Neutral Citation no. [2007] NIQB 118 | *Ref:* **HIGF5774**

Judgment: approved by the Court for handing down | *Delivered:* **8/3/07**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

DAMIEN MACKIN

Plaintiff;

-and-

S V DRUMGATH PARISH AND THE RCB

Defendant;

-and –

PATRICK RAFFERTY

Third Party. Defendant.

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HIGGINS LJ

[1] The plaintiff was born on 17 January 1962 and resides at 48, Cross Heights, Rathfriland and is now aged 45 years of age. He was a self-employed brick pointer engaged by a local building contractor named John Rafferty who ran a company called variously City Construction Services or Restoration Services. The third party Patrick Rafferty is the brother of John Rafferty and was employed by his brother. City Construction Services or Restoration Services engaged in cleaning and restoring buildings, in particular the brickwork. The defendant is the Select Vestry of the Church of Ireland Church, John Street, Rathfriland and the Representative Church Body. Mr Samuel Ringland has been a member of the Select Vestry of the Church in Rathfriland for many years and since 2000 the Honorary Treasurer.

[2] Mr McCollum QC and Mr McCollum represented the plaintiff and Mr Conlon QC and Mr Gillespie represented the defendant. The third party was

not represented in court by counsel or solicitor, his solicitor having ceased to act for him by Order of Master McCorry dated 6 October 2006. On 16 December 2005 the defendant applied under Order 16 Rule 5(2) for judgment against the third party for failure to serve a defence. The Master ordered that the 'defendant be at liberty to enter judgment for a declaration that they are entitled to be indemnified by the third party against the claim of the plaintiff' and similarly in respect of costs.

[3] In May 2002 Mr Ringland on the instructions of the Select Vestry approached the third party and requested he quote a price for power-washing the roof of the Church. He told Mr Ringland that he could not give him a quote immediately as he had to check how much the insurance had increased since the last occasion. The third party gave a quote several days later and there is an entry in the minutes of the Select Vestry meeting for 16 May 2002 that the third party had agreed to power wash the roof for £350. The third party had cleaned the roof in 1998 and 2000. Payment in 1998 was by way of a cheque made out to Restoration Services and dated 29 July and in 2000 by way of cheque dated 26 August, made out to Mr P Rafferty.

[4] Church of Ireland Church in Rathfriland is situated in the middle of the town on a street corner as depicted in photograph 1. It has one major roof covering the main part of the church and two side roofs at either end that are set off and not as high. There is a bell tower and entrance to one side of the main part of the church with a small roof at a lower level between the tower and the main roof. The overall height of the church is just over 27 feet. The main roof is steep with a pitch of 44 degrees and the slope is 19 feet 3 inches long. The entrance side of the church is on the main road with one end on a minor road. The third party lives on the opposite side of the minor road with a yard to the rear. In order to clean the roof the third party used a hydraulic lift mounted on the back of a lorry. This is commonly known as a 'cherry picker'. When in use it is supported by hydraulic jacks lowered on each side of the lorry. The lift comprises an enclosed box or basket mounted on an arm that extends upwards and sideways and is operated by controls situated in the box. The lorry was positioned on the street, probably mounted on the footpath when in use. The Vestry minutes record that in 1998 the third party gave a quotation for cleaning the roof with a hydraulic lift. He was observed cleaning the roof over the week-end of 1 June 2002 using a lorry with a hydraulic lift – a cherry picker. He was working alone and indicated to Mr Ringland that he was almost finished. The cherry picker reached across to the church roof and the third party's son was on the ground keeping the hoses from getting tangled up. No equipment was provided by the church to enable this cleaning operation to be carried out.

[5] Around 7.30 pm on 5 June 2002 the plaintiff received a telephone call from the third party asking him if he would help him clean the roof of the church. The plaintiff agreed and regarded this as doing the third party a

