The "Sunrise Crane"
[2004] SGCA 42

Case Number : CA 141/2003

Decision Date : 13 September 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J; Yong Pung How CJ

Counsel Name(s) : Lim Tean and John Seow (Rajah and Tann) for appellant; Thomas Tan and Daryll Richard Ng (Haridass Ho and Partners) for respondent

Parties : —

Admiralty and Shipping – Limitation of liabilities – Onus of proof on shipowner to rely on limitation of liability – Whether appellant shipowner entitled to limit liability under circumstances – Section 136 Merchant Shipping Act (Cap 179, 1996 Rev Ed)

Tort – Negligence – Duty of care – Dangerous goods – Whether owner of vessel discharging dangerous cargo owing duty of care to inform receiving vessel about dangerous nature of cargo immediately prior to discharge – Whether more care necessary where highly dangerous substances involved

Tort – Negligence – Duty of care – Owner of vessel discharging dangerous cargo engaging contractor to discharge cargo – Contractor informed of dangerous nature of cargo -Whether owner of discharging vessel under separate duty of care to inform receiving vessel of dangerous nature of cargo to be discharged

Tort – Negligence – Duty of care – Whether foreseeable that independent contractor might fail to inform receiving vessel of dangerous nature of cargo – Whether relationship between discharging and receiving vessels sufficiently proximate – Whether just and reasonable to impose duty of care on owner of discharging vessel under circumstances

Tort – Negligence – Remedies – Contract with third party – Whether remedies in tort automatically unavailable where plaintiff having remedy in contract against another party

13 September 2004

Chao Hick Tin JA (delivering the judgment of the majority):

1 This was an appeal against the decision of Belinda Ang Saw Ean J allowing the respondent's claim in tort arising from the loss of a small steel tanker belonging to the respondent (reported at [2004] 1 SLR 300). The appellant's defence of limitation of liability under s 136 of the Merchant Shipping Act (Cap 179, 1996 Rev Ed) was also rejected. We heard the appeal on 28 July 2004 and by a majority, with Judith Prakash J being undecided, dismissed the appeal on both liability and quantum. We now give our reasons.

2 The main substantive question that arose for consideration at the appeal was whether, in the given circumstances, a duty of care was owed by the appellant to the respondent.

The background

3 In the early hours of 8 March 2001, the appellant's vessel, the *Sunrise Crane*, a chemical carrier of Panamanian registry, moored alongside a small steel tanker, the *Pristine,* and transferred approximately 34mt of nitric acid contaminated by hydraulic oil into the No 1 wing cargo tank of the *Pristine*. A short while later, smoke was seen coming out from the forward vent of the *Pristine* which also listed a little to port. The crew from the *Pristine* evacuated to the *Sunrise Crane* and some of the

crew members from the *Sunrise Crane*, with protective equipment and breathing apparatus, boarded the *Pristine* to close its valves and openings. The *Pristine* eventually capsized. It was subsequently established that the cargo of contaminated nitric acid had bored holes into the hull of the *Pristine*, causing leaks.

4 It was common ground that prior to the transfer of the cargo from the *Sunrise Crane* to the *Pristine*, no one on board the former informed anyone on board the latter that the substance to be transferred was contaminated nitric acid.

5 Earlier, on 4 March 2001, the *Sunrise Crane* arrived in Singapore carrying a cargo of nitric acid. However, in its tank No 3C, which contained some 34mt of the acid, the cargo was found to have been contaminated due to a leak from the vessel's defective cargo pump. The 34mt could not be discharged with the rest of the cargo of nitric acid on board the vessel. It had to be disposed of by other safe means. The appellant knew of the highly dangerous nature of such contaminated nitric acid and that only stainless steel tanks could receive it.

6 The director of the appellant, Mr Kashiwagi, requested the vessel's Protection & Indemnity ("P&I") Club to help in the matter. The Club appointed a surveyor, Capt Gill, to find a suitable licensed contractor to remove the contaminated cargo. Eventually, Capt Gill got in touch with two possible contractors for the job. One of them was Mr Windsor of Pink Energy Enterprises ("Pink Energy") who was told that the cargo that required disposal was 34mt of contaminated nitric acid. The trial judge accepted Capt Gill's evidence that Mr Windsor was so told in spite of Mr Windsor's assertion to the contrary. It was agreed between Mr Gill and Mr Windsor that the price for removing the contaminated cargo was $9,000. The proposed place of transfer was to be at the outer port limit.

7 Pink Energy in turn engaged Pristine Maritime Pte Ltd ("Pristine Maritime"), who had the *Pristine* on time charter from the owner, the respondent, to remove the contaminated cargo from the *Sunrise Crane*. However, Mr Windsor failed to advise Pristine Maritime, or the owner of the *Pristine*, that the cargo was contaminated nitric acid. Instead he said it was "contaminated lubes". The works order issued by Pink Energy to the *Pristine* referred to it as "Annex I slops", *ie*, petroleum slops.

8 The *Pristine* was constituted of mild steel and was used as a slop carrier. It was only capable of carrying MARPOL Annex 1 slops. It was clearly incapable of conveying MARPOL Annex II slops, which nitric acid is.

9 There was no direct contractual relationship between the respondent and the appellant. The respondent would undoubtedly have a claim in contract against Pristine Maritime and, in turn, Pink Energy. The question was whether the respondent nevertheless had a separate claim in tort against the *Sunrise Crane* for negligence for failing to inform the *Pristine* of the nature of the cargo immediately prior to the transfer of the contaminated cargo. In other words, having regard to the circumstances and the clearly dangerous nature of the cargo which required special precaution to be taken for its removal, did the *Sunrise Crane* owe a duty of care to so inform the *Pristine*?

The decision below

10 The trial judge held that notwithstanding the fact that there was no direct contractual relationship between the appellant and the respondent, the law should still, in the circumstances, impose a duty of care on the appellant to the respondent, *ie*, to inform the respondent of the nature of the cargo. She agreed that the test to be applied to determine whether a duty arose was that propounded in *Caparo Industries Plc v Dickson* [1990] 2 AC 605 ("*Caparo*"). That test consisted of three elements (see [14] below), which in her view were all satisfied in this case.

11 In coming to her conclusion that the *Sunrise Crane* owed a duty to inform the *Pristine* of the nature of the cargo to be transferred, the trial judge also took into account the following documents:

(a) The material safety data sheet ("MSDS")

In the transportation of chemical products, a common mode of conveying information relating to such cargo is an information sheet entitled above. Its purpose is to let the receiving vessel know the characteristics of the cargo and to warn persons dealing with the product of any danger that might be associated with its use, including fire risk, accidental spillage and procedures for cleaning up. The object of the MSDS is, *inter alia*, to promote safety. Mr Kashiwagi agreed that the MSDS was one of the most important documents. He admitted that the MSDS for the cargo of nitric acid was received by the *Sunrise Crane* before the cargo was loaded onto her in Korea. He also admitted that where such a cargo was loaded for the first time, they would insist on the furnishing of a MSDS. Capt Gu Ji Bon, the master of the *Sunrise Crane*, also acknowledged that the MSDS was an important document and that those who shipped the cargo as well as those who received the cargo should have a copy of it.

(b) The International Chamber of Shipping Guides

The International Chamber of Shipping ("ICS") had promulgated two sets of recommended rules to ensure good practice in the safe operation of vessels. One was the Tanker Safety Guide ("TS Guide") and the other was the Ship-to-Ship Transfer Guide (Petroleum) ("STS Guide"). Both guides were in their third edition and will be referred to collectively as "the ICS Guides". More will be said about these guides a little later.

12 The trial judge held that the *Pristine* was entitled to a warning from the *Sunrise Crane* before the discharge of the contaminated cargo. The fact that it was due to Mr Windsor's default that the *Pristine* was not apprised of the nature of the cargo did not alter the appellant's duty to inform.

13 The trial judge next found that the appellant was not entitled to the benefit of the limitation of liability under the Merchant Shipping Act as the appellant had failed to show that the loss was without its fault or privity. There was no system in place to ensure that the master and crew of the *Sunrise Crane* would comply with its duty to warn recipients of dangerous goods.

Was there a duty to warn?

14 The threefold test enunciated by the House of Lords in *Caparo* to determine whether, in a given situation, a duty of care arises is as follows:

(a) There must be foreseeability of damage;

(b) There must be a relationship which can be characterised as one of proximity or neighbourhood; and

(c) It must be fair, just and reasonable to impose such a duty.

15 In a situation like the present, if the contract of removal and disposal had been entered into directly between the appellant and the respondent, there would have been no doubt whatsoever that the appellant would have owed a duty to advise the respondent, both in contract and in tort, of the nature of the cargo which was about to be transferred. The question in the present case was whether the appellant, in view of the very dangerous nature of the cargo, still owed a separate duty

to advise the *Pristine* of the nature of the cargo even though the appellant had informed the contractor, Pink Energy, of the nature of the cargo and it was through the default of the contractor that the information was never passed down to Pristine Maritime and, in turn, the *Pristine*.

16 The evidence showed that nitric acid contaminated with hydraulic oil is very dangerous to human beings. Besides being highly corrosive, the fumes it generates are toxic and cancerous, being carcinogenic. The transfer process would require personnel to wear protective gear such as breathing apparatus, masks and gloves.

17 The appellant argued that while notionally, in a situation like the present, the appellant would owe a duty of care, the appellant could not have reasonably foreseen that damage would arise as it had specifically asked the P&I Club representative to look for a contractor who was licensed to carry such dangerous cargo. Pink Energy was told of the nature of the cargo. The appellant could not have reasonably contemplated that Pink Energy would sub-contract with another without informing the latter of the nature of the cargo resulting in the despatch of a vessel which was not suitable for the purpose.

18 The appellant relied upon the case of *Surtees v Kingston-upon-Thames Borough Council* [1991] 2 FLR 559 where the issue was whether the injury suffered by the appellant child was reasonably foreseeable by the second and third respondents, who were the child's foster parents. Was it foreseeable that a two-year-old child would be able to turn on a hot-water tap? The English Court of Appeal by a majority held that the injury was not reasonably foreseeable because to the respondents, it did not seem possible that the appellant, who was then a two-year-old child, would turn on the hot-water tap. Stocker LJ said that to hold the respondent-foster mother to be in breach of a duty of care would be imposing an unreasonably high standard. However, it was clear that the majority, in coming to that view, had had regard to policy considerations. This appeared from what Sir Nicolas Browne-Wilkinson VC said (at 583):

> There are very real public policy considerations to be taken into account if the conflicts inherent in legal proceedings are to be brought into family relationships. Moreover, the responsibilities of a parent … looking after one or more children, in addition to the myriad other duties which fall on the parent at home, far exceed those of other members of society.

