# HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

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ANDAR TRANSPORT PTY LTD APPELLANT

AND

BRAMBLES LIMITED RESPONDENT

*Andar Transport Pty Ltd v Brambles Limited* [2004] HCA 28
*15 June 2004*
M214/2003

**ORDER**

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of Victoria dated 21 November 2002.*

3. *Remit the matter to the Court of Appeal of the Supreme Court of Victoria for further consideration.*

4. *Costs of the whole of the proceedings in the Court of Appeal of the Supreme Court of Victoria to be for that Court to determine.*

On appeal from the Supreme Court of Victoria

**Representation:**

D F Jackson QC with P H Solomon for the appellant (instructed by Wisewoulds)

S G Finch SC with D J Christie for the respondent (instructed by Allens Arthur Robinson)

## CATCHWORDS

## Andar Transport Pty Ltd v Brambles Limited

Employer and employee – Duty of care by employer to employee – Common law duty – Safe system of work – Relevance of corporate structure – Where employee is director of employer – Where employee responsible for day-to-day operation of the company – Where employee injured due to unsafe system of work – Where employee in part responsible for devising system of work – Whether employer liable to employee for breach of duty committed by employee in his capacity as director of employer.

Employer and employee – Duty of care by employer to employee – Common law duty – Safe system of work – Meaning of "safe system of work" – Where existing system of work had been in place for many years – Whether employer took reasonable steps in ensuring that a safe system of work was created and maintained – Whether length of time in which system of work has been used is relevant in assessing whether system is safe.

Contract – Construction – Indemnity clauses – Whether principles governing construction of contracts of guarantee also govern the construction of contracts of indemnity – Whether indemnity clause to be construed in favour of the indemnifier.

Tort – Joint or several tortfeasors – Contribution between tortfeasors – *Wrongs Act* 1958 (Vic), ss 23B, 24(2) – Where appellant liable as employer – Where injured employee responsible for breach of duty by appellant – Where damages previously reduced to account for contributory negligence of employee – Whether previous apportionment based on contributory negligence relevant in assessing contribution under statute – Whether previous apportionment based on contributory negligence is ground for exemption from contribution under s 24(2).

Words and phrases – "safe system of work".

*Wrongs Act* 1958 (Vic), ss 23B, 24(2).
*Corporations Act* 2001 (Cth), s 124.

1 GLEESON CJ, McHUGH, GUMMOW, HAYNE AND HEYDON JJ. This is an appeal from the orders of the Victorian Court of Appeal[1] allowing in part an appeal from the jury verdict and consequential orders of the County Court of Victoria. The issues that arise in this appeal fall into two categories: the construction of a contract of indemnity, and the operation of Pt IV of the *Wrongs Act* 1958 (Vic) ("the Wrongs Act").

The facts

2 The respondent, Brambles Limited ("Brambles"), provides laundry delivery services to a number of hospitals. Those services involve, amongst other things, the delivery by truck of large trolleys of clean linen. Since 1990, it has been the practice of Brambles to contract out its laundry delivery services to corporations that, in turn, employ drivers to load, deliver and unload the linen as directed by Brambles.

3 Mr Daryl Wail was one such driver. He was employed by the appellant, Andar Transport Pty Ltd ("Andar"). Prior to the change in business practice adopted by Brambles, Mr Wail had been employed directly by Brambles to load, deliver and unload linen trolleys. Mr Wail was also one of two directors of Andar and one of two shareholders in the company. It will be necessary to say something further regarding the corporate structure of Andar later in these reasons.

4 On 26 July 1993, Mr Wail loaded a truck with 22 trolleys of clean linen at Brambles' laundry premises in Box Hill, Victoria and drove to Cotham Private Hospital in Kew. After reversing the truck into a driveway adjacent to the hospital's delivery bay, Mr Wail opened the rear of the truck and lowered the hydraulic tailgate. He then attempted to remove one of the trolleys. However, that trolley was jammed against another trolley and, in attempting to pull it free, Mr Wail felt a searing pain across his lower back. It was subsequently determined that, as a result of this incident, the lumbosacral disc in Mr Wail's lower back had been damaged.