favour. The third party has been a friend for over twenty years. He did not ask for any money. The plaintiff lived nearby and walked to the church. He found the third party cleaning a small roof. There was no-one else about apart from the plaintiff's son who was in his early teens. The third party finished the small roof, came down and said the high part of the roof was to be cleaned. According to the plaintiff the third party had with him a three stage ladder, an aluminium roof ladder with hoops to place over the ridge tiles for stability as well as a power hose, the lance of which was on a long hose. The third party said they were going to put the roof ladder up to see if it was long enough. The three stage ladder was placed against the side of the church and extended about one metre above the guttering. The third party said he was a "bit heavy for or wary of" putting the roof ladder up, so the plaintiff volunteered to do so, saying it was "no bother to him". The plaintiff climbed the ladder carrying the roof ladder. He placed the roof ladder on the roof and pushed it up. He was holding the end of the styles, one in each hand. He found the roof ladder was not long enough and turned to tell the third party when the roof ladder slipped from his grasp. It slid towards him striking him on the leg and he fell backwards off the ladder to the ground. He sustained fractures to the L1 and L2 vertebrae of his back as well as fractures to the metatarsal bones of his right foot. He was taken to hospital. He was encased in a plaster jacket which he wore for a considerable time. This restricted what he could for himself and he required much assistance until the jacket was removed. He has not worked since the accident, though commendably has embarked on a course to enable him to qualify as a Health and Safety Officer, which he hopes will lead to employment in that field. Apart from the injuries sustained pre-existing degenerative changes have been exacerbated and the plaintiff is now restricted considerably in what he can and cannot do. He can no longer do maintenance jobs around the house and garden or play snooker. However the plaintiff has a history of back problems as far back as 1982 and in 1983, the year before he was married, he was run over by a Transit van driven by his then employer. There is a significant issue as to whether all his present complaints relate to the injuries sustained on 5 June 2002. It was the opinion of Mr JRM Elliot FRCS, who gave evidence that degenerative changes have occurred at the fracture sites of L1 and L2 and that pre-existing degenerative changes elsewhere, which caused pain, have been exacerbated. There has been a mixing or merger of the back problems. The plaintiff described suffering a lot from pain which he likened to as a toothache. He has not been prescribed medication since December 2003 and takes painkillers when required. Mr Elliott FRCS said he would not advise someone who had suffered a high energy compression injury of this type to work again at heights.

[6] By his amended statement of claim the plaintiff seeks compensation from the defendant for the personal injuries he sustained on 5 June 2002 and for loss of earnings to date and future loss. The statement of claim alleges that the defendant was the owner and occupier of the church and was responsible

for the occupation, maintenance, inspection, keeping safe, care and control of the church premises to which the provisions of the Occupier's Liability Act (NI) 1957 apply. The statement of claim alleges also that the defendant was acting as the employer of the plaintiff and was responsible for providing a safe system and a safe place of work. It is alleged further in the statement of claim that the plaintiff was carrying out work to clean the roof of the church premises when he was knocked off a ladder and this it was alleged was caused by the negligence, nuisance and breach of statutory duty of the defendant. Thirty nine particulars of negligence are alleged as well as breaches of section 2 of the Occupier's Liability Act (NI) 1957 and various regulations of the Provision and Use of Work Equipment Regulations (NI) 1999, the Construction (Health Safety and Welfare) Regulations (NI) 1996 and the Workplace (Health Safety and Welfare) Regulations (NI) 1993 as well as two sections of the Factories Act (NI) 1965.

[7] The plaintiff has worked in the construction industry most of his adult life and is an experienced brick layer and pointer. He also worked in public houses. He is familiar with ladders and scaffolding. He has known the third party a long time. They have worked together for the same company and on the same jobs. He did not consider he was employed by the third party on the evening in question and did not contemplate taking legal action against him. He knows the third party has done jobs in the past reasonably well, but declined to say if he was competent stating it was not his place to judge him. He claimed that he would not engage the third party to clean a roof as he is not a contractor and that the third party should not have undertaken the job on behalf of the church. As he was not a contractor the third party would not know what to organise in order to do the job. If City Construction Services had been asked to do the job they would have had all the equipment necessary. He considered that the third party should have appreciated that scaffolding, ladders, hoists and a cherry picker were needed, though he agreed it was possible to do the job with a ladder and roof ladder provided the roof ladder was long enough. He agreed that the third party had power hosed other premises with City Construction Services and that he was fit to power hose the church. He said there was nothing unusual about putting a roof ladder up. It was a straightforward operation which he had performed before and that all contractors would do it the way he was doing it. He had no criticism of the procedure adopted. However he said the church should not have engaged the third party and that they should have had a surveyor out to the premises to carry out an assessment of what was needed and should have ensured that the correct equipment was present. He claimed the church should have expected two men were needed to do the job and should have told the third party this. Mr Declan Cosgrove, Consulting Engineer, was critical of an operation to clean a roof using a roof ladder and of the decision to climb the ladder carrying the roof ladder. Ladders are for access only and not for working from. He considered a hoist like a cherry picker was necessary and that the third party should have known the length of roof

ladder required from his previous cleaning of the roof. He thought the accident occurred because the plaintiff lost control of the roof ladder as he pushed it out to the ridge which was beyond its reach.

[8] Mr Ringland received a telephone call on 5 June 2002 and went to the church where he found the plaintiff lying face down. He did not know the plaintiff nor was he or anyone else connected to the church aware of the plaintiff's presence on church property. A fixed price had been agreed with the third party for the job and if he had said he was bringing someone else to assist him that would have been a matter for the third party and not the church. Mr Ringland asked the third party what had happened as he thought the third party had finished. The third party explained that he could not get at a small area behind the tower previously and that the plaintiff had come in off the street to give him a hand. This was just a figure of speech, but it accurately described the informal relationship between the plaintiff and the third party. Mr Ringland did not see an aluminium ladder with wheels and hoops but did see a wooden roof ladder and a two stage aluminium ladder which was twisted in some fashion. There were differences in the evidence of Mr Ringland, the plaintiff and the third party as to the conversation between Mr Ringland and the third party, the nature of the work being carried out by the third party on 1 June, about the type of ladders being used on 5 June and the conversation after the accident. Generally speaking I preferred the evidence of Mr Ringland on these matters. In particular I am satisfied the third party mentioned the question of insurance and that on 1 June the third party said he was almost finished.