19 It seemed to us the position taken by the appellant was that in a situation such as the present, no duty of care would arise because the appellant would be entitled to assume that Pink Energy would have discharged its contractual duties of providing a barge which was in a position to remove the contaminated nitric acid, and thus the damage which arose was wholly unforeseeable. In this regard, the appellant further relied on the case of *Hodge & Sons v Anglo-American Oil Company* (1922) 12 Ll L Rep 183 ("*Hodge*") where a serious explosion on a petroleum barge caused the death of a number of workmen. Others were injured. The barge-owner had contracted with a ship repairer, Miller, to undertake some work on the barge, involving the lifting out of a tank. Miller, in turn, sub-contracted the work to Hodge. Earlier on the fateful day, Miller had informed Hodge that the barge was on its way to the latter's wharf. A lighterman employed by the owner brought the barge into Hodge's wharf. Within 30 minutes, the foreman of Hodge commenced work on the barge's tank with an oxy-acetylene burner before it was free of petrol vapour. An explosion occurred. Hodge sued the owner of the barge for property damage caused by the occasion. Willmott, an employee of Hodge and who was also injured, sued the barge-owner too. However, there was one important fact in that case which made all the difference. The lighterman on arrival at Hodge's wharf had informed Hodge's foreman, when he saw the oxy-acetylene burner being brought to the barge, not to use the oxy-acetylene burner until the tanker had been properly ventilated. The Court of Appeal unanimously dismissed the claim of Hodge. However, by a majority, it also held that the barge-owner was not liable

to Willmott for not informing him of the dangerous nature of the barge. Bankes LJ observed (at 184–185):

> The Anglo-American Oil Co were, in my opinion, under a double duty, (a) the duty of using reasonable means for securing the efficient cleaning out of the tank, and (b) the duty of giving any necessary warning of the dangerous character of the tank even after a proper and sufficient cleaning. … With regard to the second duty, a warning would not, in my opinion, be required where the person who would otherwise be entitled to warning was already aware of the danger, or who might reasonably be assumed to be aware of it. … [I]f a warning was needed it was sufficiently given by the notice painted on the barge itself, and by the warning given by the lighterman who brought the barge to Messrs Hodge's wharf …

20 Next, it is also pertinent to note what Scrutton LJ summarised to be the law on the point. First, (at 187), he referred to the case of *Dominion Natural Gas Co, Ld v Collins* [1909] AC 646 where Lord Dunedin said:

> What that duty is will vary according to the subject-matter of the things involved. It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed upon those who send forth or instal [*sic*] such articles when it is necessarily the case that other parties will come within their proximity.

He then went on to hold (also at 187) that:

> In the case of things dangerous in themselves the supplier or circulator is liable to persons with whom he has no contract for damages which they could not avoid by reasonable care; but if he warns them of the danger, or the danger is obvious, so that they need no warning, he is not liable because they could avoid the danger by reasonable care. … The duty is to warn of dangers not obvious to a reasonably careful person.

21 Finally, Scrutton LJ opined that the law which should apply to the case was as follows (at 188):

> The law, therefore, seems to be: (1) That if the barge which has carried petrol is an article dangerous in itself, it is the duty of the owners to take proper and reasonable precautions to prevent its doing damage to people likely to come into contact with it. These precautions may be fulfilled by entrusting it to a competent person with reasonable warning of its dangerous character, if that danger is not obvious. If such precautions are not taken, the owner will be liable to third persons with whom he has no contract for damage done by the barge, which they could not have avoided with reasonable care. (2) If the barge which has carried petrol is not dangerous in itself, but becomes dangerous because it has been insufficiently cleaned, and the owner is ignorant of the danger, the owner is not liable for damage caused by it to persons with whom he has no contract. … (3) In the case of a thing dangerous in itself, where either the danger is obvious or the owner has given proper warning to the person entrusted with it, not being his servant, the owner is not liable for negligence of such person causing injury to a third party; such negligence is *nova causa interveniens.*

22 Scrutton LJ further found (at 189), in relation to the facts of the case before him, that:

> It appears to me that Miller, Hodges and Bennett had ample knowledge and warning that the barge was dangerous, and that after hatches had been closed for some unknown time lights

might not be used on the barge without tests or other precautions. For the owners to hand a dangerous barge to competent people who had full knowledge of the probability of danger, even if they did not know the exact amount of it, appears to me to involve no further liability on the owners. If those competent people with knowledge are then negligent, that is, in my view, a new intervening cause, which may impose liability on the interveners, but breaks the chain of liability on the owners.

23 The facts in our present case were not similar to those in *Hodge*. Both Bankes and Scrutton LJJ observed that there was ample knowledge on the part of Hodge and Miller that the barge was dangerous: there was a notice painted on the barge itself and in addition, the lighterman of the barge did warn Hodge's foreman not to use the oxy-acetylene burner until the tanker had been properly ventilated. There was absolutely no similar warning given by the crew of the *Sunrise Crane* to the *Pristine*. In fact, we note that the crew of the *Pristine* did ask the crew of the *Sunrise Crane* for a sample of the cargo that was going to be discharged into the *Pristine* but this request was turned down by the crew of the *Sunrise Crane*.

24 The ultimate question that has to be answered is what was the degree or scope of care which a person in the shoes of the appellant should exercise. Lord Atkin put it well in *Donoghue v Stevenson* [1932] AC 562 in these words (at 596):

> *The nature of the thing may very well call for different degrees of care*, and the person dealing with it may well contemplate persons as being within the sphere of his duty to take care who would not be sufficiently proximate with less dangerous goods; so that not only the degree of care but the range of persons to whom a duty is owed may be extended. But they all illustrate the general principle. [emphasis added]

25 It is obvious that the law expects a person who carries a pound of dynamite to exercise more care than if he is only carrying a pound of butter, or putting it another way, to exercise more care with a bottle of poison than a bottle of lemonade: see *Beckett v Newalls Insulation Co Ld* [1953] 1 WLR 8. What is adequate for one set of circumstances may not be so in relation to a different set of circumstances. It stands to reason that more care must be exercised where a highly dangerous substance is involved.

26 It seemed to us that this was very much in the thought of Lord Roskill in *Caparo* when he said (at 628):

> [I]t has now to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or in cases where such liability can be shown to exist, determine the extent of that liability. Phrases such as "foreseeability", "proximity", "neighbourhood," "just and reasonable," "fairness," "voluntary acceptance of risk," or "voluntary assumption of responsibility" will be found used from time to time in the different cases. But, as your Lordships have said, such phrases are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty.

27 In this regard, the following finding of the judge was germane to the question of whether the appellant still owed a duty of care at the time the transfer was effected (at [31]):

> On the overall evidence before me, I find that Captain Gill [and hence in our view the appellant] knew that someone else [and not Pink Energy] would undertake the actual collection and disposal of the contaminated nitric acid. After the disposal contract was awarded to Pink Energy, the [appellant] knew the identity of the receiving vessel. The [appellant was] provided with certain information. [It was] given, in particular, the name of the receiving vessel, her registration No SB411J, the VHF channel for radio communication between *Sunrise Crane* and *Pristine* and the coordinates at OPL for the two vessels to rendezvous the night of 7 March 2001.

28 The appellant was in the business of transporting dangerous goods. The respondent was not. In our opinion, the judge was correct to hold that carriers like the appellant should not take for granted (a) their own common knowledge or assumptions about safety in the transportation of chemicals and (b) that their contractor, Pink Energy, who would not be the one actually carrying out the task, would properly discharge its contractual duties. Mr Windsor had, in fact, asked Capt Gill for a fax confirmation of the disposal assignment, but Capt Gill said that he was too busy to attend to it. The judge's observation on this at [38] was most apt: "With a verbal contract, the opportunity for mistakes occurring is not so remote."

29 Thus, the following features of the present case were critical. First, the cargo to be transferred was highly dangerous and toxic. Second, the appellant knew that Pink Energy would not be the party removing the cargo. Third, there was no written communication between the appellant (or Capt Gill) and Pink Energy as to the nature of the cargo and the request for one by Pink Energy was not acceded to. Fourth, the appellant's and the respondent's vessels were in close proximity to each other when the transfer was carried out. Fifth, the appellant, being in the business of transporting dangerous chemicals, would have appreciated the dire consequences if nitric acid were to be transferred to a vessel not built for receiving such a substance. Sixth, the practice of the *Sunrise Crane* of asking for a MSDS in relation to the first-time shipment of a particular chemical, illustrated the need for special care in regard to the shipment of chemicals, particularly chemicals of the nature of nitric acid. Seventh, the crew of the *Pristine* had asked for a sample of the slops but this was not provided to them by the crew of the *Sunrise Crane*. Eighth, there was evidence to suggest that during the transfer of the contaminated cargo, the crew of the *Pristine* were without protective gear because after the transfer was effected and smoke appeared, the cargo officer of the *Pristine* had requested for the loan of some gas masks from the *Sunrise Crane* to enable the crew of the *Pristine* to close its manholes. Moreover, even with the borrowed gas masks, the crew of the *Pristine* refused to reboard the barge to close the manholes. This emerged from the evidence of the master of the *Sunrise Crane*, Capt Gu.

30 In relation to ordinary or less dangerous chemicals, an advice to the main contractor could perhaps suffice. But, in our judgment, having regard to the circumstances of the present case, and the fact that a very dangerous substance was involved, more care should have been exercised by the *Sunrise Crane.* In a sense, this is not unlike the situation where an employer is nevertheless liable for the acts of an independent contractor where the acts involved special dangers to others. Accordingly, we agreed with the trial judge's determination.

Man B&W Diesel S E Asia Pte Ltd v PT Bumi International Tankers

31 The appellant placed considerable reliance on the views expressed by this court in *Man B&W Diesel S E Asia Pte Ltd v PT Bumi International Tankers* [2004] 2 SLR 300 ("*Bumi*") where it stated (at [34]):

> We also acknowledge that the *Donoghue* principle is not a statutory definition. Its application has not remained static. It is evolving. It offers an avenue of redress for losses suffered by a person

on account of the acts or omission of another, where such losses would otherwise be without a remedy.

32 It is, however, also important to note what the court there stated in the next sentence:

> While we would not say that for every subsequent case to fall within the scope of the decision in *Ocean Front* [*ie*, *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113], the facts must be identical or the same, extreme caution must be exercised in extending the *Donoghue* principle, or the decision in *Ocean Front*, to new situations, particularly to a scenario which is essentially contractual.