The litigation

5 By a writ and statement of claim filed on 17 June 1998 in the County Court of Victoria, Mr Wail commenced proceedings against Brambles alleging

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**1** *Brambles Ltd v Wail* (2002) 5 VR 169.

negligence. The particulars of negligence pleaded by Mr Wail included a failure by Brambles to ensure that the trolleys could be manoeuvred without risk of injury and a failure by Brambles to ensure that the trolleys could be manoeuvred having regard to their excessive weight when fully laden.

6 On 22 March 2000, the jury found in favour of Mr Wail. Mr Wail was awarded general damages of $100,000 and pecuniary loss damages of $315,000. After a subtraction of $104,411.60 pursuant to s 135A of the *Accident Compensation Act* 1985 (Vic), the balance of damages was reduced by 35 per cent to take account of Mr Wail's contributory negligence. As a result, the trial judge entered judgment for Mr Wail in the amount of $201,822.46 with damages by way of interest of $2,000 and costs to be paid on a "solicitor/client" basis. The findings of the jury, and the consequential orders of the trial judge in this respect, are not the subject of an appeal to this Court. However, it will be necessary further to consider the basis of the jury's determination as to the negligence of Brambles later in these reasons.

7 By a third party notice deemed to have been served on 7 June, Brambles had joined Andar as a party to the County Court proceedings. It had sought an indemnity from Andar in respect of any damages which Brambles might be ordered to pay to Mr Wail or, in the alternative, contribution by reference to Andar's own alleged negligence as the employer of Mr Wail. By agreement between the parties, the issues arising on the third party notice were heard by Judge Kent sitting without a jury. On 6 June 2001, Judge Kent dismissed Brambles' claims against Andar.

8 Brambles appealed against the jury verdict and the orders of Judge Kent in the principal proceeding and the third party proceeding[2]. On 27 September 2002, the Court of Appeal (Winneke P, Charles and Batt JJA) dismissed the appeal in respect of the former, but allowed the appeal in respect of the latter. The Court held that a contractual agreement said to be in force between Brambles and Andar obliged Andar to indemnify Brambles against all sums payable by Brambles in the principal proceeding. Although the Court also concluded that Brambles was entitled to contribution pursuant to s 23B of the Wrongs Act, the existence of the indemnity made it unnecessary to consider further the contribution claim. Andar now appeals to this Court.

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**2** *Brambles Ltd v Wail* (2002) 5 VR 169.

9 Two primary questions arise for consideration: first, whether the Court of Appeal erred in concluding that Andar was contractually obliged to indemnify Brambles for liability incurred as a result of Mr Wail's injury; and, secondly, whether the Court of Appeal erred in concluding that a claim for contribution by Brambles against Andar pursuant to the Wrongs Act was otherwise available. The latter question in turn requires consideration of the circumstance that the person who suffered damage in the present case (Mr Wail) was a director of the company said to be jointly liable in respect of that damage (Andar) and also was responsible for the day-to-day operations of that company in respect of its laundry delivery operations. As will appear from these reasons, the first question should be answered in the affirmative and the second in the negative. The result is that the appeal should be allowed, the orders of the Court of Appeal should be set aside, and the matter should be remitted to that Court for calculation of the amount of contribution to which Brambles is entitled.

Contractual relationship

10 Before turning to the indemnity clause said to apply in the present case, it is first convenient to consider the agreement in which the clause arises. That agreement is entitled "INDEPENDENT TRUCKING CONTRACTOR AGREEMENT" ("the Agreement"). The parties to the Agreement are identified as Princes Fabricare Services ("Princes Services") and Andar. Princes Services is a division of Brambles and, for present purposes, it is convenient to refer to it as Brambles when construing the Agreement. Brambles did not dispute that the Agreement is a standard form document prepared by solicitors acting on its behalf. That, as will appear, is a significant circumstance for questions of construction of the document.