[9] The Vestry minutes over a number of years were produced and examined. They showed that the Church had engaged contractors and others for different jobs on church property over the years. As one would expect the extent and detail of the entries varied, depending on the nature of the job being carried out. The third party had no insurance to cover his work at the church.

[10] The claim that the church employed the plaintiff was, correctly, abandoned by Mr McCollum QC at the end of the plaintiff's case. Furthermore the plaintiff explicitly did not make a case that the defendant was liable for a competent independent contractor.

[11] I am satisfied on the balance of probabilities that the church engaged the third party to carry out the cleaning of the roof having previously engaged him to do so in 1998 and 2000 and that he had done so satisfactorily on those occasions. The third party used the cherry picker on 1 June and when he returned on 5 June only a small portion remained to be cleaned and this was why the cherry picker, which was probably the one used by City Construction Services, was not present. The involvement of the plaintiff was not known to the church or any member of the church with responsibility,

before the accident and the plaintiff fell a very short time after he arrived on the church premises. If the area to be cleaned on 5 June was the main roof or part of it, the roof ladder was inadequate for that purpose. That a roof ladder was inadequate for that purpose would have been known to the plaintiff and the third party, both of whom were men of experience in the construction environment. That was not a fact they needed to be told. I do not consider, as the plaintiff claimed, that the third party told him the main roof needed to be cleaned. That or most of it was cleaned on 1 June when the cherry picker was available. On the other hand if the small roof behind the church tower was to be cleaned or a portion of the main roof then the equipment to hand would have appeared more reasonable to them. I am not satisfied the entire or major part of the main roof was to be cleaned on 5 June. A roof ladder on the main roof could have been used to clean part of the main roof or the small roof between the church tower and the main roof. Once a roof ladder, that was not long enough, was placed on the main roof, but before it was secured at the ridge, it would have been obvious to these experienced men that it was not the correct length. It seems more likely it was known that the roof ladder was not long enough and what the plaintiff was doing was pushing the roof ladder further up than it would ordinarily go in order to try and secure it on the ridge. This might explain why the third party said he was too heavy or wary of it and why the plaintiff said he would have a go. The twist in the ladder has not been explained. It remains a possibility that the cause of this accident was not the roof ladder, but a failure in the ladder when the roof ladder was being pushed and the plaintiff over extended. Either way the third party had devised an unsafe system or had faulty or incorrectly assembled equipment. However if the third party was negligent in the system devised, the plaintiff was equally negligent in engaging in it, given his knowledge and experience.

[12] It was submitted by Mr McCollum QC that the third party was not an independent contractor but a servant or agent of the church and in those circumstances the church was vicariously liable for the negligent acts and omissions of the third party. He accepted the onus was on the plaintiff to prove that the third party was a servant or agent, but otherwise in relation to him being an independent contractor. It was submitted that there was no evidence he was a contractor, there was no evidence of his ability to power hose buildings prior to 1998 and no inquiry had been made as to his insurance cover, despite other entries in the Select Vestry minutes relating to insurance cover by other persons engaged by the church. He was simply a neighbour who had been asked to do a job and had been paid for it. It was submitted by Mr McCollum QC that if the third party was a servant or agent of the church then the various Construction and Health Regulations relied on in the pleadings became operative as the defendant would have the necessary degree of control of the operation required by those regulations. Alternatively Mr McCollum QC submitted that if the third party was not a servant or agent of the church and was an independent contractor, did the defendant

discharge the duty of care owed to the plaintiff under the provisions of the Occupier's Liability Act (NI) 1957. It was conceded by Mr Conlon QC that on 5 June 2002 the plaintiff was a visitor to the premises for the purposes of the 1957 Act.

[13] It was submitted by Mr McCollum QC, relying on section 2(4) that injury was caused to the plaintiff by a danger due to the faulty execution of a work of maintenance by the third party engaged by the defendant. The danger was the risk of falling off the roof. It was submitted the facts relating to the plaintiff's fall demonstrated that the third party was incompetent. Work to the roof of any premises has inherent dangers, not just to the personnel involved but also to passers-by. No steps had been taken by the defendant to ensure not just that the third party was competent but that he had in place the requisite insurance necessary for the work to be undertaken. There was no evidence of his competence other than that he had carried out the task twice before and to the defendant's satisfaction, but not that it had been carried out safely. Mr McCollum accepted that there were situations in which an occupier who employed an independent contractor was under no duty to take any steps and gave as an example a government department engaging a major building contractor. However in this case the defendant was employing the 'man next door' and doing so in the context of a job that required a hydraulic lift capable of accessing all areas of the roof and for which the third party needed manual assistance.

