the contract. As stated earlier, there is an identity of interest between the respondents and Kuehne & Nagel as far as performance of the latter's contractual obligations is concerned. When these facts are taken into account, and it is recalled that the appellant knew the role to be played by employees pursuant to the contract, it is clear to me that this Court is witnessing an attempt in effect to "circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort". In my view, we should not sanction such an endeavour in the name of privity of contract.

252 Finally, there are sound policy reasons why the doctrine of privity should be relaxed in the circumstances of this case. A clause such as one in a contract of storage limiting the liability of a "warehouseman" to $40 in the absence of a declaration by the owner of the goods of their value and the payment of an additional insurance fee makes perfect commercial sense. It enables the contracting parties to allocate the risk of damage to the goods and to procure insurance accordingly. If the owner declares the value of the goods, which he or she alone knows, and pays the additional premium, the bargain will have placed the entire risk on the shoulders of the "warehouseman". On the other hand, if the owner refuses the offer of additional coverage, the bargain will have placed only a limited risk on the "warehouseman" and the owner will be left with the burden of procuring private insurance if he or she decides to diminish its own risk. In either scenario, the parties to the contract agree to a certain allocation and then proceed, based on this agreement, to make additional insurance arrangements if required. It stretches commercial credulity to suggest that a customer, acting prudently, will not obtain insurance because he or she is looking to the employees for recovery when generally little or nothing is known about the financial capacity and professional skills of the employees involved. That does not make sense in the modern world.

253 In addition, employees such as the respondents do not reasonably expect to be subject to unlimited liability for damages that occur in the performance of the contract when said contract specifically limits the liability of the "warehouseman" to a fixed amount. According to modern commercial practice, an employer such as Kuehne & Nagel performs its contractual obligations with a party such as the appellant *through* its employees. As far as the contractual obligations are concerned, there is an identity of interest between the employer and the employees. It simply does not make commercial sense to hold that the term "warehouseman" was not intended to cover the respondent employees and as a result to deny them the benefit of the limitation of liability clause for a loss which occurred during the performance of the very services contracted for. Holding the employees liable in these circumstances could lead to serious injustice especially when one considers that the financial position of the affected employees could vary considerable such that, for example, more well off employees would be sued and left to look for contribution from their less well off colleagues. Such a result also creates uncertainty and requires excessive expenditures on insurance in that it defeats the allocations of risk specifically made by the contracting parties and the reasonable expectations of everyone involved, including the employees. When parties enter into commercial agreements and decide that one of them and its employees will benefit from limited liability, or when these parties choose language such as "warehouseman" which implies that employees will also benefit from a protection, the doctrine of privity should not stand in the way of commercial reality and justice.

254 For all the above reasons, I conclude that it is entirely appropriate in the circumstances of this case to call for a relaxation of the doctrine of privity.

(b) How Should the Doctrine of Privity be Relaxed?

255 Regardless of the desirability of making a particular change to the law, I have already noted that complex changes with uncertain ramifications should be left to the legislature. Our power and duty as a court to adapt and develop the common law must only be exercised generally in an incremental fashion. This is particularly important when, as here, changes to substantive law are concerned, as opposed to changes to procedural law. The respondents submit that this Court should relax the doctrine of privity so as to permit non-contracting employees to take the benefit of any immunities or limitations of liability granted to their employer. They offer three requirements for the application of this new exception, namely: (1) there is a contractual limitation of liability between an employer and another party; (2) the loss occurs during the employer's performance of its contractual obligations to that party; and (3) the employees are acting in the course of their employment when the loss occurs.

256 In my opinion, not only does the respondents' submission go beyond what is required to dispose of the present appeal, but it also does not represent an incremental change to the law. The main problem I have is with their first requirement. As we have seen earlier, the criticisms and statutory inroads into the doctrine of privity of contract have mostly, if not exclusively, occurred with respect to third party beneficiaries. That is, with respect to third parties to whom contracting parties have extended, either expressly or impliedly, some form of benefit arising under the contract.

However, this is not the thrust of the respondents' submission. In essence, what they are requesting is the recognition of a third party right, or *jus tertii*, for complete strangers to their employer's contracts, without any regard whatsoever to the intention of the contracting parties. While this may be an appropriate step for the legislature, it is not the type of incremental change that this Court should endorse.