33 The remarks quoted above of this court were made in relation to its decision in the *Ocean Front*. In *Ocean Front*, this court broke new ground when it held that the developer of a condominium was liable in tort for non-personal injury losses suffered by the management corporation of the development. In coming to that conclusion, the court took into account, *inter alia*, the scheme of things laid down in the Land Titles (Strata) Act (Cap 158, 1988 Rev Ed) and the role of the management corporation in a condominium development. It was in that statutory context that the court found that the developer owed a duty of care to the management corporation even though there was no actual privity of contract between the two.

34 Reverting to this court's observations in *Bumi* quoted above, while it is true that the law of tort offers an avenue of redress for losses suffered by a person where such losses would otherwise be without a remedy, it does not conversely mean that remedies in tort become automatically unavailable simply because the plaintiff has a remedy in contract against another party. To conflate the two would be to ignore the fundamental difference between contract and tort. Tortious duties are primarily fixed by law while contractual duties are based on the consent of the parties.

35 More importantly, there is a fundamental difference between the claim in the present action and that in *Bumi.* Here, the claim was for direct physical damage to property; there was no attempt to extend the *Donoghue* principle to a new situation. In *Bumi*, it was for pure consequential economic losses and there the shipowner and the contractor had by contract expressly provided for the remedies which would be available in the event that the vessel (and its engine) did not perform up to specifications. And that, in fact, happened. However, the engine was provided to the contractor by a sub-contractor. The court there held that the plaintiff was not entitled to claim in tort against the sub-contractor for the pure economic losses.

36 It is clear that the law does differentiate between a claim in pure economic loss and that for personal injuries or physical damage. In respect of the former, the law is more restrictive in imposing a duty of care. The rationale for this is expressed very eloquently by the authors of *Clerk and Lindsell on Torts* (18th Ed, 2000) as follows (at para 7-85):

> Three features distinguish economic loss claims from most physical damage claims. First, whilst the links between negligence and physical damage depend largely on the laws of nature and necessarily limit the type of relationship giving rise to a claim, those between negligence and pure economic loss are primarily human in creation and can form a complex web through which economic losses can ripple out from the one negligent act. Secondly, because the economic relationships are frequently created rather than imposed, the participants in the web have a greater opportunity to use contracts to determine the level of risk to be taken and the degree of protection from loss required. … Thirdly, as Hobhouse LJ has observed, "in a competitive economic society the conduct of one person is always liable to have economic consequences for another and, in principle, economic activity does not have to have regard to the interests of

others and is justifiable by the actor having regard to his own interests alone". Furthermore, as McHugh J has noted, "pure economic losses frequently result in mere transfers of wealth. The plaintiff's loss is the defendant's or a third party's gain", whereas "harm to a person or property ordinarily involves a new loss to social wealth." These features have led the courts to take a more restrictive approach to the imposition of a duty of care in relation to economic loss than in relation to physical damage.

37 Thus, the approach taken in *Bumi* can have no application to the present action which came very much within the traditional mould of a claim in negligence where direct property damage was caused. The only question was whether the owner of the *Sunrise Crane* had fulfilled its duty of care by merely engaging Pink Energy to remove the cargo and telling Pink Energy of the nature of the cargo. For the reasons given in [29] and [30] above, we did not think so.

38 While it is true that in *Mohd bin Sapri v Soil-Build (Pte) Ltd* [1996] 2 SLR 505 ("*Soil-Build*"), a personal injury case, this court adopted the threefold test propounded in *Caparo*, a case involving economic loss, it should not therefore follow that both types of cases stood exactly on the same footing. While the applicable test may be the same, the question whether in a given situation a duty of care arises, and the scope of the duty, must necessarily depend on all the circumstances. Here, again, we would reiterate what Lord Roskill said in *Caparo* quoted in [26] above.

39 In *Soil-Build*, this court held that the owner and main contractor were not liable to a worker of a sub-contractor who was injured in the course of work. There was nothing inherently dangerous in what the worker was to do. The injured worker fell from a height because of an unsafe method of work which he and his fellow workers had adopted.

40 The appellant also relied upon *Kubach v Hollands* [1936] 3 All ER 907, *Holmes v Ashford* [1950] 2 All ER 76 and *Norton Australia Pty Limited v Streets Ice Cream Pty Limited* (1968) 120 CLR 635 to submit that notifying an intermediary of the risk is sufficient. We did not think these cases were helpful as they were clearly distinguishable. They did not involve ships transferring hazardous goods. In those cases, it was envisaged that the goods would physically pass from the manufacturer, through the intermediary, and eventually to the end user. A similar factual matrix could not be found in the present appeal. The highly hazardous cargo was directly transferred from the *Sunrise Crane* to the *Pristine* and the appellant had envisaged, right from the beginning, that there would be such a direct transfer onto a barge which would be coming to collect the highly hazardous contaminated cargo.

41 We did not think that in imposing a duty of care in the circumstances here, we had adopted an unreasonably high standard. Neither did we think it was unfair or unjust to impose such a duty. A higher standard of care was necessary because of the highly hazardous nature of the cargo and the appellant was aware that the actual licensed contractor who would be removing the cargo would not be Pink Energy but someone else. There was no way the *Pristine* could have known that the cargo was contaminated nitric acid. Indeed, *Pristine's* request for a sample of the cargo was turned down.

The ICS Guides

42 We now turn to the ICS Guides. The appellant alleged that the judge was wrong to have relied on them because none of the witnesses were questioned as to their applicability. Furthermore, the appellant submitted that if the ICS Guides could properly apply, then its provisions should apply to both vessels.

43 However, we must point out that it was the appellant who first introduced the TS Guide into

the proceedings in its closing submission at the trial to substantiate what it alleged to be the meaning of "slops". As the appellant produced only a part of this Guide, which was helpful to the point it was trying to make, the respondent placed the entire document before the court. The respondent relied upon the parts of the TS Guide which had a bearing on the question of limitation of liability. It should also be noted that the TS Guide has references to the STS Guide. An example of such a cross-referencing can be found at para 5.14.1 of the TS Guide, which reads:

> Navigational and ship handling aspects of an STS operation between chemical carriers will be very similar to those of an STS operation between oil tankers, as described in the ICS/OCIMF publication Ship to Ship Transfer Guide (Petroleum), which should be consulted ...

44 The appellant in reply had objected to the respondent's reliance on the TS Guide. This was rebutted by the respondent who argued that the court should be entitled to see what the entire document contained; it was not for the appellant to pick and choose what the court could see. It stands to reason that as the appellant had relied on a part of the ICS Guides to substantiate its case, it should have no reason to object to another part of the ICS Guides being relied upon by the opponent to show global industry practices or standards.

45 The ICS is the international trade association for merchant ship operators and its membership comprises national shipowners' associations representing over half of the world's merchant fleet. The preface to the TS Guide states:

> The purpose of this publication is to provide those serving on ships carrying hazardous and noxious chemicals in bulk with up to date information on recognised good practice in safe operation. … The recommendations cannot cover every possible situation that may be encountered on a chemical tanker, but they do provide wide general guidance on safe procedures and safe working practices when handling and transporting chemicals in bulk …
>
> The Guide deals primarily with operational matters and good safety practices. ...
>
> IMPORTANT NOTE
>
> It is emphasised that this Guide is meant to complement, not supersede, any company safety and operational guidelines or ship emergency plans, including safety management procedures required by the IMO International Safety Management (ISM) Code.

Paragraph 1.1 of the TS Guide states:

> Chemical tankers are required to transport a wide range of different cargoes, and many tankers are designed to carry a large number of segregated products simultaneously. The operation of chemical tankers differs from any other bulk liquid transportation operations, in that on a single voyage a large number of cargoes with different properties, characteristics and inherent hazards may be carried. Moreover, in port several products may be handled simultaneously at one berth, typically including different operations such as discharge and loading as well as tank cleaning. Even the less sophisticated chemical tankers are more complex to operate than oil tankers.

Paragraph 2.2 of the TS Guide goes on to state in no uncertain terms:

> The IMO Codes require that certain information must be available on board the ship for each particular cargo, and prior to loading. … It is the shipper's responsibility to provide the necessary information, which may be given in the form of a cargo information form or data sheet for each

cargo. Loading should not commence before the master is satisfied that the necessary information for safe handling of the cargo is available to the personnel involved.

46 The reference to the ICS Guides made by the judge was only to show that the practice of the *Sunrise Crane* of requiring the furnishing of a MSDS whenever it was the first time a cargo of that particular chemical was being shipped on board, was completely in line with the safety practices adopted by the industry as a whole. She said at [40]:

> The duty to inform the receiver of the dangerous nature of the goods is not foreign to the chemical tankers in the industry. Such disclosure is very much part of and inherent in the basic safety procedures and work practices of chemical tankers in the industry. The *ICS Tanker Safety Guide (Chemicals)*, (3rd Ed, 2000) which is intended as a guide to complement and not replace a shipowner's own safety or operational guidelines for chemical tankers sets out the reasonable steps the recipient of chemical cargo [is] to take once the information on the cargo is received. The section on ship-to-ship transfer contains a checklist to ensure compatibility of ships and their cargo handling equipment. It provides that when preparing for a ship-to-ship transfer, the two masters involved should agree at the earliest opportunity on every aspect of the transfer procedure. The guide also provides that the cargo operation should be planned and agreed between the two ships. The same safety measures for handling cargo should be observed when handling slops or contaminated cargo for disposal.

47 Taking the recommendations in the ICS Guides into account, which required the appellant to inform the *Pristine* of the nature of the cargo when the transfer was about to begin, all the more the acts of the appellant fell short of the standard of care required of it.

Proximity

48 Turning next to the test of proximity. In numerous cases, many attempts were made to elucidate this concept as applied in different circumstances. We think it would be expedient to revert back to basics, the very seminal pronouncement of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 at 580 where he said:

> Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

49 This statement of Lord Atkin was further elucidated by Deane J in the Australian High Court in the case of *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 55 as follows:

> It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss or injury sustained. It may reflect an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance. Both the identity and the relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of case.

50 Plainly, the position of the appellant's vessel and the respondent's tanker was as proximate as could conceivably be. The two vessels were moored alongside and, through hoses, the contaminated nitric acid was discharged into a tank of the *Pristine*. The situation here could hardly be any different from the case where there was a collision between two vessels, causing physical damage to either or both vessels. It was beyond argument that the act of transferring the contaminated cargo from the *Sunrise Crane* to the *Pristine* was an act which directly affected the respondent.