[14] Mr Conlon QC in a comprehensive and well marshalled submission approached the evidence in a slightly different manner from Mr McCollum QC. In summary it was submitted that the defendant owed no duty of care to the plaintiff at common law. The third party was an independent contractor. As such the defendant owed no duty of care to employees of the third party or persons brought in to assist him in whatever capacity. Section 1(1) of the Occupier's Liability Act (NI) 1957 confines the duty which an occupier of premises owes to his visitors to dangers due to the state of the premises (the occupancy duty) or to dangers due to things done or omitted to be done on the premises (the activity duty). Danger due to the state of the premises did not arise, as was accepted by Mr McCollum QC. Danger due to activity might be restricted to the use of the roof ladder (the narrow duty) or encompass the entire operation on 5 June 2002 to continue the cleaning of the roof of the church with a mechanical hoist (the wider duty). In relation to the former, the plaintiff must have let go of the roof ladder for the accident to have occurred in the manner described by the plaintiff. The latter would require an involvement by the church in the decision-making process as to how the cleaning of the roof would be carried out and by whom. To impose a duty relating to this would be neither fair nor reasonable. As the third party was an independent contractor the defendant was entitled to rely on sections 2(4)(b) and 2(3)(b) of the Occupier's Liability Act (NI) 1957. It was submitted that there was no evidence that the third party was anything other than a

competent contractor and no duty of care rested on the defendant to inquire or ensure that the third party had appropriate insurance.

[15] The first question for consideration is the nature of the relationship, if any, between the plaintiff, the third party and the defendant. The question whether work is undertaken in an employee/employer relationship or as an independent contractor is a question to be decided on the facts in each individual case. There is no single test that determines whether the relationship is the former rather than the latter. Various tests have been proposed but the issue remains fact-specific. However the answer to various questions may provide or help to provide the answer – was the worker in business on his own account, who controlled the method of carrying out the work, who provided the equipment required and who engaged other workers. Generally speaking the third party was not in business on his own account. He was employed by his brother. However it is equally clear he held himself out to perform tasks on his own account as and when required, as he did in 1998 and 2000. He was to perform the cleaning operation on this occasion as he did in the past, even though on one occasion the cheque was made payable to Restoration Services. Furthermore he was to carry out the cleaning operation without any assistance, guidance, instruction or input by the church. He was in control of the operation and was to be paid a single agreed figure for it. This was a case of a church requiring a specific task to be performed, as they had in the past, and engaging someone in whom they had confidence to carry out again an identical task with the same skill and ability. All of this and the circumstances generally satisfy me that this was a contract of services between the church and the third party in which the third party was neither a servant or agent of the church, but rather an independent contractor and the church his employer as such. The plaintiff was not in any employer/employee relationship with the church.

[16] The decision to clean the roof without the assistance of a mechanical hoist and the choice of equipment on 5 June 2002 was that of the third party alone. On arrival at the church the plaintiff acquiesced in that decision. He was under no compulsion to assist the third party or to make use of the equipment that was present. The defendant had no reason to believe or suppose the plaintiff might be present on this occasion or that he might be required. If the ladder was too short or the means to use or position it inappropriate, then any failure to devise a safe system of work or provide the necessary equipment was that of the independent contractor, the third party.

[17] Generally speaking at common law an employer of an independent contractor will not be vicariously liable to an employee of the independent contractor for the negligence of that independent contractor. There are certain exceptions. The independent contractor may be liable where he was negligent in the selection of the independent contractor or was responsible for the negligent manner in which the independent contractor carried out the job. He

may also be liable where the act the independent contractor was engaged to carry out was unlawful or extra-hazardous or carried out on the highway or where the employer was under a statutory or other non-delegable duty. In the absence of some special circumstance there is no duty on an employer of an independent contractor to satisfy himself that the contractor has the requisite insurance cover for the job. The true question in any case in which an employer is sued for damage or injury caused by his independent contractor is whether the employer himself was in breach of a duty which he himself owed to the plaintiff.

[18] Does an employer of an independent contractor who is also an occupier owe a duty of care to the employee or friend of an independent contractor who comes on to his premises through the intervention of the independent contractor? In the case of visitors (which the plaintiff was) the duty of care of an occupier is now governed by the Occupier's Liability Act (NI) 1957. This Act replaced the common law rules relating to the duty owed by an occupier of premises to his visitors 'in respect of dangers due to the state of the premises or to things done or omitted to be done on them ' - see section 1(1). The extent of the occupier's duty of care towards visitors is set out in section 2 of the 1957 Act. Section 2 states -

> "2.- (1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.
>
> (2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
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> (3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases-
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> (a) an occupier must be prepared for children to be less careful than adults; and
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> (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)-

(a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

(b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps, if any, as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not."