257 In my opinion, a threshold requirement for employees to obtain the benefit of their employer's contractual limitation of liability clause is the express or implied stipulation by the contracting parties that the benefit of the clause will also be shared by said employees. Without such a stipulation, it is my view that the employees are in a no better situation than this Court held those employees involved in *Greenwood Shopping Plaza*, *supra*, to be in, and should not therefore be able to rely on the clause as a means of defence. This Court found that the employees were strangers to the contract, as I discussed above. As for the other requirements proposed by the respondents, I agree with their substance although I would express them in a different manner.

258 In the end, the narrow question before this Court is: in what circumstances should employees be entitled to benefit from a limitation of liability clause found in a contract between their employer and the plaintiff (customer)? Keeping in mind the comments made earlier and the circumstances of this appeal, I am of the view that employees may obtain such a benefit if the following requirements are satisfied:

> 1) The limitation of liability clause must, either expressly or impliedly, extend its benefit to the employees (or employee) seeking to rely on it; and
>
> 2) the employees (or employee) seeking the benefit of the limitation of liability clause must have been acting in the course of their employment *and* must have been performing the very services provided for in the contract between their employer and the plaintiff (customer) when the loss occurred.

Although these requirements, if satisfied, permit a departure from the strict application of the doctrine of privity of contract, they represent an incremental change to the common law. I say "incremental change" for a number of reasons.

259 First and foremost, this new exception to privity is dependent on the intention of the contracting parties. An employer and his or her customer may choose the appropriate language when drafting their contacts so as to extend, expressly or impliedly, the benefit of any limitation of liability to employees. It is their intention as stipulated in the contract which will determine whether the first requirement is met. In this connection, I agree with the view that the intention to extend the benefit of a limitation of liability clause to employees may be express or *implied* in all the circumstances: see e.g. *Mayfair Fabrics v. Henley*, 244 A.2d 344 (N.J. 1968); *Employers Casualty Co. v. Wainwright*, 473 P.2d 181 (Colo. Ct. App. 1970) (*cert*, denied).

260 Second, taken as a whole, this new exception involves very similar benchmarks to the recognized agency exception, applied in *The Eurymedon* and by this Court in *ITO — International Terminal Operators*, *supra*. As discussed in the latter decision, the four requirements for the agency exception were inspired from the following passage of Lord Reid's judgment in *Midland Silicones*, *supra* (at p. 474):

> I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.

The first requirement of both exceptions is virtually identical. The second and third requirements of the agency exception are supplied by the identity of interest between an employer and his or her employees as far as the performance of contractual obligations is concerned; this is implicit in the recognition of this new exception. As for the fourth requirement of agency, while this new exception makes no specific mention of consideration moving from the employees to the

customer, the second requirement of the new exception embraces the same elements which were adopted by courts to recognize consideration moving from stevedores in cases involving "*Himalaya* clauses".

261 Third, it must be remembered that I am proposing a very specific and limited exception to privity in the case at bar; viz. permitting employees who qualify as third party beneficiaries to use their employer's limitation of liability clauses as "shields" in actions brought against them, when the damage they have caused was done in the course of their employment and while they were carrying out the very services for which the plaintiff (customer) had contracted with their employer. In sum, I am recognizing a limited *jus tertii*.

262 In closing on this point, I wish to add the obvious comment that nothing in the above reasons should be taken as affecting in any way recognized exceptions to privity of contract such as trust and agency. In other words, even if the above requirements are not satisfied, an employee may still establish the existence of a trust or agency so as to obtain a benefit which the contracting parties intended him or her to have, notwithstanding lack of privity.

(c) Application of the New Exception

263 The only question in the case at bar is whether the respondents are third party beneficiaries with respect to the limitation of liability clause so as to come within the first requirement of the test I set forth above. Based on uncontested findings of fact, the respondents were acting in the course of their employment when they caused the transformer to topple over. Moreover, at that time they were performing the very services provided for in the contract between Kuehne & Nagel and the appellant, namely, the storage and upkeep of the transformer.

264 For convenience, I reproduce again the limitation of liability clause:

> LIABILITY - Sec. 11(*a*) The responsibility of a warehouseman in the absence of written provisions is the reasonable care and diligence required by the law.
>
> (*b*) The warehouseman's liability on any one package is limited to $40 unless the holder has declared in writing a valuation in excess of $40 and paid the additional charge specified to cover warehouse liability.