Limitation of liability

51 Finally, we would like to state that we have seen in draft the dissenting opinion of Prakash J where she dealt with the question why the limitation of liability prescribed in s 136 of the Merchant Shipping Act was not available to the appellant in this case. We agree with what she has stated and do not wish to add anything more.

Yong Pung How
Chief Justice

Chao Hick Tin
Judge of Appeal

The "Sunrise Crane"

[2004] SGCA 42

Court of Appeal — Civil Appeal No 141 of 2003
Yong Pung How CJ, Chao Hick Tin JA and Judith Prakash J
28 July 2004; 26 August 2004

13 September 2004

Judith Prakash J (delivering the dissenting judgment):

Introduction

52 This appeal raised interesting issues relating to the extent to which a duty of care can arise in tort in relation to actions carried out pursuant to contract and to the manner in which such duty may be discharged. There was also an issue as to whether the appellant shipowner had established that it was entitled to limit its liability for damage caused by its vessel on the ground that such damage was not caused by its actual fault or privity. The appeal was heard on 28 July 2004 and at the conclusion of the oral arguments I was undecided but Yong Pung How CJ and Chao Hick Tin JA were of the view that it should be dismissed. The appeal was, accordingly, dismissed. I have now had the opportunity of reconsidering the issues and the authorities and have come to certain conclusions which I set out below.

Background

53 The appellant, Doman Shipping SA, a Panamanian company, is the owner of the vessel *Sunrise Crane*. The vessel is managed by a Japanese company, Setsuyo Kisen Co Ltd, and one

Mr Akihiko Kashiwagi is a director of both the management company and the appellant. The vessel is a chemical carrier which is registered at the port of Panama. Its construction permits it to safely carry various liquid chemical products which are hazardous in nature. In February 2001, the vessel was carrying, among other things, a cargo of nitric acid for discharge in Singapore. Nitric acid is an extremely dangerous substance due to its highly corrosive nature. It can only be carried in stainless steel tanks as it corrodes mild steel.

54 The vessel arrived in Singapore on 4 March 2001. The next day, it was found that some 34mt of nitric acid stowed in tank No 3C had been contaminated by hydraulic oil. This contaminated cargo could not be discharged with the rest of the nitric acid and arrangements had to be made to dispose of it on an urgent basis. The vessel is entered with the Japan Ship Owners' Mutual Protection & Indemnity Association ("the Club") so Mr Kashiwagi asked the Club to look into the matter and find a licensed contractor to dispose of the contaminated nitric acid.

55 The Club's representative in Singapore appointed a surveyor (Capt Gill) who investigated the situation and also attempted to find a contractor to remove the contaminated cargo from the vessel. Capt Gill contacted two outfits in Singapore that he knew were in the business of disposing of contaminated liquid cargo and, having told them the nature of the cargo, asked for quotations for its disposal. As a result of these enquiries, and after discussions between the Club's representative, Capt Gill, and the management company's local representative, a contract was made between the appellant and a business called Pink Energy Enterprises ("Pink Energy") for the disposal of the cargo by transferring it from the *Sunrise Crane* to another ship which would then take it away and deal with it. The representative of Pink Energy was one Malcolm Windsor. He was told that the cargo to be disposed of was 34mt of nitric acid contaminated with hydraulic oil and was specifically asked whether Pink Energy was capable of carrying out the disposal of this cargo. Mr Windsor confirmed that it could do the job. He was also shown a sample of the contaminated cargo. In court, Mr Windsor denied that he had been told that the cargo was nitric acid but the judge found against him on this point and that finding has not been appealed against.

56 The ship-to-ship transfer was arranged for the night of 7 March 2001. Pink Energy informed the appellant that the recipient vessel would be the motor tanker *Pristine* of the port of Singapore. The *Pristine* was owned by the respondent, Cipta Sarana Marine Pte Ltd, who had let it out on time charter to Pristine Maritime Pte Ltd. The latter operated the *Pristine* as a slop carrier. It collected, from other vessels, petroleum slops falling within the category known as the "MARPOL Annex I slops". Nitric acid is not an Annex I slop. It is an Annex II slop. The *Pristine* was constructed of mild steel and was not designed to carry Annex II slops. On behalf of Pink Energy, Mr Windsor employed Pristine Maritime Pte Ltd to collect the contaminated cargo from the *Sunrise Crane*. He did not tell Pristine Maritime or the respondent that the contaminated cargo was nitric acid. He described it as "contaminated lubes".

57 The *Pristine* arrived alongside the *Sunrise Crane* at the Western Petroleum Anchorage at about 1.00am on 8 March 2001. The hose of the *Sunrise Crane* was connected to *Pristine's* tanks and discharging operations started. Within about half an hour all the contaminated cargo was transferred into the tanks of the *Pristine*. A little while later whitish smoke was seen emanating from the sounding pipes of the *Pristine* and the vessel listed a little to port. Smoke continued to emerge and the vessel listed more. The crew were evacuated from the *Pristine* onto the *Sunrise Crane*. Eventually, the *Pristine* capsized. Investigations subsequently determined that the nitric acid had bored holes into the hull of the *Pristine*, thus permitting the ingress of water. It was not disputed that no one on board the *Sunrise Crane* had told anyone on board the *Pristine* before pumping started that it was contaminated nitric acid that was making its way into the latter vessel.

58 The respondent brought this action to recover the value of the *Pristine*. In its statement of claim, it alleged that the appellant owed a duty of care to it as the owner of the *Pristine* to give it full details of the nature of the cargo before the cargo was to be received by the *Pristine* and/or to deliver cargo that was safe for the *Pristine* to carry. The appellant's response was that it had engaged an independent contractor, *ie*, Pink Energy, to dispose of the cargo and that Pink Energy was fully informed of the nature of the cargo and had inspected a sample of it. Pink Energy had nominated *Pristine* as the tanker barge to receive the cargo and there was no contractual nexus between the appellant and Pink Energy. Thus, the appellant did not owe the respondent any duty of care to inform the respondent of the nature of the cargo and even if it did, this duty had been discharged when it informed Pink Energy of the nature of the cargo prior to Pink Energy's agreement to undertake the disposal job. In the alternative, the appellant pleaded that it was entitled to limit its liability in accordance with the provisions of the Merchant Shipping Act (Cap 179, 1996 Rev Ed) as the loss of the *Pristine* had arisen without the appellant's actual fault or privity.

The decision below

59 The action was heard before Belinda Ang Saw Ean J. The learned trial judge found in favour of the respondent. She held that the appellant owed a duty of care to the respondent to warn it of the dangerous nature of the cargo before the *Pristine* received it but made no finding in relation to the allegation that the appellant had a duty to deliver a cargo which was safe for the *Pristine*. She found that the contractual relationship between the appellant and Pink Energy was no answer to the wholly independent consideration of whether the law should impose a duty of care on the appellant with respect to the respondent. Using the test established in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 ("*Caparo*"), Ang J found that a duty of care was established as all three elements of this test had been satisfied. The judge mentioned a document called the material safety data sheet ("MSDS") which is used in the transportation of chemicals as a mode of conveying information on such cargo and which is usually given by the shipper of the cargo to a carrier prior to shipment. She considered that the *Sunrise Crane* should have provided the *Pristine* with an MSDS. The judge also held that disclosure to a receiver of dangerous goods of the nature of such goods is very much part of and inherent in the basic safety procedures and work practices of chemical tankers in the industry. She referred to a document called "ICS Tanker Safety Guide (Chemical)" in support of that finding. On this basis, the judge found that the appellant had a duty of care to warn the *Pristine* of the nature and dangerous characteristics of the cargo it was proposing to discharge into the *Pristine* before commencing such discharge. By failing to give such warning, the appellant was in breach of its duty owed to the respondent to take reasonable care to prevent damage to the *Pristine* from the contaminated cargo.

60 Although Ang J found that on a balance of probabilities, Capt Gill did inform Mr Windsor that the cargo was contaminated nitric acid, she held that Mr Windsor's failure to inform Pristine Maritime about it did not break the chain of causation. In her judgment, a disclosure to Pink Energy and Mr Windsor's knowledge of the dangerous nature of the contaminated nitric acid could not, in law, be imputed to the respondent. She decided that the works order given by Pink Energy to Pristine Maritime which stated that the cargo was "contaminated lubes" was not an intervening act because it was issued before the appellant had failed to inform the respondent about the dangerous nature of the cargo. Nor did Mr Windsor's breach of his contract to provide a licensed contractor break the chain of causation – regardless of its competence, the respondent was entitled to a warning prior to the cargo being loaded.

61 Finally, Ang J held that the appellant could not avail itself of the defence of limitation. The appellant's appointment of a competent crew qualified to handle the nitric acid was not enough to show that the negligence of those on board the *Sunrise Crane* was without the fault or privity of the

appellant. She also found that there was no evidence of what Mr Kashiwagi did at the management level to ensure that the master and those on board would comply with the appellant's duty to warn recipients of dangerous goods.

Issues on appeal

62 The appellant appealed against the whole of Ang J's decision. Thus, the main issues on appeal were the same as those in the court below. These were:

(a) Should the law impose a duty of care on the appellant towards the respondent when the appellant had contracted with and relied on Pink Energy so far as the disposal contract was concerned?

(b) Even if there was a duty of care on the part of the appellant towards the respondent, was it discharged when the appellant informed Pink Energy of the nature of the cargo to be disposed of?

(c) If the appellant did owe the respondent a duty of care, was the loss suffered by the respondent caused by Pink Energy's misrepresentation on the nature of the cargo or was it caused by the breach of duty on the part of the appellant that arose when the crew of the *Sunrise Crane* failed to inform the crew of the *Pristine* of the nature of the cargo to be discharged?

(d) Was the respondent entitled to limit its liability?

Existence of a duty of care

63 In view of the judge's finding that the appellant owed the respondent a duty to warn it of the nature of the cargo it was going to discharge into the *Pristine's* tanks before commencing the discharge procedure, the duty of care that has to be considered is whether in the circumstances of this case such a duty to warn existed. As the appellant submitted, a duty of care is not an abstract matter. In each case what has to be established is the existence of a duty on the part of the particular defendant to avoid causing damage or injury to the particular plaintiff of the particular kind which he had in fact sustained.