11 The Agreement is dated 28 March 1990. Pursuant to cl 1 of the Agreement, when read with the definition of "Term" on the attestation page, the Agreement is limited to a period of three years from the commencement date of 4 April 1990. During argument before this Court, and before the courts below, submissions were made concerning the extent to which the terms of the Agreement continued in force after the conclusion of the three year period. However, as will appear from these reasons, a proper construction of the indemnity clauses relied upon by Brambles makes it unnecessary to determine that question.

12 Clause 1 of the Agreement sets out the principal obligation imposed upon Andar. By virtue of that clause, Andar is obliged to make available to Brambles a specified truck for use in connection with Brambles' laundry delivery business. Clause 2 regulates the operation of the truck. Amongst other things, Andar is

required to procure and retain the services of a "suitably qualified driver" to operate the truck (cl 2.1), and to ensure that the truck is painted with the colours and insignia of Brambles (cl 2.2). By virtue of cl 2.3, Andar is required to:

> "procure the Driver to undertake and complete a course of training to be conducted by [Brambles] at the expense of [Andar] in relation to the operational standards procedures and requirements of [Brambles] in relation to the Delivery Round to be completed by the Vehicle".

"Driver" is defined in Item 7 of the Schedule to the Agreement as "the person named in the Agreement or any other person nominated by [Andar] who has been trained and approved by [Brambles]". Mr Wail is so named on the attestation page of the Agreement. "Delivery Round" is defined in the Schedule to mean all current and future customers of Brambles' laundry business located within the geographical area assigned to Andar in the Agreement.

13 Clause 3 of the Agreement is headed "Principal Obligations of [Andar]". By virtue of cl 3.4, Andar is obliged to procure "prompt compliance" by Mr Wail "with the conditions and provisions of any plans and schemes formulated by [Brambles]". Andar is further required to repair, maintain and fit out the vehicle in accordance with Brambles' instructions, plans and/or specifications and to obtain and install any fixtures, fittings and equipment in the vehicle as may be prescribed by Brambles (cl 3.11). In this way, the Agreement seeks to balance a right to supervise the operations and conduct of the truck and driver with the competing objective of isolating the truck drivers from Brambles' employment structure. In this context, cl 9 is relevant. That clause is headed "Direction and Control" and provides that:

> "[Mr Wail] shall not form part of [Brambles'] organisation and [Mr Wail] and any other employee nominee or agent of [Andar] shall not be under the direction or control of [Brambles] but [Brambles] shall have the right to notify [Andar] that it is dissatisfied with the manner in which the Delivery Round is being completed and in that event [Andar] (if required by [Brambles]) may substitute another Driver."

14 It is now convenient to consider the extent and scope of the indemnity sought to be relied upon by Brambles in this appeal.

Indemnity provisions

15 Mention should first be made of cl 4 of the Agreement. That clause is headed "Further Obligations of [Andar]". Clause 4.6 provides that Andar agrees:

"[t]o assume sole and entire responsibility for and indemnify [Brambles] against all claims liabilities losses expenses and damages arising from operation of the Vehicle by reason of any happening not attributable to the wilful negligent or malicious act or omission of [Brambles]".

A second right of indemnity is contained in cl 8 of the Agreement. It is this clause, and, in particular, cll 8.2.2 and 8.2.3, upon which Brambles seeks to rely in order to ground the liability of Andar to indemnify Brambles for the judgment entered against it in respect of Mr Wail's injury. It is convenient to set out cl 8 in full:

"[Andar] shall –

8.1 Conduct the Delivery Round at its sole risk and releases [Brambles] from all claims and demands of every kind and from all liabilities of every kind which may arise in respect of any accident loss or damage to property or death of or injury to any person of any nature or kind in the conduct of the Delivery Round by [Andar].