265 Does the language chosen indicate that the benefit of the clause is specifically restricted to Kuehne & Nagel? I think not. On the contrary, when all of the relevant circumstances are considered, it is my view that the parties must be taken as having intended that the benefit of this clause would also extend to Kuehne & Nagel's employees.

266 It is clear that the parties did not choose express language in order to extend the benefit of the clause to employees. For example, there is no mention of words such as "servants" or "employees" in s. 11(b) of the contract. As such, it cannot be said that the respondents are express third party beneficiaries with respect to the limitation of liability clause. However, this does not preclude a finding that they are *implied* third party beneficiaries. In view of the identity of interest between an employer and his or her employees with respect to the performance of the former's contractual obligations and the policy considerations discussed above, it is surely open to a court, in appropriate circumstances, to conclude that a limitation of liability clause in a commercial contract between an employer and his or her customer impliedly extends its benefit to employees.

267 In the case at bar, the parties have not chosen language which inevitably leads to the conclusion that the respondents were not to benefit from s. 11(*b*) of the contract of storage. The term "warehouseman" as used in s. 11(b) is not defined in the contract and the definition provided in the *Warehouse Receipt Act*, s. 1, is of no use in determining whether it includes employees for the purpose of the contractual limitation of liability. While it is true that s. 10(e) of the contract uses the term "warehouse employee", this by itself does not preclude an interpretation of "warehouseman" in s. 11(b) of the same contract as implicitly including employees for the purposes of the limitation of liability clause. Such a conclusion does not offend the words chosen by the parties.

268 When all the circumstances of this case are taken into account, including the nature of the relationship between employees and their employer, the identity of interest with respect to contractual obligations, the fact that the appellant knew that employees would be involved in performing the contractual obligations, and the absence of a clear indication in the contract to the contrary, the term "warehouseman" in s. 11(b) of the contract must be interpreted as meaning "warehousemen". As such, the respondents are not complete strangers to the limitation of liability clause. Rather, they are unexpressed or implicit third party beneficiaries with respect to this clause. Accordingly, the first requirement of this new exception to the doctrine of privity is also met.

C. Conclusion

269 The respondents owed a duty of care to the appellant in their handling of its transformer. According to the uncontested findings of the trial judge, they breached this duty causing damages in the amount of $33,955.41. While neither trust nor agency is applicable, the respondents are entitled to benefit directly from the limitation of liability clause in the contract between their employer and the appellant. This is so because they are third party beneficiaries with respect to that clause and because they were acting in the course of their employment and performing the very services contracted for by the appellant when the damages occurred. I acknowledge that this, in effect, relaxes the doctrine of privity and creates a limited *jus tertii*. However, when viewed in its proper context, it merely represents an incremental change to the law, necessary to see that the common law develops in a manner that is consistent with modern notions of commercial reality and justice.

V. Disposition

270 For the foregoing reasons, I would dismiss the appeal and cross-appeal, both with costs.

***McLachlin J.*:**

271 I agree with Justice Iacobucci that the appeal should be dismissed. However, I arrive at the conclusion that the liability of the defendant employees is limited to the $40 maximum stipulated in their employer's contract by somewhat different reasoning.

272 Iacobucci J., as I understand his reasons, founds the liability of the defendants in tort. He concludes that the defendant employees owed the plaintiff a duty of care and that they breached that duty in dropping the plaintiff's transformer. He then finds that the limitation in the contract between the plaintiff and a third party (the employer) is a bar to full recovery in tort. He simply asserts this, without much discussion of how, as a matter of doctrine, defendants in a tort action can raise, as a defence to a tort claim, a contract to which they are not parties. I believe the question of how, in terms of legal principle, a term of a contract can serve as a defence to a claim in tort is important for this and future cases. Hence these reasons.

273 I have also had the advantage of reading my colleague Justice La Forest's reasons. While 1 confess to great admiration for the scholarship and good sense they display, my concerns about the magnitude of the change they would introduce to the Canadian law of tort and the difficult questions they raise prevent me from agreeing with them. Later in these reasons, I will briefly address some of these concerns.