64 In a much cited passage, Lord Bridge of Harwich in *Caparo* ([59] *supra* at 617–618) identified three elements that had to be present in order for the court to determine whether a duty of care was owed in any particular circumstance and if so what its scope was. The three elements were: foreseeability of damage, a relationship of "proximity" or "neighbourhood" existing between the party owing the duty and the party to whom it was owed and thirdly, that the situation was one in which the court considered it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. Lord Roskill, who also sat in *Caparo*, cautioned at 628:

> [I]t has now to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or in cases where such liability can be shown to exist, determine the extent of that liability. Phrases such as "foreseeability," "proximity," "neighbourhood," "just and reasonable," "fairness," "voluntary acceptance of risk," or "voluntary assumption of responsibility" will be found used from time to time in the different cases. But, as your Lordships have said, such phrases are not precise definitions. At best they

> are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty.

Caparo was a case involving economic loss but its principles were applied by this court in *Mohd bin Sapri v Soil-Build (Pte) Ltd* [1996] 2 SLR 505 ("*Mohd Sapri*"), a claim for physical injury, to explain why a specialist contractor on a building site owed no duty to a worker employed by an independent sub-contractor to provide him with proper equipment and to supervise his use of such equipment.

65 This court has had further occasion to consider the principles regarding the imposition of a duty of care in a series of cases starting in 1996 and ending just a few months ago. It appeared at first that of the three elements mentioned in *Caparo*, that of proximity was pre-eminent and could be used as the main determinant of the existence of a duty of care. The first of these cases was *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113 ("*Ocean Front*"). There the court conducted a wide-ranging review of the authorities both in England (including *Caparo*) and in Australia and concluded at 139, [68] and [69] (*per* L P Thean JA):

> Whatever language is used the court is basically involved in a delicate balancing exercise in which consideration is given to all the conflicting claims of the plaintiffs and the defendants as viewed in a wider context of society. …
>
> But the approach of the court has been to examine a particular circumstance to determine whether there exists that degree of proximity between the plaintiff and the defendant as would give rise to a duty of care by the latter to the former with respect to the damage sustained by the former. Such proximity is the 'determinant' of the duty of care and also the scope of such duty.

The court then went on to adopt a two-step test. The first step was to determine whether the necessary degree of proximity existed between the plaintiff and the defendant so as to give rise to a duty of care by the defendant to the plaintiff and to determine that duty. The second step was, having found such degree of proximity, to consider whether there was any material factor or policy which precluded such a duty from arising. The emphasis on proximity as being the main ingredient in the determination of the duty of care was reiterated in *RSP Architects Planners & Engineers v MCST Plan No 1075* [1999] 2 SLR 449 (see the discussion at [15]–[32]) where the main issue was whether *Ocean Front* had been correctly decided. Both these cases were cases that involved the recognition of a duty of care on the part of builders and architects to avoid causing economic loss to persons who purchased the buildings built or designed by them.

66 In the latest case on the issue, *Man B&W Diesel S E Asia v PT Bumi International Tankers* [2004] 2 SLR 300 (the "*Bumi*" case), this court declined to extend the duty not to cause economic loss to the situation of a builder of an engine *vis-à-vis* the owner of the ship in which that engine was installed when there was no contract between the engine builder and the shipowner. Chao Hick Tin JA, who delivered the court's decision, reconsidered previous authorities including *Ocean Front*. Whilst not disavowing the two-step test applied there, he drew attention to other factors that had been important in *Ocean Front* and stated (at [31]):

> The court also indicated that there was no single rule or set of rules for determining whether a duty of care arises in a particular circumstance, and the scope of that duty. It said that in determining whether a duty of care existed, and the scope of such duty, all the relevant circumstances would have to be examined. This approach was similar to that enunciated by

Gibbs CJ in *The Council of the Shire of Sutherland v Heyman* (1984-1985) 157 CLR 424 at 441:

> In deciding whether the necessary relationship exists, and the scope of the duty which it creates, it is necessary for the court to examine closely all the circumstances that throw light on the nature of the relationship between the parties.

It would appear therefore that the concept of proximity has been moved slightly from the centre of the exercise and the court has returned to what some may consider a more traditional balancing of the various factors involved without giving one or another pre-eminence. Thus, in deciding whether or not a particular defendant owed a particular plaintiff a duty not to cause the plaintiff the damage he in fact sustained, the court must give due regard to all the circumstances in which the transaction that gave rise to the damage occurred so as to understand the relationship between the parties at the time of the damage. Whilst the three cases referred to above were all cases involving economic loss, these principles apply equally to cases involving physical loss as was recognised by this court when it applied the *Caparo* formulation to the situation in *Mohd Sapri*.

67 The relevant circumstances in this case are as follows:

(a) First, that nitric acid is an extremely dangerous substance capable of causing physical damage to persons and property.

(b) That the appellant was aware of the danger that nitric acid could cause.

(c) That the appellant appointed a reputable agent, the Club, to obtain for it a licensed contractor to take the nitric acid off its ship.

(d) That Capt Gill, a person with experience in the local marine industry, approached Pink Energy whom he knew to be in the business of disposing liquid waste from vessels.

(e) That Pink Energy was informed of the nature of the cargo to be handled.

(f) That the appellant only gave the contract to Pink Energy after receiving an assurance from Mr Windsor that Pink Energy was capable of carrying out the disposal of such cargo. As the judge found, Pink Energy acted as an independent contractor and it was not the employee or agent of either Pristine Maritime or the appellant.

(g) That Pink Energy sub-contracted the job of disposing of the cargo to Pristine Maritime without telling the latter what the true nature of the cargo was and Pristine Maritime then sent its chartered vessel, the *Pristine*, to collect the cargo on the basis that the same was contaminated lubes.

(g) That when the *Pristine* arrived and moored alongside the *Sunrise Crane*, no one on board the *Sunrise Crane* informed those on board the *Pristine* of the nature of the cargo to be transferred into the latter's tanks.

On the above facts alone, I have difficulty in finding that the appellant owed either the respondent or those on board the *Pristine* a duty to warn them of the nature of the cargo prior to discharge. I will explain.

68 The respondent submitted that a person who is handing over dangerous goods to another has a duty to inform the party physically receiving the dangerous goods of their nature. In this respect, it

relied on the decisions in *Brass v Maitland* (1856) 6 EL & BL 470; 119 ER 940, *Bamfield v Goole and Sheffield Transport Company, Limited* [1910] 2 KB 94 ("*Bamfield*") and *Hodge & Sons v Anglo-American Oil Company* [1922] Ll L Rep 183 ("*Hodge & Sons*"). In the first case, the plaintiffs were common carriers who accepted all sorts of cargo on board their vessel for carriage. The defendants delivered bleaching powder packed in casks to the plaintiffs' vessel without informing them that the bleaching powder contained a corrosive substance. The packing was inadequate and the corrosive contents escaped and caused damage to other cargo on board the vessel. Lord Campbell CJ and Wightman J held that there was an implied undertaking on the part of shippers of goods on board a general ship that they would not deliver, to be carried on the voyage, packages of a dangerous nature, which those employed on behalf of the shipowner might not on inspection be reasonably expected to know to be of a dangerous nature, without giving notice. That case established the duty of notification in a situation where the contract for carriage was directly between the shipowner and the shipper. The court rejected the shipper's argument that he did not have to make any warranty as to the nature of the goods shipped and that it was the duty of the master of the ship to ask for information about the cargo. The rationale for the holding appears in the judgment of Lord Campbell CJ at 482–483:

> But here there is an allegation that the plaintiffs and their servants neither had knowledge nor means of knowledge of the dangerous nature of the goods, or of the defective packing, which increased the danger. If, under these circumstances, there were not a duty incumbent on the shipper to give notice of the dangerous nature of the goods to be shipped, commerce could not be carried on. It would be strange to suppose that the master or mate, having no reason to suspect that goods offered to him for a general ship may not safely be stowed away in the hold, must ask every shipper the contents of every package. If he is not to do so, and there is no duty on the part of the shipper of a dangerous package to give notice of its contents or quality, the consequence is that, without any remedy against the shipper, although no blame is imputable to the shipowners or those employed by them, this package may cause the destruction of the ship …

69 In the next case, *Bamfield*, the defendants delivered to the plaintiff's husband, who was the owner of a keel, for carriage thereon by him as a common carrier, a quantity of a chemical called ferro-silicon, packed in casks. This was a dangerous substance as in certain circumstances it gave off poisonous gases. The defendants described the goods as "general cargo" and did not tell the plaintiff's husband it was ferro-silicon. The plaintiff's husband died from the poisonous gases emitted and the defendants were held liable for his death. Two of the judges made this decision on the basis that where a consignor, who delivered goods to a common carrier for carriage by him, did not give notice to the carrier that the goods were dangerous, he must, unless the carrier knew or ought to know the dangerous character of the goods, be taken impliedly to warrant that the goods were fit for carriage in the ordinary way and not dangerous. The third judge held that a shipper shipping dangerous cargo had a duty to give the carrier such information as he had as to the nature of the article being shipped and because the defendants had not discharged this duty by describing the cargo simply as "general cargo", they were liable. Here again, there was a shipment of goods pursuant to a contract that was directly between the shipper and the carrier. Neither *Brass v Maitland* nor *Bamfield* is an apt precedent for the present case.

70 The facts of the third case, *Hodge & Sons*, were different. To paraphrase Scrutton LJ (at 186), what happened was that a serious explosion on a barge which had carried petrol caused the death of a number of workmen and injuries to others. Willmott, one of the latter, sued the owners of the barge. The position of the owners was that they had contracted with one Miller to do certain work on the barge. This involved lifting out the tank and Miller sub-contracted with Hodges to lift the tank out. Willmott was a worker employed by Hodges. The owners had no contract either with Hodges

or Willmott. The judge at first instance found that the explosion had been caused by negligence on the part of Hodges' foreman who applied an oxy-acetylene flare to the tank without taking steps to see whether it was clear of petrol vapour. It was common ground that the barge was a dangerous thing whether it contained petrol or whether the petrol had been discharged and the tank cleaned. The owners of the barge were, by a majority comprising Bankes and Scrutton LJJ, held not to be liable to Willmott for not informing him of the dangerous nature of the barge.