[19] In this case the allegation is not that the injury arose from any danger due to the state of the premises, rather that it was due to the equipment chosen by the third party and the manner in which he chose to carry out the cleaning of the roof on 5 June 2002. Mr McCollum QC identified the danger for the purposes of section 1(1) as the danger of falling of the roof. Of course it was not the roof that was the cause of the plaintiff's fall, but the roof ladder.

The plaintiff must have lost control of the ladder and let go of one of the legs for it to strike him on the thigh and cause him to fall.

[20] Section 2(4)(b) provides that an occupier is not to treated, without more, as answerable for the danger due to the state of the premises or to things done or omitted to be done on them, if he acted reasonably in entrusting the work to an independent contractor. Whether he has acted reasonably in engaging an independent contractor must be judged against all the circumstances and whether he had taken such steps, if any, as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done. The words ' that the work had been properly done' implies that the duty arises when the work has been completed. In Ferguson v Welsh 1987 1 WLR 1553 Lord Keith of Kinkel considered that too restrictive a construction. At the same time he made some general observations on the liability of an occupier for his independent contractor. At 1560B he said -

> "It would be going a very long way to hold that an occupier of premises is liable to the employee of an independent contractor engaged to do work on the premises in respect of dangers arising not from the physical state of the premises but from an unsafe system of work adopted by the contractor. In this connection, however, it is necessary to consider section 2(4)(b) of the Act ……,
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> The enactment is designed to afford some protection from liability to an occupier who has engaged an independent contractor who has executed the work in a faulty manner. It is to be observed that it does not specifically refer to demolition, but a broad and purposive interpretation may properly lead to the conclusion that demolition is embraced by the word "construction." Further the pluperfect tense employed in the last words of the paragraph "the work had been properly done" might suggest that there is in contemplation only the situation where the work has been completed, but has been done in such a way that there exists a danger related to the state of the premises. That would, however, in my opinion, be an unduly strict construction, and there is no good reason for narrowing the protection afforded so as not to cover liability from dangers created by a negligent act or omission by the contractor in the course of his work on the premises. It cannot have been intended not to cover, for example, dangers to visitors from

falling masonry or other objects brought about by the negligence of the contractor. It may therefore be inferred that an occupier might, in certain circumstances, be liable for something done or omitted to be done on his premises by an independent contractor if he did not take reasonable steps to satisfy himself that the contractor was competent and that the work was being properly done. It would not ordinarily be reasonable to expect an occupier of premises having engaged a contractor whom he has reasonable grounds for regarding as competent, to supervise the contractor's activities in order to ensure that he was discharging his duty to his employees to observe a safe system of work. In reasonable steps to satisfy himself that the contractor was competent and that the work was being properly done.

It would not ordinarily be reasonable to expect an occupier of premises having engaged a contractor whom he has reasonable grounds for regarding as competent, to supervise the contractor's activities in order to ensure that he was discharging his duty to his employees to observe a safe system of work. In special circumstances, on the other hand, where the occupier knows or has reason to suspect that the contractor is using an unsafe system of work, it might well be reasonable for the occupier to take steps to see that the system was made safe.

The crux of the present case therefore, is whether the council knew or had reason to suspect that Mr. Spence, in contravention of the terms of his contract, was bringing in cowboy operators who would proceed to demolish the building in a thoroughly unsafe way."

At page 1562E Lord Oliver of Aylmerton commented -

"It is possible to envisage circumstances in which an occupier of property engaging the services of an independent contractor to carry out work on his premises may, as a result of his state of knowledge and opportunities of supervision, render himself liable to an employee of the contractor who is injured

> as a result of the defective system of work adopted by the employer. But I incline to think that his liability in such case would be rather that of joint tortfeasor than of an occupier. Whether or not that is so, however, the additional evidence in the instant case is quite insufficient to lead to the conclusion that such a claim against the respondent council could be supported."

At page 1563E Lord Goff of Chieveley made some relevant remarks -

> "On the assumption that Mr. Ferguson was the lawful visitor of the council on the land, the council owed to him the common duty of care, i.e. a duty "to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there:" see section 2(2) of the Act. I have emphasised the words "in using the premises" because it seems to me that the key to the problem in the present case lies in those words. I can see no basis, even on the evidence now available, for holding that Mr. Ferguson's injury arose from any breach by the council of that duty. There can, no doubt, be cases in which an independent contractor does work on premises which result in such premises becoming unsafe for a lawful visitor coming upon them, as when a brick falls from a building under repair onto the head of a postman delivering the mail. In such circumstances the occupier may be held liable to the postman, though in considering whether he is in breach of the common duty of care there would have to be considered, inter alia, the circumstances specified in section 2(4)(b) of the Act. But if I ask myself, in relation to the facts of the present case, whether it can be said that Mr. Ferguson's injury arose from a failure by the council to take reasonable care to see that persons in his position would be reasonably safe in using the premises for the relevant purposes, the answer must, I think, be no. There is no question as, I see it, of Mr. Ferguson's injury arising from any such failure; for it arose not from his use of the premises but from the *1564 manner in which he carried out his work on the premises. For this simple reason, I do not consider that the Occupiers' Liability Act 1957 has anything to do with the present case.