274 In the court below, Lambert J.A conducted an analysis in contract, and found an independent contract between the plaintiff and the employees. A limitation of liability clause was seen by Lambert J.A. to be a logically necessary term to that contract. Meanwhile, Southin J.A. found the employees liable in trespass. With respect, Lambert J.A.'s approach suffers from many difficulties, chief among which is that of uncertainty as to the terms that a court will find to be applied between the employees and the plaintiff in any given case. I am also in respectful disagreement with Southin J.A.'s approach, as an action in trespass is most likely inappropriate in law where a bailor who came into possession of goods with the consent of the plaintiff damages the goods negligently (and not intentionally).

275 The analysis in this case, as I see it, must start from the self-evident proposition that tort and contract constitute separate legal regimes. The plaintiff's action against the employees in this case is necessarily in tort, since there was no contract between it and the employees. The defendants, however, seek to rely on the terms of the contract between the plaintiff and their employer as a defence. The question is whether they can do this, and if so, on what basis.

276 Several theories for permitting an employee sued in tort to rely on a term of limitation in his employer's contract have been suggested. The most salient is the assertion that the plaintiff voluntarily accepted the risk of damage over the amount specified in the limitation clause. On this theory, the plaintiff, having agreed to the limitation of liability vis-à-vis the employer, must be taken to have done so with respect to the employer's employees.

277 The concept of voluntary assumption of the risk is known in tort law by the maxim *volenti non fit injuria*. Scholars have characterized it in two different ways: first, as a negation or limitation of the duty of care, and second, as a waiver of an existing cause of action (i.e. a bar to recovery): *Clerk & Lindsell on Torts* (16th ed. 1989), at pp. 112-13; J. G. Fleming, *The Law of Torts* (7th ed. 1987), at p. 265; *Salmond and Heuston on the Law of Torts* (19th ed. 1987), at pp. 557-58; A. M. Linden, *Canadian Tort Law* (4th ed. 1988), at pp. 448-49. The negation or limitation of duty of care approach looks at all the circumstances, including the contract, to determine what was the common law duty between the parties. The waiver approach assumes a standard duty of care, but says that the plaintiff's right to sue for breach of that duty has been removed.

278 In the court below, McEachern C.J.B.C., Wallace J.A. and Hinkson J.A. took the first approach. My colleague Iacobucci J., as I understand his reasons, takes the second. He says it is unnecessary to take the "tort" approach. He determines breach on the usual standard of care without consideration of the particular circumstances or the contract. He then proceeds to consider whether the limitation of liability in the plaintiff-employer contract provides a defence, and finds it does.

279 The first problem in Iacobucci J.'s approach is whether the defendants, who were not parties to the contract, can rely on the contract at all. In the past, the doctrine of privity of contract has said no. Iacobucci J. says this should no longer be a bar; I agree.

280 But there is a second problem. This arises from the fact that the contract term, even if it can be raised as a defence by the employees, does not by *its content* provide the employees with a defence. The contract exempts only the "warehouseman". The term "warehouseman" is not defined in the contract. But in my respectful view, upon a reading of the contract as a whole, the only reasonable interpretation is that the term "warehouseman" refers to the employer and does not include the employees.

281 One way of overcoming this difficulty would be through the doctrine of implied terms. It might be argued that where a customer and employer contract for a limitation of liability in circumstances where they know that the work will be done by the employer's employees, it is an implied term of that contract that the plaintiff accepts the risk of the employees' negligence as well, with the consequence that the employees may raise the defence of *volenti* against the plaintiff.

282 The supposition of an implied term to exempt the employees from liability on this case runs up against the problem that there is nothing to suggest that the parties intended the word "warehouseman", which defines whose liability is exempted, to include the employees. With all respect to Iacobucci J.'s apparent finding to the contrary, the conclusion that the parties intended "warehouseman" to include employees is of doubtful validity, given the absence of evidence on the matter and the fact that elsewhere in the contract "warehouseman" can only be read as not extending to employees.

283 However, presumed intention of the parties is only one of the grounds on which an implied term may be founded. As G. H. Treitel states in *The Law of Contract* (8th ed. 1991) at p. 185:

> Implied terms may be divided into three groups. The first consists of terms implied in fact, that is, terms which were not expressly set out in the contract, but which the parties must have intended to include. The second consists of terms implied in law, that is, terms imported by operation of law, although the parties may not have intended to include them. The third consists of terms implied by custom.