71 Bankes LJ held that the barge owners were under two duties, one was the duty of using reasonable means to secure the efficient cleaning out of the tank and the other was the duty of giving any necessary warning of the dangerous character of the tank even after a proper and sufficient cleaning. The first duty extended to all who came into contact with the tank in the course of carrying out the repairs and that included Willmott. As regards the second duty, the warning would not be required where the person who would otherwise be entitled to a warning was already aware of the danger or who might reasonably be assumed to be aware of it. On the facts, Miller required no warning and the barge owners were entitled to assume that Hodges needed no warning as to the danger. As regards the individual workmen employed by Hodges, Bankes LJ said (at 185):

> I do not think that the present is a case in which the Anglo-American Oil Co were under any duty to Messrs Hodges' workmen to give them any individual warning. Whether a warning to an employer of the dangerous character of an article sent to him for repair is a sufficient warning to the workmen directed by the employer to carry out those repairs must be a question of fact depending upon the particular circumstances of each case. There are in this case, in my opinion, no such special circumstances as placed the Anglo-American Oil Co under any duty to give any warning to the plaintiff Willmott or to the other employees of Messrs Hodges.

Applying those views to the facts of this case, the appellant would have a duty to tell Pink Energy of the dangerous nature of the goods (and that is not a duty that has ever been disputed by the appellant) but would not be under a similar duty to warn the employees or agents of Pink Energy unless special circumstances existed. On that basis, no duty to warn would exist between the appellant and Pink Energy's sub-contractors.

72 Scrutton LJ, in agreeing that the appeal should be dismissed, said at 188:

> The law, therefore, seems to be: (1) That if the barge which has carried petrol is an article dangerous in itself, it is the duty of the owners to take proper and reasonable precautions to prevent its doing damage to people likely to come into contact with it. These precautions may be fulfilled by entrusting it to a competent person with reasonable warning of its dangerous character, if that danger is not obvious. If such precautions are not taken, the owner will be liable to third persons with whom he has no contract for damage done by the barge, which they could not have avoided with reasonable care. (2) If the barge which has carried petrol is not dangerous in itself, but becomes dangerous because it has been insufficiently cleaned, and the owner is ignorant of the danger, the owner is not liable for damage caused by it to person whom he has no contract. … (3) In the case of a thing dangerous in itself, where either the danger was obvious or the owner has given proper warning to the person entrusted with it, not being his servant, the owner is not liable for negligence of such person causing injury to a third party; such negligence is *nova causa interveniens.*

Again, applying *dictum* (1) above to the facts of this case, since the nitric acid was an article that was dangerous in itself though the danger was not obvious, the appellant had a duty to take proper and reasonable precautions to prevent its doing damage to third parties and such duty was fulfilled by telling Pink Energy it was nitric acid and then entrusting it to Pink Energy, who held itself out to be a

competent person, to handle the same.

73 It appears to me that the cases cited by the respondent do not support its submission that in the circumstances of this case, there was a duty on the appellant to warn the respondent of the nature of the cargo. The same result is reached by an application of the threefold test set out in *Caparo* and analysing the facts to ascertain whether the three elements required to impose a duty of care existed. The first element is foreseeability. It might appear that the damage caused was eminently foreseeable. After all, nitric acid is extremely corrosive and it could be "foreseen" that if the *Pristine* was not equipped with stainless tanks, the nitric acid would corrode its hull. But as stated by *Clerk & Lindsell on Torts* (18th Ed, 2000) at para 7-134:

> **The nature of foreseeability** The test is not one of the actual foresight of the defendant. Rather the question is what the court, reviewing the evidence with hindsight and trying to do justice, determines to be foreseeable. In this way the foresseability test has become something of a cloak for the exercise of policy and discretion. It enables courts to exercise a supervisory power of deciding whether or not it is reasonable to ascribe liability towards particular claimants.

Further, as held in *Surtees v Kingston-upon-Thames Borough Council* [1991] 2 FLR 559, foreseeability is subject to three limitations: (a) an injury of the kind which, in fact, must be one which was reasonably likely to occur; (b) the injury in fact sustained must be the kind which was foreseeable; and (c) in the context both of foreseeability and the extent of the duty and its breach, those questions must be considered in the light of all the existing circumstances. It is also pertinent that in the *Bumi* case ([66] *supra*), this court opined (at [38]) that foreseeability of harm does not automatically lead to a duty of care.

74 The appellant could foresee that nitric acid could cause damage to the ship receiving it from the *Sunrise Crane*. It was because such damage could be foreseen that the appellant wanted a licensed contractor to undertake the disposal job. It was because such damage could be foreseen that the appellant appointed the Club's local representative to look for such a licensed contractor and it was because such damage could be foreseen that it considered only the two contractors brought to it by the marine surveyor selected by the Club and asked for an assurance that Pink Energy could handle the cargo before awarding the contract. Finally, it was because such damage could be foreseen that the nature of the cargo was made known to everybody involved in the discussions and the awarding of the contract, including the Club, the surveyor, Capt Gill and the contractor's representative, Mr Windsor.

75 Once the contract had been awarded under such circumstances, could the appellant have foreseen that the tanker sent to collect the cargo would not have been told its nature? I do not think so. The details of the *Pristine* were given to the *Sunrise Crane* before the tanker arrived alongside and since these details came from Pink Energy, the appointed contractor, the appellant and those on board the *Sunrise Crane* would have assumed that the *Pristine* was suitably equipped to handle the cargo. In fact the evidence was that the officers of the *Sunrise Crane* did make such an assumption before the discharge started. Capt Gu, the master of the *Sunrise Crane*, testified that in all his years of experience sailing on chemical tankers, when there were chemical slops to be loaded, the slop disposal contractor would have been informed of the type of slops in advance so that the proper barge was sent out to receive them. The appellant and its crew could not have foreseen that Pink Energy would have sent out a vessel that was built of mild steel and did not have stainless steel tanks. Whilst theoretically it was foreseeable that nitric acid could corrode the hull of the vessel it was discharged into, it was not foreseeable in all the circumstances that existed then that it would corrode the hull of the *Pristine*. In the light of all the circumstances of this case, I do not think that the injury in fact sustained was foreseeable by a person in the position of the appellant.

76 The next element to be considered is proximity. The Australian High Court case of *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, in addition to the observation of Gibbs CJ on the necessity to take all relevant factors into account in determining the existence of a duty of care, is also useful on what constitutes the element of proximity. Having pointed out (at 53–54) that "[r]easonable foreseeability of loss or injury to another is an indication and, in the more settled areas of the law of negligence involving ordinary physical injury or damage caused by the direct impact of [a] positive act, commonly an adequate indication that the requirement of proximity is satisfied", Deane J went on to say that Lord Atkin's notions of reasonable foreseeability and proximity in *Donoghue v Stevenson* [1932] AC 562 were distinct. He then explained what the notion of proximity entailed. He said at 55:

> It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss or injury sustained. It may reflect an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance. Both the identity and the relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of case.

77 It would appear that in this case all these types of proximity did exist. There was certainly physical proximity between the appellant and the respondent in that the *Pristine* was moored alongside the *Sunrise Crane* in order to enable the ship-to-ship transfer of cargo to take place. Then, while there was no direct relationship between the appellant and the respondent, there was circumstantial proximity as the *Pristine* had been sent by the appellant's contractor, Pink Energy, to fulfil its contract with the appellant. The *Pristine* was not there by chance. Finally, the act complained of was that the appellant did not tell the respondent what cargo was being discharged. The evidence was that if the respondent had known it was nitric acid, those on board the *Pristine* would not have taken on the cargo. In this sense therefore, the failure to warn led to the receipt of the cargo and the consequential loss of the vessel.

78 Considering that there was proximity in the sense used in *Caparo* but, in my view, no reasonable foreseeability, it is now necessary to consider whether it would be just, fair and reasonable in all the circumstances to impose on the appellant a duty to warn the respondent of the nature of the cargo prior to discharging it into the respondent's vessel. The present case serves as an example of a situation commonly met with in day-to-day life, though fortunately the disastrous consequences that resulted here are not the norm. The situation I am talking about is the employment by party A of party B to do a certain piece of work which may involve danger or dangerous elements, for example, repairing an unsafe roof or cleaning a tank from which a noxious cargo had been discharged or transporting a dangerous item or animal. In each of those cases, the person in the position of party A usually looks for a qualified person to undertake the work concerned and selects party B as having the necessary qualifications. In employing party B, party A will inform party B of what exactly has to be done. Once the contract has been made, party A leaves the execution of it to party B and does not usually check that the workmen or equipment that party B sends along to handle the job are aware of the nature of the job or are suited for it. He assumes that party B will provide suitably informed personnel and suitable equipment for the job. I do not think that party A, as long as he has given proper and full disclosure to party B, is wrong to make such an assumption. I do not think it is fair or reasonable or just to impose on party A the duty to countercheck just before the job starts that the person sent to do it knows what it is or that the

equipment is suitable. It would be unduly onerous to require party A to be present to warn party B's employees or sub-contractors of the dangers involved in carrying out the work.

79 In *Mohd Sapri* ([64] *supra*), the defendant, SE, was a specialist sub-contractor for the installation of a sprinkler system at a warehouse. SE engaged two independent sub-contractors to install the sprinkler system and the plaintiff worker was employed by one of these, one Ishak. He was injured when he fell off a staging that was being pushed along by his fellow workers. This court (reversing a decision I made at first instance) held that SE did not owe the plaintiff a duty to provide proper equipment for his use and to supervise his use of it. In delivering the judgment of the court, Yong Pung How CJ said at 515, [36]:

> In the present case, it would require a further extension of the duty of care to say that SE should have provided proper equipment for the plaintiff's use, and that it should have supervised his use of the equipment. Such equipment would have been made available upon request by Ishak. There was no dispute that Ishak had never asked for the equipment and could not be bothered to collect it. In effect, SE was being made liable for Ishak's sloth. The trial judge's decision implies that while an independent contractor who employs workers (ie Ishak) may be responsible for carrying out an employer's non-delegable duties, such duties would also have to be undertaken concurrently as a matter of general law by the party appointing the independent contractor (ie SE). As counsel for SE put it, this would 'open new floodgates to claim against a whole new class of third parties' and there will be 'ambiguity as to the boundary of this class of third parties as well as the extent of their rights (and) duties'.

To impose a duty of care on the appellant in this case would be to make the appellant, as the employer, responsible for carrying out the duty of the independent contractor, Pink Energy, to inform its sub-contractor of the nature of the cargo to be collected. I agree that the imposition of such a duty would open floodgates to claims against a whole new class of third parties and therefore consider no duty should be imposed.