> I wish to add that I do not, with all respect, subscribe to the opinion that the mere fact that an occupier may know or have reason to suspect that the contractor carrying out work on his building may be using an unsafe system of work can of itself be enough to impose upon him a liability under the Occupiers' Liability Act 1957, or indeed in negligence at common law, to an employee of the contractor who is thereby injured, even if the effect of using that unsafe system is to render the premises unsafe and thereby to cause the injury to the employee. I have only to think of the ordinary householder who calls in an electrician; and the electrician sends in a man who, using an unsafe system established by his employer, creates a danger in the premises which results in his suffering injury from burns. I cannot see that, in ordinary circumstances, the householder should be held liable under the Occupiers' Liability Act 1957, or even in negligence, for failing to tell the man how he should be doing his work. I recognise that there may be special circumstances which may render another person liable to the injured man together with his employer, as when they are, for some reason, joint tortfeasors; but such a situation appears to me to be quite different.
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> On the evidence in the present case, I can see no special circumstances by reason of which the council, as occupier, might be held liable to Mr. Ferguson under the Act of 1957."

[21] The third party is a highly experienced workman in restoration and cleaning of buildings. He was previously engaged to clean the roof of the church on two occasions. He performed those tasks competently and efficiently and to the satisfaction of the church authorities. It was because of this that he was requested to do so again. The plaintiff had no criticism of his competence as a workman. When requested the plaintiff attended within minutes and was content to assist the third party. The Select Vestry requested the third party to clean the roof and left to him, as they were entitled to do, the decision as to how the job would be performed and what equipment would be used. It was no function of the Select Vestry or any member of it to tell the third party how to do the job nor was there any necessity to do so. The Select Vestry were aware that the third party was a competent contractor for the purposes of cleaning the church roof. There was no necessity to go further. In this regard the defendant is entitled to point to section 2(3)(b) and rely on

the fact that the third party is an experienced workman who would appreciate and guard against any special risk involved in cleaning the roof with a power hose and a roof ladder. The defendant had no control over how the cleaning of the roof would be performed. Mr McCollum QC accepted that if the defendant had no control over the operation them the various construction and health and safety regulations pleaded had not been breached and did not assist the plaintiff.

[22] Mr McCollum QC submitted that the facts of the accident demonstrated that the third party was incompetent. The two men were endeavouring to discover whether the roof ladder would extend over the ridge. That involved pushing the roof ladder up the roof which, of course, is what it is designed for. It would have been clear after a short period that it was too short but the plaintiff continued, to see if he could extend it over the ridge. In doing so he lost control of one leg or style of the ladder. I do no think this is demonstrates the third party was an incompetent contractor or workman. Indeed he had shown his competence to do the job in the past.

[23] The thrust of Mr McCollum's submission was that the defendant had taken no steps to satisfy itself that the third party had the necessary insurance for the task, that is, insurance to cover a helper assisting the third party. Generally speaking an occupier who has entrusted work to a competent independent contractor has discharged the common duty of care in respect of to his visitors (in respect of damage arising from faulty maintenance) by engaging a competent independent contractor. Section 2 (4)(b) requires an occupier to have acted reasonably in engaging an independent contractor, in all the circumstances, and satisfied himself that the contractor is competent. The circumstances which might otherwise cause the occupier to be answerable arise from damage caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair. Thus it is the competence of the contractor to execute the work without causing danger which is the issue, not whether the contractor has the necessary insurance. This is confirmed by the last few words of section 2(4)(b) ' and that the work had been properly done'. This is not altered by the fact that the court must consider all the circumstances.