See also Le Dain J. in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, 41 C.C.L.T. 1, 77 N.R. 161, 21 O.A.C. 321, 40 D.L.R. (4th) 385, and my concurring reasons in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, 40 C.C.E.L. 1, 92 C.L.L.C. 14,022, 91 D.L.R. (4th) 491, *(*sub nom. *Lefebvre v. HOJ Industries Ltd.)* 136 N.R. 40, 53 O.A.C. 200. In short, the court, where appropriate, may as a matter of policy imply a term in a particular type of contract, even where it is clear the parties did not intend it.

284 This would seem to me to afford a sufficient foundation for lacobucci J.'s conclusion that the contract exemption should afford a defence to the employees. It might be argued that *as a matter of policy* the courts should imply a term in warehousing contracts that "warehouseman" includes the employees of the warehouse for purposes of contractual limitations of liability. This in turn would permit the conclusion that the plaintiff, by entering into such a contract, waived its right to sue the employees for damage beyond $40. This approach does, however, raise the difficult question of whether the court should, as a matter of policy, imply the term contended for.

285 But voluntary assumption of the risk can be grounded on a broader basis than waiver based on the contract's exclusion clause, as the three judges of the court below who dealt with the matter in tort concluded. Quite apart from the particular contract term, it can be argued that the concatenation of circumstances giving rise to the tort duty, of which the contract with its exemption of liability is one, are such that they limit the duty of care the employees owed to the plaintiff. As Wallace J.A. put it (quoting Purchas L.J. in *Pacific Associates Inc. v. Baxter*, [1990] 1 Q.B. 993, [1989] 2 All E.R. 159 (C.A.), at p. 1011), the question of whether there are circumstances qualifying or negating the duty of care "can only be answered in the context of the factual matrix including especially the contractual structure against which such duty is said to arise."

286 The law of tort has long recognized that circumstances may negate or limit the duty of care in tort. Indeed, as noted earlier in these reasons, this is one of the fundamental theories by which scholars have explained the defence of voluntary assumption of the risk. Waivers and exemption clauses, whether contractual or not, have long been accepted as having this effect on the duty in tort. As Fleming, *supra*, at p. 265 (dealing with the complete negation of any duty of care), puts it:

> The basic idea is that the plaintiff, by agreeing to assume the risk himself, absolves the defendant from all responsibility for it. The latter's duty of care is thus suspended.

287 Canadian courts, including this one, have applied this principle in determining liability and damages in tort. In *Car & General Insurance Corp. v. Seymour*, [1956] S.C.R. 322, 2 D.L.R. (2d) 369, Kellock J., after discussing the duty of care that is ordinarily owed by the operator of an automobile to a passenger, stated (at p. 331):

> A finding of *volenti* involves the consequence that no such duty existed, the onus of establishing which lay upon the defendant.

See also *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186, 44 C.C.L.T. 225, 86 N.R. 241, 29 O.A.C. 1, 51 D.L.R. (4th) 321, [1988] R.R.A. 444, at p. 1203.

288 McEachern C.J.B.C., Hinkson J.A. and Wallace J.A. in the Court of Appeal below, after a careful review of the circumstances giving rise to the duty of care owed by the employees to the plaintiff in this case, concluded that it was limited to damage under $40. It would serve no purpose to repeat the considerations that led them to this conclusion, which have been ably summarized by Iacobucci J. Suffice it to say that I think they were right. (I add only the caveat that unlike one commentator (W. J. Swadling, "Privity, Tort and Contract: Exempting the Careless Employee" (1991),

4 *Journal of Contract Law* 208, at pp. 218-19), I do not read Hinkson J.A. as holding that reliance by the plaintiff is essentia] to recovery in all such cases, nor Wallace J.A. as saying that the only requirement for liability is what is "just and reasonable.")