80 The *Bumi* case ([66] *supra*) also contained some observations which, though the facts of that case are very different from the present, are helpful in considering whether it is fair, just and reasonable to impose a duty of care here. Chao Hick Tin JA said at [34]:

> It is true that the principle enunciated in *Donoghue* – namely, that when a person can or ought to appreciate that a careless act or omission on his part may result in physical injury to other persons or their property, he owes a duty to all such persons to exercise reasonable care to avoid such careless act or omission – has been extended to claims other than for such personal injuries or property damage … We also acknowledge that the *Donoghue* principle is not a statutory definition. Its application has not remained static. It is evolving. It offers an avenue of redress for losses suffered by a person on account of the acts or omission of another, where such losses would otherwise be without a remedy. While we would not say that for every subsequent case to fall within the scope of the decision in *Ocean Front* the facts must be identical or the same, extreme caution must be exercised in extending the *Donoghue* principle, or the decision in *Ocean Front*, to new situations, *particularly to a scenario which is essentially contractual*. [emphasis added]

As long ago as 1922, Scrutton LJ observed in *Hodge & Sons* that, in the absence of special circumstances, a person in the position of the appellant did not have a duty to warn the employee of his contractor as to the dangerous nature of the goods that the contractor had agreed to handle. That position has not changed in the intervening years. The "special circumstances" that Scrutton LJ was referring to must have been circumstances which would make it foreseeable that without such a

warning loss would be caused. In this case (subject to the caveat that I will discuss below) there were no special circumstances to require the warning to be given. The loss was not foreseeable despite the proximity of the parties and it would not, in my view, be fair or reasonable or just to impose on the appellant a duty to warn the respondent as the sub-contractor or employee of Pink Energy of the nature of the goods since Pink Energy had been given all necessary information.

81 Whilst I have largely used the *Caparo* test in this discussion, I believe the same result would have been arrived at by applying the two-stage test derived from *Ocean Front*. In relation to the first stage, the necessary "proximity" would not be established notwithstanding the matters stated in [77] above, as the important element of foreseeability is absent and this element forms part of the concept of "proximity" in the two-stage test. Secondly, even if the first stage were satisfied, the second would not be because, as I have shown in [78] and [79] above, there are policy reasons why a duty of care should not be imposed in the circumstances of this case and others like it. Whilst in the past I have tried to extend the duty of care, I accept, as I must, the limits laid down by this court in the *Mohd Sapri* and *Bumi* cases and those limits, in my respectful view, necessarily prevent the existence of any duty of care here.

82 My decision above was arrived at on the basis that all the relevant facts were those stated in [67] above. The trial judge, however, did not rely only on those facts in order to come to her decision. She also relied on the contents and existence of three documents, *viz*:

(a) The International Chamber of Shipping Tanker Safety Guide (Chemicals) (3rd Ed) ("Tanker Safety Guide").

(b) The International Chamber of Shipping Ship-to-Ship Transfer Guide (Petroleum) (3rd Ed).

(c) The MSDS for nitric acid.

The judge noted that the MSDS is an information form or data sheet on a particular chemical which is prepared for the purpose of warning persons dealing with such product of any dangers that might be associated with its use including fire risk, accidental spillage and procedures for clean up. She considered it an appropriate mode of conveying information of the cargo and noted that the master of the *Sunrise Crane* had acknowledged that the MSDS was an important document and those who shipped the cargo as well as those who received it should have a copy of the MSDS. Plainly the judge was of the opinion that the *Sunrise Crane* should have given a copy of the relevant MSDS for nitric acid to the *Pristine*. She further stated that the duty to inform the receiver of the dangerous goods was not foreign to chemical tankers because such disclosure was part of and inherent in the basic safety procedures and work practices of chemical tankers as shown by the provisions of the Tanker Safety Guide. The judge was impressed by the fact that the guide contains operational guidelines on ship-to-ship transfers and that the safety measures provide that the cargo operation should be planned and agreed between the two ships and that the two masters involved should agree at the earliest opportunity on every aspect of the transfer procedure.

83 I agree that if the evidence had shown that the practice in the chemical transportation industry was for any chemical tanker discharging cargo to, just prior to discharge, as a matter of course for reasons of safety, notify the recipient of the cargo of the nature of the cargo and then work with that recipient on every aspect of the transfer procedure for the purposes of ensuring safety, notwithstanding that the recipient had previously been notified (or could reasonably be assumed to have been notified of the nature of the cargo by the shipowner or his representative), that would constitute the special circumstance that would impose a duty of care on the appellant and its representatives, the crew of the *Sunrise Crane*, to notify those on board the *Pristine* of the nature

of the cargo before the discharging operation commenced. From a consideration of the record, however, it appears to me that no such practice in the chemical trade was proved to exist on the balance of probabilities.

84 In regard to the MSDS, Mr Kashiwagi had testified that ordinarily the *Sunrise Crane* would still receive nitric acid as cargo even if the shipper had not given the vessel the MSDS for it. On this part of the evidence, the judge expressed the view that it did not follow that if the roles were reversed the appellant could reasonably adopt the same attitude as the whole purpose of disclosing the nature of the cargo and its dangers was to enable the recipient to take reasonable care to avoid damage. The appellant submitted that the judge had misunderstood the relevance of the MSDS. This was an important document giving information as to the first aid and clean up procedures to be followed when there was any incident involving the subject chemical. Accordingly, the shipper of the chemical would provide the vessel with a copy of the relevant MSDS so that it could be kept on board and the crew would have it available as a guide when necessary.

85 Mr Kashiwagi's point was, the appellant submitted, and I agree, simply that although shippers routinely handed over the appropriate MSDS for the cargo shipped, the supply of such MSDS was not a pre-requisite prior to the shipment of the cargo. It was put to Mr Kashiwagi that if the MSDS was an important document, it would be prudent for a shipowner to require that it be provided whenever a cargo of nitric acid was loaded. His reply was that if it was the first time the vessel was handling nitric acid, he might make it a condition that the document be received and the main reason for this condition would be that the ship would want to compare the MSDS for nitric acid which it had on board with that supplied by the shipper to see whether the latter contained any changes in the way that the cargo should be handled. Otherwise, the *Sunrise Crane* did not need a copy of the document prior to shipment because its crew was trained to handle and was knowledgeable about nitric acid and also because the crew already had their own copies of the MSDS for all chemicals handled.

86 Capt Gu agreed that the MSDS was an important document as it contained general safety information and specified the hazardous property of the cargo. He also agreed that both parties who were involved in a discharge and loading operation should have the MSDS but he asserted that the MSDS booklet would be kept on board every ship that carried chemicals so that they could know about the cargoes they carried. Capt Gu was emphatic that the vessel sent to collect the contaminated cargo should have known what type of slops it was receiving and that it was his view that the *Pristine* must have known the nature of the cargo. Despite this evidence, it was not put to him at any time that those on board the *Sunrise Crane* had a duty to provide the *Pristine* with the MSDS for nitric acid before commencing discharge of the cargo and that this duty existed notwithstanding that it could be reasonably assumed that the *Pristine* knew what it was collecting.

87 It was also in evidence that a contractor who was experienced in dealing with the disposal of chemical slops would not require or ask for a copy of the MSDS in order to dispose of the contaminated nitric acid as it would have its own copy of the MSDS. This was the evidence given by one Mr Awtar Singh, the representative of Chem-Solv Technologies Pte Ltd, the other disposal contractor who had put in a bid to dispose of this cargo. His company specialised in handling, transporting, treating and disposing of toxic waste. It was licensed to carry out such treatment and disposal of toxic waste. Mr Singh said that his company commonly handled nitric acid and would not require any MSDS before transporting such cargo as it has its own MSDS. He also confirmed that the purpose of the MSDS was to get information on how to handle the product and the safety precautions to take.

88 Accordingly, it was not established that the purpose of the MSDS was to notify the receiving party of the nature of the cargo and its dangers. Its purpose was to advise on handling, first aid and

clean up procedures in relation to that cargo. The evidence did not establish that it was the practice in the trade for each person discharging or receiving nitric acid or other chemicals to hand over or receive, as the case may be, an MSDS in respect of that cargo. What was established was simply that persons in the chemical transportation industry had access to the MSDS for each chemical carried because in most cases persons in the trade kept their own copies of these documents and also, if an intended recipient asked for an MSDS in respect of the cargo that was going to be loaded onto his vessel, he would be given one by the shipper.

89 As regards the tanker safety guide and the ship-to-ship transfer guide, there was no evidence that these documents represented the prevailing practice of the chemical transportation industry or that of the petroleum industry. Neither document was mentioned in the pleadings or produced during discovery. Further, neither document was shown to any of the appellant's witnesses. They were not asked by the respondent's counsel to comment on the procedures recommended by each guide. Nor was it put to them that those procedures represented the prevailing practice followed by chemical tankers and shore tanks and other recipients of chemical cargo. The point relating to the guides was brought up for the first time by the respondent in its written closing submissions. With due respect to the trial judge, I do not think that she was entitled to rely on those guides as evidence of the practice in the industry. The only evidence of the practice in the industry was that given by the appellant's witnesses including Mr Awtar Singh and no part of that evidence supported the respondent's contention that the chemical transportation industry followed an established practice whereby the persons on board a vessel receiving chemical cargo were invariably notified of the nature of that cargo prior to commencement of loading and notwithstanding that loading was taking place in accordance with a pre-existing contract for the loading of cargo of that nature.

90 Thus, in relation to the issues raised on appeal, I have come to the conclusion that the law should not impose a duty of care on the appellant to warn the respondent of the nature of the cargo when the appellant had contracted with Pink Energy for the disposal of that cargo and had given Pink Energy itself all necessary information about it. The appellant had a duty of care to inform the party it employed to dispose of the cargo of the true nature of the cargo. The appellant did not have a duty to give such information to the employee, sub-contractor or other person sent by Pink Energy to carry out the contract as it could not foresee that the latter would suffer injury by its omission to impart the information. Whilst I sympathise with the respondent in respect of the catastrophic loss that it has suffered, in my judgment, the law does not permit it to make this loss the responsibility of the appellant. The party who should have told the respondent the true nature of the cargo to be loaded was Pink Energy. Pink Energy was in the position of the shippers in *Brass v Maitland* and *Bamfield* and thus had the duty to inform the *Pristine* of the dangerous nature of the cargo that the latter would receive from the *Sunrise Crane*. I assume this action was brought against the appellant rather than Pink Energy because the appellant has greater financial resources than Pink Energy. That, however, is not a good reason to make the appellant liable.

91 In view of these conclusions, I need not deal with the issue of causation. However, as my learned brothers have found a duty of care to exist and I have also expressed the view that had it been proved to be the industry-wide practice to inform recipients of the nature of the cargo being discharged immediately prior to the commencement of discharging operations, then there would have been such a duty on the appellant in relation to the respondent, I turn to consider whether in such circumstances the defence of limitation would be available to the appellant.