8.2 Indemnify [Brambles] from and against all actions, claims, demands, losses, damages, proceedings, compensation, costs, charges and expenses for which [Brambles] shall or may be or become liable whether during or after the currency of the Agreement and any variation renewal or extension in respect of or arising from –

8.2.1 loss damage or injury from any cause to property or person occasioned or contributed to by the neglect or default of [Andar] to fully, duly, punctually and properly pay, observe and perform the obligations, covenants, terms and conditions contained in the Agreement and on the part of [Andar] to be paid, observed and performed.

8.2.2 loss, damage, injury or accidental death from any cause to property or person caused or contributed to by the conduct of the Delivery Round by [Andar].

8.2.3 loss, damage, injury or accidental death from any cause to property or person occasioned or contributed to by any act, omission, neglect or breach or default of [Andar].

> [N]otwithstanding that any of such actions, claims, demands, losses, damages, proceedings, compensation, cost, charges, and expenses shall have resulted from any act or thing which [Andar] may be authorised or obliged to do under the Agreement and notwithstanding that any time waiver or other indulgence has been given to [Andar] in respect of any obligation of [Andar] under the Agreement AND PROVIDED ALWAYS it is agreed and declared that the obligations of [Andar] under this Clause shall continue after variation or termination of the Agreement and any renewal or extension in respect of any act, deed, matter or thing happening before such termination."

16 The Court of Appeal concluded that cll 8.2.2 and 8.2.3 applied to the injury incurred by Mr Wail. According to their Honours[3]:

> "In their plain and ordinary meaning both clauses are apt to cover the occurrence of the injury to Wail. His injury clearly arose out of and was contributed to by the conduct of the delivery round, the injury having been in part caused by Andar's breach of its obligation to provide a safe system of work. We see no justification for reading down the clauses so as to exclude a situation in which Brambles' negligence was partly responsible for the occurrence of the injury."

Principles of construction

17 The proper construction of cll 8.2.2 and 8.2.3 cannot be undertaken without reference to the principles of construction applicable to contractual indemnities. The starting-point is the decision of this Court in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd*[4]. In that case, the Court considered whether two clauses of a guarantee operated as conditions the breach of which would discharge the surety from liability. In answering that question in the affirmative, Mason ACJ, Wilson, Brennan and Dawson JJ said[5]:

> "At law, as in equity, the traditional view is that the liability of the surety is strictissimi juris and that ambiguous contractual provisions should be

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**3** (2002) 5 VR 169 at 191-192.

**4** (1987) 162 CLR 549.

**5** (1987) 162 CLR 549 at 561.

> construed in favour of the surety. The doctrine of strictissimi juris provides a counterpoise to the law's preference for a construction that reads a provision otherwise than as a condition. A doubt as to the status of a provision in a guarantee should therefore be resolved in favour of the surety".

In *Chan v Cresdon Pty Ltd*[6], Mason CJ, Brennan, Deane and McHugh JJ described the statement in *Ankar* set out above as evidencing a "settled principle governing the interpretation of contracts of guarantee".

18 It may be noted that the conclusions reached in *Ankar* and *Chan* as to the principles to be applied to the construction of contracts of guarantee are binding, but did not enjoy unanimous support in the early case law. In *Mason v Pritchard*[7], the Court of King's Bench was reported to have held that the terms of a guarantee "were to be taken as strongly against the party giving the guarantie as the sense of them would admit of". That approach was disputed in *Nicholson v Paget*[8]. There, Bayley B said[9]:

> "[T]his is a contract of guarantie, which is a contract of a peculiar description; for it is not a contract which a party is entering into for the payment of his own debt, or on his own behalf; but it is a contract which he is entering into for a third person: and we think that it is the duty of the party who takes such a security to see that it is couched in such words as that the party so giving it may distinctly understand to what extent he is binding himself."