[24] Whether liability arises from the absence of appropriate insurance cover has been considered in a number of cases, to which I was referred - Gwilliam v West Hertfordshire Hospital NHS Trust 2003 PIQR 99, Bottomley v Todmodern Cricket Club 2004 PIQR 275 and Naylor v Payling 2004 EWCA Civ 560. Gwilliam and Bottomley involved the engagement of independent contractors in hazardous operations. Bottomley's case concerned a pyrotechnic display at a cricket club's annual fund raising event, part of which involved the discharge of petrol-filled mortar tubes placed in the ground. The two man team (known as Chaos Encounter) engaged to perform this hazardous display were inexperienced and unaware of the basic safety

requirements for such a display. Chaos Encounter had no public liability insurance. Proper inquiries would have revealed their inexperience as well as the fact that they had no public liability insurance. The judge found that the club had failed to take reasonable care to select a reasonably competent stunt operator, and had failed to take any adequate steps to ascertain whether the two members of Chaos Encounter were insured in respect of the proposed display. Following Honeywill & Stein Ltd v Larkin Brothers Ltd [1934] 1 K.B. 191 the judge found the club had employed them to carry out an extra-hazardous activity on its premises and in those circumstances a duty is imposed on the employer to see that care is taken and the employer is vicariously liable for any negligence of the independent contractor. He found that the defendant was in breach of its duty to take reasonable care to select a reasonably competent independent contractor and that proper check would have revealed that Chaos Encounter had no public liability insurance. That decision was upheld on appeal. Gwilliam concerned the provision of a 'splat-wall' at a hospital fund raising event. Participants bounced on a trampoline and stuck to the wall with Velcro. A hire company provided the equipment and the staff, but their public liability insurance expired four days before the event at which the plaintiff was injured. The trial judge dismissed the claim. On appeal a majority, but for different reasons, held the hospital liable on the ground that it had failed to ensure that the company was insured. Both these cases were considered in Naylor v Payling, supra. In that case the owner of a nightclub engaged an independent contractor to provide security at the club premises. The contractor did not have public liability insurance to cover the activities of his employees one of whom was a door attendant who acted negligently resulting in injury to the plaintiff. The trial judge found that the door attendant was not the employee of the club owner and that the club owner did not owe any non-delegable duty to the plaintiff. However the judge found that the club owner owed a duty to the plaintiff to ensure that the independent contractor was insured. On appeal by the club owner it was held that the judge had been wrong to impose a duty on the club owner to ensure that the independent contractor had been insured. There was no obligation on the club owner to be insured himself, nor did the law impose a freestanding duty on an employer to satisfy himself that his independent contractor had insurance cover save in special circumstances, which did not exist in this case, Gwilliam v West Hertfordshire Hospitals NHS Trust [2002] EWCA Civ 1041 and Bottomley v Todmorden Cricket Club [2003] EWCA Civ 1575 were distinguished. The club owner had a duty of care to take reasonable steps to ensure the safety of visitors to the nightclub and this had not been breached given that the independent contractor was accredited by the appropriate authorities. Furthermore, the independent contractor had been employed by the club owner for 18 months before the plaintiff was injured and had had no reason to doubt the contractor's competence during that period. Latham LJ said at paragraphs 24 and 25 –

> "24. In these circumstances, the judge was wrong to approach the matter as he appears to have done by

imposing a duty on the appellant to ensure Mr Whitehead was insured. The question nonetheless arises as to whether, in the circumstances, the appellant was under an obligation to check Mr Whitehead's insurance position as a necessary or at least a prudent means of assessing Mr Whitehead's competence in the sense to which I have already referred. There are, it seems to me, clear distinctions between this case and both Gwilliam and Bottomley. As will have been apparent from the facts of both those cases, the contractor in each case was carrying out what was essentially a one-off operation, although it is right to say that Chaos Encounters had performed once before for the Cricket Club. But the hospital certainly had no experience of the contractor in that case; it had obtained the name from the Yellow Pages. And the experience of the Cricket Club was limited.

25. In those circumstances, I can see the force of the argument that a check on the insurance position might have had a bearing on the assessment of whether or not the contractor was competent. But in the present case, the position was very different. Mr Whitehead, on the evidence accepted by the judge, had provided employees who were licensed, and therefore approved by the local Pub and Club Watch Committee. And he had had a significant period of time in which to assess the competence of Mr Whitehead and his employees. No evidence was called to suggest the it should have caused the appellant to doubt their competence. In these circumstances, I do not consider that it was open to the judge to conclude that that was, as he put it, "not enough ... to make them competent". I would accordingly allow this appeal."

Neuberger LJ said at paragraph 38 -

"38. I rest my view that there should not, save in special circumstances, be a duty on an employer to check that his independent contractor has insurance cover on a number of factors. First, the law as I understand it to be, and as summarised above, is clear and simple. There are two types of case. The first is where the employer will not be liable for the torts of

his contractors, provided that reasonable care is taken in selecting him for the relevant task, and that the employer is not responsible for the tort, e.g. by requiring the task to be carried out in a negligent way, or in some other way contributing directly to the negligent act. The second type of case is the *627 well established category of exceptions where the employer cannot avoid liability, for instance where the liability is non-delegable or where the task is unlawful, extra hazardous, or carried out on a public highway. To invent a third and intermediate category, where the task is hazardous but not extra hazardous, and where the employer can delegate but only if he satisfies himself that the independent contractor is insured or otherwise good for a claim, seems to me to be unnecessary and to introduce an undesirable degree of rigidity into the field. In the normal type of case, the more hazardous the task for which the contractor is employed, the greater the care one would expect of the employer when selecting the contractor.