Limitation of liability

92 Section 136 of the Merchant Shipping Act provides, *inter alia*, that where a ship has, in the discharge of its cargo, caused damage to any property, the owner of the ship is entitled to limit his

liability for such damage to an amount based on the tonnage of his ship and calculated in accordance with the formula provided in the section as long as such loss or damage was sustained "without his actual fault or privity". This section is the Singapore law enactment of the provisions of the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships 1957 ("the 1957 Convention"), a treaty which over 50 state parties have ratified.

93 The concept that a shipowner should be entitled to limit his liability when by reason of negligent management or navigation his ship collides with and damages another vessel or other property and/or causes loss of life or personal injury to passengers or crew or others was first codified in France in the 17th century. It was subsequently adopted by several other European countries. Limitation of a shipowner's liability for damage caused by the negligent management or navigation of his ship is an exception to the general rule that a person who negligently causes damage is responsible for the full financial consequences of the same provided such consequences are not too remote. However, this rule has been embodied in two international conventions in modern times, the 1957 Convention mentioned above, and the more recent treaty, the Convention on Limitation of Liability for Maritime Claims 1976 ("the 1976 Convention"), and is apparently here to stay. *Chorley & Giles' Shipping Law* (8th Ed, 1987) states at pp 394–395 the justification for the rule:

> The convenience of the rule is responsible for its survival. The modern justification is not that it would be unfair to make a shipowner pay for all the damage he has caused: it is that a shipowner can obtain adequate insurance cover for third party claims if his insurers can calculate their maximum exposure with certainty. Victims generally benefit if the limits are set high enough and they can be sure that an insurer will pay their claim.

94 In order for a shipowner to rely on the limitation of liability provided by s 136, he has the onus of proving that the loss or damage caused by the negligent navigation or management of his ship took place without his "actual fault or privity". The test of what amounts to "actual fault or privity" was set out by Lord Denning MR in *The Eurysthenes* [1976] 2 Lloyd's Rep 171 at 178–179 as follows:

> This was followed by a succession of Merchant Shipping Acts, all of them directed to limiting the responsibilities of the shipowner for the acts or defaults of his servants. He was not to be liable for acts done "without his fault or privity" beyond the value of the vessel. The object of these Acts was to limit his liability for his servants on the basis of respondeat superior, but to leave him fully liable for faults done by himself personally or with his privity …
>
> This historical survey shows to my mind that, when the old common lawyers spoke of a man being "privy" to something being done, or of an act being done "with his privity", they meant that he knew of it beforehand and concurred in it being done. If it was a wrongful act done by his servant, then he was liable for it if it was done "by his command or privity", that is, with his express authority or with his knowledge and concurrence. "Privity" did not mean that there was any wilful misconduct by him, but only that he knew of the act beforehand and concurred in it being done. Moreover, "privity" did not mean that he himself personally did the act, but only that someone else did it and that he knowingly concurred in it. … Without his "actual fault" meant without any actual fault by the owner personally. Without his "privity" meant without his knowledge or concurrence.
>
> …
>
> [W]hen I speak of knowledge, I mean not only positive knowledge but also the sort of knowledge expressed in the phrase "turning a blind eye".

95 Although it would appear from the above explanation of the meaning of "actual fault or privity" that it would not be very difficult for a shipowner to show that any particular negligent act in the management or navigation of his vessel occurred without his fault or privity, the courts do not favour limitation and, as the cases developed over the years, the opposite proved to be the case. A survey of the cases on the issue cited by the appellant itself shows that the threshold to cross before a defendant can avail himself of the limitation defence is very high. In *The Norman* [1960] 1 Lloyd's Rep 1, the shipowners failed to pass on to the master of the vessel information in circulars about navigation hazards in an area in which the *Norman* was likely to be navigated. The vessel struck an uncharted rock in fog at night and sank. The defence of limitation was denied. Lord Radcliffe, in coming to the conclusion that the owners had a duty to communicate the latest information that would assist navigation, found two questions to be pertinent:

(a) What, if any, action should have been taken on receipt of the circulars by a prudent and conscientious owner who had a trawler around the area identified with navigational hazards; and

(b) If action should have been taken, had the owners established with sufficient probability that even though it was not, the omission had no bearing upon the casualty that occurred so that it was not contributed to by their fault?

96 In *The England* [1973] 1 Lloyd's Rep 373, the owners failed to ensure that copies of the Port of London River By-laws were placed on the ship. These by-laws required a vessel making a turning manoeuvre along the Thames River to give a whistle signal. The defendants' vessel did not give such a signal and this resulted in it colliding with the plaintiffs' vessel. The defendants asserted that they were entitled to limit liability on the basis that they had engaged a master who had sufficient knowledge to navigate the River Thames. The defence was rejected by the Court of Appeal. It was held that in the circumstances, the owner ought to have foreseen that, without specific instruction, the master, however competent, might fail to have the by-laws available or fail to study them and that therefore the owners were under a duty at least to give specific instructions to the master that in trading to the Port of London, he must have available a copy of the by-laws. Since they had failed to disprove that the absence of by-laws on board was a contributory cause of the casualty, they were not entitled to limit. Sir Gordon Willmer stated at 383:

> [T]he decision of the House of Lords in the case of *The Norman* [1960] 1 Lloyd's Rep 1, seems to me to have thrown quite a fresh light on the extent of the managerial duties of owners and managers, especially in relation to the supply of navigational information and publications to their vessels. It seems to me that it is no longer permissible for owners or managers to wash their hands so completely of all questions of navigation, or to leave everything to the unassisted discretion of their masters.
>
> This relatively new approach, as I think it is, was well illustrated by the decision of this Court in *The Lady Gwendolen,* [1965] P 294; … I venture to quote two sentences from the judgment which I myself delivered in that case, because they seem to me to be equally apt to the circumstances of this case. On pp 345 and 346 of the respective reports I am reported as saying:
>
> > … It seems to me that any company which embarks on the business of shipowning must accept the obligation to ensure efficient management of its ships if it is to enjoy the very considerable benefits conferred by the statutory right to limitation.

97 In *Grand Champion Tankers Ltd v Norpipe A/S* (*The Marion*) [1984] 1 AC 563, the ship managers had left the matter of updating the charts entirely to the master. There was no system in place for the owners to supervise and ensure that the master updated the charts. Further, the

managers' alter ego was absent from the company for long periods of time and had failed to give instructions with regard to matters about which he required to be kept informed of. Consequently a document which was issued by the vessel's port of registry warning of the *Marion's* navigational charts not having been corrected for several years was not brought to his notice. The law lords agreed with the Court of Appeal who found that the managers had failed to operate a proper system of keeping the charts up-to-date, and the owners therefore could not prove that the loss was without their actual fault. The only judgment in the House of Lords was delivered by Lord Brandon of Oakbrook. Referring to *The England* and describing Sir Gordon Willmer as "the acknowledged master of Admiralty law in his time", Lord Brandon (at 572–573) cited the passage set out above at [95] and endorsed what Sir Gordon Willmer described as "this relatively new approach" as being the correct approach in law to the problem of actual fault of shipowners or ship managers in contested limitation actions. I note here that Lord Brandon himself was an expert in admiralty matters and was the admiralty judge before he was elevated to the Court of Appeal.

98 It would appear therefore that in order to establish that its own fault did not contribute to the loss here, the appellant had to show that it had an efficient system of management of the vessel that ensured that, at the least, the standard industry practices for dealing with the dangerous chemical cargoes that the vessel carried were implemented and followed by the officers and crew of the ship. Such practices would have included the safety and other procedures to be followed when loading and discharging such cargo, whether from or to a shore terminal or from or to another vessel.

99 The appellant did not give any evidence as to the management system which it had adopted so as to ensure that the vessel implemented and followed the industry standards of practice in relation to the handling of chemical cargo. It relied on the fact that it had appointed a competent master and officers to serve on the *Sunrise Crane* and that these persons were specially qualified and trained to handle chemicals. Mr Kashiwagi testified that the master and chief officer were experienced chemical tanker officers who had received special training in chemical and hazardous cargo pursuant to the requirements of the Standards of Training, Certification and Watchkeeping 1995 ("STCW 95"), an international convention prepared by the International Maritime Organisation. The STCW 95 requires that all deck officers on board oil and chemical tankers undergo various courses so that they know how to handle chemical and hazardous cargo while sailing on board such ships.

100 The officers were qualified to handle dangerous cargo like nitric acid. This fact did not, however, in my view, absolve the appellant from its own duty to ensure that there was a proper system on board the vessel for dealing with such cargo, in particular in relation to the transfer of the cargo between vessels or between the vessel and a shore installation. No evidence was given of the existence of this system. If indeed there had been an industry-wide practice for chemical carriers to notify recipients of their cargo of the nature of the cargo prior to discharge, I would expect that any system on board the vessel would set out the procedures whereby such notification could be given. It would specify whether the notification could be oral or needed to be in writing and, if the latter, whether an MSDS or some other document had to be handed over to the recipient. In these circumstances, had I found that the duty to warn existed, I would also have found that the appellant had not discharged the burden upon it to show that the crew's failure to comply with that duty arose without its actual fault or privity.

101 It is clear from the cases I have cited that, over the years, the courts have whittled down the protection available to a shipowner from the 1957 Convention and s 136 of the Merchant Shipping Act. There is hardly a reported case after *The Norman* where an owner has managed to show that his systems of management of the vessel were such that they in no way contributed to any negligence on the part of the crew of the vessel. Thus, the purpose of s 136 has to a great extent been negatived and the protection it offers to shipowners is, largely, illusory. That development was a

major reason why many countries, including the United Kingdom, moved away from the 1957 Convention and adopted the 1976 Convention instead. Under the 1976 Convention, the monetary limits are much higher but the benefit to the shipowner is that, in almost every case, he will be able to limit because the right to limit is only lost if it is proved that the loss sued for "resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result". That phraseology makes it very difficult for a claimant to break limitation. Bearing in mind that the object of the limitation statute is to assist shipowners in getting sufficient insurance to cover possible losses and therefore assist claimants in being paid at least a portion of their losses, it appears to me that the present state of the law of limitation in Singapore is not achieving that objective. It is time for us to consider ratifying the 1976 Convention and amending s 136 of the Merchant Shipping Act accordingly.

Conclusion

102 For the reasons given above, I must respectfully dissent from my brethren on their finding with respect to breach of duty. I concur that if there was a breach of duty, no entitlement to limit liability has been proved.