The approach adopted by Bayley B echoed the decision of the Supreme Court of the United States in *Russell v Clarke*[10]. There, Marshall CJ had remarked that the law should subject a person having no interest in a transaction to pay the debt of another only when the person's undertaking manifests a clear intention to bind

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**6** (1989) 168 CLR 242 at 256.

**7** (1810) 12 East 227 at 228 [104 ER 89 at 89].

**8** (1832) 1 C & M 48 [149 ER 309].

**9** (1832) 1 C & M 48 at 52 [149 ER 309 at 311].

**10** 7 Cranch 69 (1812).

himself for that debt. In his Honour's view, "[w]ords of doubtful import ought not, it is conceived, to receive that construction"[11].

19 However, by 1840, the balance of authority had shifted in favour of the approach adopted in *Mason*. In *Mayer v Isaac*, Alderson B, with whom Gurney, Rolfe and Parke BB agreed, observed[12]:

> "There is a considerable difficulty in reconciling all the cases on this subject, arising principally from their not being at one as to the principle of decision: some laying it down that a liberal construction ought to be put upon the instrument in favour of the person giving the guarantee, as in *Nicholson* v *Paget*; others that it ought to be strictly construed, as in *Mason* v *Pritchard*. Undoubtedly, the generally received principle of law is, that the party who makes any instrument should take care so to express the amount of his own liability, as that he may not be bound beyond what it was his intention that he should be; and, on the other hand, that the party who receives the instrument, and parts with his goods on the faith of it should rather have a construction put upon it in his favour, because the words of the instrument are not his, but those of the other party. And therefore, if I were obliged to choose between the two conflicting principles which have been laid down on this subject, I should rather be disposed to agree with that given in *Mason* v *Pritchard*, than with the opinion of Bayley B, in *Nicholson* v *Paget*."

Writing in 1897, de Colyar, after referring to *Mason*, *Nicholson* and *Mayer*, summarised the position as follows[13]:

> "The result of the authorities, therefore, seems to be, that in the construction of guarantees it is a general rule that a guarantee is, like any contract to be construed against the contractor and in favour of the person receiving it."

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**11** 7 Cranch 69 at 92 (1812).

**12** (1840) 6 M & W 605 at 612 [151 ER 554 at 557].

**13** *A Treatise on the Law of Guarantees and of Principal & Surety*, 3rd ed (1897) at 200-201. See also Stearns, *The Law of Suretyship*, 2nd ed (1915) at 18-20.

However, although the conclusion reached by de Colyar continues to find support in England[14], it must be read in light of the decision of the Judicial Committee, sitting on appeal from the Court of Appeal of New South Wales, in *Coghlan v S H Lock (Australia) Ltd*[15]. In that case, decided very shortly before *Ankar*, Lord Oliver of Aylmerton referred to "certain well-known principles of construction in relation to guarantees" and observed[16]:

> "Such a document falls to be construed strictly; it is to be read contra proferentem; and, in case of ambiguity, it is to be construed in favour of the surety."

In any event, it should be noted that the rationale for the approach adopted in *Mayer* appears to lie in the circumstance that the guarantee there in question was prepared and drafted by the guarantor; hence the statement by Alderson B that "the party who makes any instrument should take care so to express the amount of his own liability"[17]. Such reasoning can have no application in circumstances where, as here, the relevant instrument was drafted by a party other than the guarantor or indemnifier[18].

20 In *Ankar*, reference was also made to a distinction then accepted in the United States between the construction of guarantees in which the surety was "compensated" and those in which the surety was not. Mason ACJ, Wilson, Brennan and Dawson JJ observed[19]:

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**14** Moss and Marks, *Rowlatt on Principal and Surety*, 5th ed (1999) at 44; cf Andrews and Millett, *Law of Guarantees*, 3rd ed (2000) at 70-71.