289 In England, the courts have rejected the doctrine of "vicarious immunity" which holds as a matter of principle that "an employee who performs acts under a contract made between his employer and a third party is entitled to the same immunities that the contract confers on his employer" (Swadling, *supra*, at p. 223). However, more recent decisions have opened the door to an analysis based on modification of the duty of care similar to that adopted in the Court of Appeal below. In *Junior Books Ltd. v. Veitchi Co.*, [1983] 1 A.C. 520, [1982] 3 All E.R. 201 (H.L.), Lord Roskill, in addressing the question as to "what the position would be in a case where there was a relevant exclusion clause in the main contract", stated (at p. 546):

> ... that question does not arise for decision in the instant appeal, but in principle I would venture the view that such a clause according to the manner in which it was worded might in some circumstances limit the duty of care just as in the *Hedley Byrne* case the plaintiffs were ultimately defeated by the defendants' disclaimer of responsibility.
>
> [Emphasis added.]

290 The principles of tort set out in *Anns v. Merton London Borough Council*, [1978] A.C. 728, *(*sub nom. *Anns v. London Borough Council of Merton)* [1977] 2 All E.R. 492 (H.L.), and repeatedly applied by this Court permit, and indeed require, the court to take into account all relevant circumstances in assessing the duty of care which a particular defendant owes to a particular plaintiff. The existence of a limitation on liability, whether contractual or otherwise, may affect the ambit of that duty of care. In this case, the majority of the Court of Appeal, applying these principles, concluded that the duty of care of the defendants was limited to damage under $40, the plaintiff having accepted all risk of damage over that amount. I would affirm that conclusion.

291 I have outlined how the notion of voluntary assumption of the risk, whether on the basis of a contractual waiver via the doctrine of implied terms, or on an analysis based on the scope of the duty of care, permits the conclusion that the defendant employees are not liable to the plaintiff. It remains to consider briefly the conclusion of my colleague La Forest J. that on the matrix of facts relevant to this case, no duty of care whatsoever lies on the employees, that duty lying exclusively on the employer. My concern is whether it is appropriate for this Court to take such a step at this time.

292 The rale proposed by my colleague La Forest J. would introduce a change in the common law of tort of major significance. It has always been accepted that a plaintiff has the right to sue the person who was negligent, regardless of whether the employee was working for someone else or not. The employer becomes liable only by the doctrine of vicarious liability, absent independent negligence on its part. The reasons of my colleague would reverse the scheme; the employer, regardless of whether it was itself negligent, would be primarily liable for the negligence of its employees. Only in exceptional cases, as where there is specific reliance on the employee or special "safety concerns", would there be a right to sue the employee directly.

293 Such a change would have great impact on the substantive and procedural rights of plaintiffs. On the substantive front, elimination of the current right to recover against a negligent employee would deprive a plaintiff of the possibility of alternative recovery in cases where, for example, the employer has insufficient insurance and no realizable assets (frequently the case with smaller corporate employers). On the procedural front, the rights to discovery and use in evidence of the testimony of the person who was actually negligent might be lost. These are but two important consequences that come to mind.

294 Not only is the proposed change in the law one of great significance; it would introduce collateral questions the answers to which are not immediately apparent, at least to me. How does one define specific reliance on employees or special safety concerns? Once established, do they justify holding employees liable for property damage and economic loss as well as for personal injury damages? Should an employer sued in such a case have a right over against the employee?

My concern is not that questions such as these cannot be satisfactorily resolved, but that their resolution would involve the courts in a long and difficult process of law-making in an area where the legislative process might be better suited than the courts to setting the rules. In the meantime employees, employers and the insurance industry would find it difficult to accurately assess and provide for the risk of liability. These considerations suggest to me that however attractive the idea posited by my colleague may seem, the better course is to leave it to the legislatures of Canada to consider the full implications of the proposed change, decide whether on balance it is desirable, and if they think it is, impose appropriate exceptions, terms and conditions.

295 As I stated in *Watkins v. Olafson*, [1989] 2 S.C.R. 750, [1989] 6 W.W.R. 481, 39 B.C.L.R. (2d) 294, 50 C.C.L.T. 101, 100 N.R. 161, 61 D.L.R. (4th) 577, 61 Man. R. (2d) 81, at p. 761 [S.C.R.]:

> ... major revisions of the law are best left to the legislature. Where the matter is one of a small extension of existing rules to meet the exigencies of a new case and the consequences of the change are readily assessable, judges can and should vary existing principles. But where the revision is major and its ramifications complex, the courts must proceed with great caution.

Conclusion

296 I would dismiss the appeal and cross-appeal with costs.

Appeal and cross-appeal dismissed.

Footnotes

* Stevenson J. took no part in the judgment.