39. Secondly, as I have already said, it appears to me that such an intermediate category is unwarranted by authority. As Sedley L.J. pointed out in para.[52] of Gwilliam, there are authoritative recent statements which establish that the law in the field of negligence develops on an incremental or case by case basis, rather than by seeking to apply or construct general restitutionary or compensatory principles: see at para.[52].

40. Thirdly, save in a case where the employer is himself under an obligation to have insurance cover, it seems somewhat illogical that he should be under an obligation to satisfy himself that his independent contractor has insurance cover. As was suggested by Waller L.J. in the course of argument in this case, there is obvious attraction in the notion that an employer, under an obligation to have insurance cover himself, should be under a duty to satisfy himself that any independent contractor to whom he delegates some or all of his duties, should himself be similarly covered. Indeed, it may well be that the judge in this case was under the impression that Mr Naylor was legally obliged to have insurance cover:

see the first sentence of para.[38] of his judgment. If he was under that impression, then it is common ground that he was mistaken.

41. It is true that in this case Mr Naylor in fact had insurance cover. However, in my judgment, that provides no support for the proposition that he should therefore have satisfied himself that Mr Whitehead had insurance cover. Save where he is required to do so (e.g. by statute in the case of motor vehicle drivers, or by professional requirement, as in the case of solicitors and barristers) the primary, and indeed in many cases, the sole, reason a person obtains insurance cover is for his own benefit, and not for the benefit of the public. Accordingly, the fact that an employer has taken out insurance cover cannot, at least on its own, begin to justify the argument that he should therefore satisfy himself that his independent contract has insurance cover. Indeed, if it were otherwise, it could logically lead to the ridiculous conclusion that, in an otherwise identical factual situation, an employer who had taken out insurance himself would be negligent for not having checked whether his independent contractor had insurance cover, whereas an employer who had not taken out such cover would not be so negligent.

42. Fourthly, it appears to me that to impose an obligation on an employer to ensure that his independent contractor is insured might, to use the words of Waller L.J. at para.[38] of Gwilliam, "be said to drive a coach and horses through the fundamental position of there being no vicarious liability for the activities of an independent contractor save in the exceptional cases, such as extra hazardous activities". At first sight, of course, there is a clear difference between the employer not being able to avoid liability *628 and the employer only being able to avoid liability provided he is satisfied that the independent contractor is insured. However, the effect of concluding that the employer has to satisfy himself that the independent contractor is insured almost amounts to holding that, unless the employer makes sure that the independent contractor is good for the money, either through insurance or on some other basis, he, the employer, will be liable for any acts of negligence on the part of the independent contractor.

> In any case where the employer is being sued for the negligence of the independent contractor, it will be the independent contractor who is primarily liable; accordingly, if the employer is to be liable at all in practice, it would only be if the independent contractor is not good for the claim, either on his own or through and insurer.
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> 43. It therefore follows that, absent special circumstances, there could be no liability on an employer merely because he fails to satisfy himself that his independent contractor is insured or otherwise able to meet a claim for negligence. Special circumstances could, in my view, include cases where the employer is himself under a duty (whether statutory or not) to insure himself, or where the employer accepts that, in the particular circumstances, he should insure himself for the protection of the public (as the defendant appears to have accepted in Gwilliam). I do not suggest that any such case would always amount to sufficient special circumstances or, indeed, that other cases could not amount to special circumstances. In the present case, however, I am satisfied that there were no special circumstances.

[25] Thus the employer of an independent contractor who is also an occupier owes no general duty to ensure that the contractor has appropriate insurance. Liability may arise in special circumstances where the duty is non-delegable or the nature of the work undertaken by the independent contactor is especially hazardous. Neither circumstance is present in this case. The third party was carrying out a cleaning operation which he had carried out previously and which was the business of his brother's company for whom he normally worked. If the defendant was aware or should have been aware that the third party would engage a helper, either paid or voluntary, there was no duty on the defendant to ensure that the third party was insured against any risks that might arise from that engagement. In entrusting the job to the third party the defendant acted reasonably and had taken such steps as he ought, to be satisfied that the third party was competent. In satisfying itself that the third party was competent there was no duty on the defendant to ensure that the third party was insured. Indeed the third party mentioned checking the insurance rates at the time he was asked to undertake the job.

[26] In my view the plaintiff has failed to prove that the defendant owed a duty of care to him, either as employer or as the employer of an independent contractor or as occupier of the church premises or that the defendant was in

breach of any such duty. Accordingly the claim against the defendant is dismissed and there will be judgment for the defendant against the plaintiff with costs. As the plaintiff is legally aided the order for costs is not to be enforced without leave of this court.