**15** (1987) 8 NSWLR 88.

**16** (1987) 8 NSWLR 88 at 92; cf *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd* [1996] 2 BCLC 69 at 77 (PC).

**17** (1840) 6 M & W 605 at 612 [151 ER 554 at 557].

**18** See also *Halford v Price* (1960) 105 CLR 23 at 30, 34, 40, 41 (an insurance policy case); *Davis v Commissioner for Main Roads* (1968) 117 CLR 529 at 534 (a contract of indemnity case).

**19** (1987) 162 CLR 549 at 560.

> "In the United States the rule of strict construction, though applied in favour of sureties who receive no reward, is not applied to a compensated surety, ie, a surety for reward. On the contrary the suretyship contract is construed against the compensated surety."

Their Honours referred to the decision of the Supreme Court of the United States in *Chapman v Hoage*. In that case, Stone J, speaking for the Court, said[20]:

> "One who engages in the business of insurance for compensation may properly be held more rigidly to his obligation to indemnify the insured than one whose suretyship is an undertaking uncompensated and casual."

In *Ankar*, this Court declined to adopt the distinction in the United States cases. No party in the present case has sought to dispute *Ankar*. Moreover, in any consideration of the law in the United States it is important to note that the mere circumstance that a surety undertakes its obligations for consideration or profit does not automatically result in the characterisation of that surety as "compensated"[21]. Rather, the expression "compensated surety" appears to be directed toward corporations whose regular business is the writing of surety agreements and who, as a result, are able to assess the risk involved under each agreement and charge compensatory premiums accordingly[22]. So much was made clear by the *Restatement of the Law of Security* promulgated in 1941. This defined the expression to mean[23]:

> "[A] person who engages in the business of executing surety contracts for a compensation called a premium, which is determined by a computation of risks on an actuarial basis."

Other sureties, whether strictly gratuitous or whether receiving some pecuniary advantage, whose surety contracts were occasional and incidental to other

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**20** 296 US 526 at 531 (1936).

**21** *Bank of Nova Scotia v St Croix Drive-In Theatre Inc* 728 F 2d 177 at 181 (1984).

**22** *Bank of Nova Scotia v St Croix Drive-In Theatre Inc* 728 F 2d 177 at 181 (1984); Stearns, *The Law of Suretyship*, 5th ed (1951) at 89-92; Arnold, "The Compensated Surety", (1926) 26 *Columbia Law Review* 171 at 172-173.

**23** §82, comment (i).

business, did not fall within the definition of a "compensated surety"[24]. It follows that the present case falls outside the approach adopted in the United States with respect to compensated sureties.

21 In any event, it may be significant that the recent *Restatement of the Law of Suretyship and Guaranty*, promulgated since *Ankar* was decided, no longer distinguishes between compensated and uncompensated sureties[25]. The result appears to be that, in jurisdictions which apply the *Restatement*, guarantees will no longer be construed in favour of an uncompensated surety in the event of ambiguity[26]. That circumstance may be a further example of the concern in the United States, identified but rejected in *Ankar*, that the law not be over-zealous in its protection of sureties[27]. It is, however, unnecessary further to consider the United States position given the reasoning in *Ankar* and the position of the parties in the present appeal.

22 This case concerns not a guarantee but an indemnity: guarantee provisions such as those considered in *Ankar* and indemnity clauses such as those at issue in the present case differ in form and effect. In *Sunbird Plaza Pty Ltd v Maloney*, Mason CJ said[28]:

> "Discussion of the question must begin with the proposition, established by the cases on s 4 of the *Statute of Frauds* 1677 (UK) that a contract of guarantee is, subject to any qualifications made by the particular instrument, a collateral contract to answer for the debt, default or miscarriage of another who is or is contemplated to be or to become liable to the person to whom the guarantee is given. Such a promise was required by s 4 of the *Statute of Frauds* to be evidenced in writing, unlike a contract of indemnity, which stands outside the statutory requirement. An indemnity is a promise by the promisor that he will keep the promisee

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**24** §82, comment (i).

**25** See, eg, §14, comment (c) with §49, comment (b).

**26** cf *Corpus Juris Secundum*, (1987), vol 72 at 232.

**27** See *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 at 560.

**28** (1988) 166 CLR 245 at 254.

harmless against loss as a result of entering into a transaction with a third party." (footnotes omitted)

23 However, notwithstanding the differences in the operation of guarantees and indemnities, both are designed to satisfy a liability owed by someone other than the guarantor or indemnifier to a third person. The principles adopted in *Ankar*, and applied in *Chan*, are therefore relevant to the construction of indemnity clauses[29].

Conclusions as to construction

24 Before this Court, Andar submits that cll 8.2.2 and 8.2.3 are limited to the indemnification of Brambles against any vicarious liability which Brambles might incur against third parties. Such a construction would, if adopted, prevent recourse to the clauses in respect of injuries suffered by employees of Andar such as Mr Wail.

25 On their face, neither cl 8.2.2 nor cl 8.2.3 expressly provides that liability arising on the part of Brambles as a result of injuries suffered to employees of Andar falls within the terms of the indemnity. That omission is not surprising. As noted earlier in these reasons, one of the primary concerns of the Agreement is to ensure that, to *outside observers*, Brambles appears to be the sole entity involved in the provision of the relevant laundry services. In this way, the Agreement may be seen as an attempt to minimise, as far as is possible, the practical effects of the change in business practice embarked upon by Brambles when it required employees such as Mr Wail to be employed by independent corporations. The obligation upon Andar to paint the vehicle used by Mr Wail with the Brambles livery and name is a practical example of this desire to present to the public at large a seamless delivery operation. The possibility of a suit against Brambles premised upon vicarious liability was, in these circumstances, a distinct possibility.

26 There are additional reasons for adopting Andar's proposed construction of the indemnity. With respect to cl 8.2.2, the indemnity is limited to liability

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**29** See *Davis v Commissioner for Main Roads* (1968) 117 CLR 529 at 534, 537; *Smith v South Wales Switchgear Co Ltd* [1978] 1 WLR 165; [1978] 1 All ER 18; *Greenwell v Matthew Hall Pty Ltd (No 2)* (1982) 31 SASR 548. See also Andrews and Millett, *Law of Guarantees*, 3rd ed (2000) at 73; O'Donovan and Phillips, *The Modern Contract of Guarantee*, Eng ed (2003) at 258-259.

arising in connection with the "conduct of the Delivery Round by [Andar]". As noted earlier in these reasons, the effect of cl 2.1 of the Agreement was that the Delivery Round could only be "conducted" by Andar through a nominated driver. In the absence of an express provision to the contrary, it is unlikely that the indemnity contained in cl 8 extends to liability arising in respect of injuries suffered by that nominated driver as a result of the conduct of the Delivery Round by that person.

27 With respect to cl 8.2.3, the phrase "injury … from any cause to property or person occasioned or contributed to by any act, omission, neglect or breach or default of [Andar]" is critical. That expression contains two elements: first, an injury suffered by a "person" and, secondly, a requirement that the injury be occasioned, or contributed to, by the conduct of Andar. In the context of the Agreement as a whole, the latter element required the involvement of Mr Wail as driver. The structure of the clause therefore suggests that the person mentioned in the first element is a person other than the person necessarily encompassed within the second.

28 This construction of cll 8.2.2 and 8.2.3 has the advantage of operating consistently with cl 4.6. That clause provides for an indemnity granted by Andar in favour of Brambles which does not extend to liabilities arising from the operation of the truck which are attributable to the negligent acts or omissions of Brambles. The liability for which Brambles now seeks an indemnity clearly falls within that limitation.

29 Finally, to the extent that cll 8.2.2 and 8.2.3 remain ambiguous, the principles of construction outlined earlier in these reasons require the provisions to be construed in favour of Andar. Accordingly, cll 8.2.2 and 8.2.3 do not oblige Andar to indemnify Brambles in respect of liability arising as a result of Mr Wail's injury. That conclusion makes it unnecessary to consider the extent to which the terms of the Agreement continued in force after their formal expiry on 4 April 1993.

The Wrongs Act

30 Part IV of the Wrongs Act (ss 23A-24AD) establishes a statutory right to contribution. The history and scope of Pt IV was recently discussed by this Court in *Alexander v Perpetual Trustees WA Ltd*[30].

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**30** (2004) 78 ALJR 411; 204 ALR 417.

31 Section 23B of the Wrongs Act is headed "Entitlement to contribution". Sub-section (1) thereof provides that:

> "Subject to the following provisions of this section, *a person liable in respect of any damage suffered by another person* may recover contribution from any other person liable in respect of the same damage (whether jointly with the first-mentioned person or otherwise)." (emphasis added)

Section 24(2) provides that the amount of contribution recoverable under s 23B shall be such as may be found by the jury, or by the court if the trial is without a jury, "to be just and equitable having regard to the extent of that person's responsibility for the damage". That sub-section also permits the judge or jury to exempt a person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

32 The phrase italicised in s 23B(1) as set out above is given content by s 23A. Sub-section (1) thereof provides:

> "For the purposes of this Part a person is liable in respect of any damage if the person who suffered that damage, or anyone representing the estate or dependants of that person, is entitled to recover compensation from the first-mentioned person in respect of that damage whatever the legal basis of liability, whether tort, breach of contract, breach of trust or otherwise."

33 In *Alexander*, Gleeson CJ, Gummow and Hayne JJ said[31]:

> "Two relevant propositions are … central to the proper application of s 23B as it is to be understood in the light of s 23A. First, the party claiming contribution (the claimant) must show that it is liable in respect of damage suffered by another person (the injured plaintiff). Secondly, the claimant may recover contribution from any other person (the potential contributor) who is also liable to the injured plaintiff in respect of the same damage. The relevant inquiry is not confined to whether the damage for which each is liable can be said to be the same; both claimant and potential contributor must be liable to the injured plaintiff."

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**31** (2004) 78 ALJR 411 at 417 [32]; 204 ALR 417 at 425.

In the present case, there is no dispute that the first of those propositions has been satisfied as a result of the findings made against Brambles by the jury at trial. This appeal is therefore concerned with the second proposition. Put shortly, the issue to be determined is whether Andar is liable to Mr Wail for the injury suffered by him on 26 July 1993. The Court of Appeal answered that question in the affirmative. In our view, it was correct to do so.

Employer's common law duty of care

34 It is well accepted that, in the absence of statutory provisions to the contrary, an employer owes a common law duty to its employees to take reasonable care for their safety[32]. The duty encompasses an obligation to take reasonable steps to provide safe plant and machinery and a safe system of work. Of particular significance in the present case are two features of the duty. The first is its non-delegability[33]. In *Kondis v State Transport Authority*, Deane J said[34]:

> "[I]n the context of the particular relationship of employer and employee and of the undertaking by the employee of the general obligation to work in the interests of the employer, the content of the employer's duty to take reasonable care to provide a safe system and conditions of work for the employee is not discharged by delegation unless the delegate, be he employee or independent contractor, in fact provides the reasonable care which the employer was under an obligation to bring to bear."

The second feature to be noted is that the duty is imposed upon all employers, however the business be formed or structured. As Lord Wright noted in *Wilsons and Clyde Coal Co Ltd v English*[35]:

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**32** *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18 at 25; *Commissioner for Railways (NSW) v O'Brien* (1958) 100 CLR 211 at 216-217; *O'Connor v Commissioner for Government Transport* (1954) 100 CLR 225 at 229; *Ferraloro v Preston Timber Pty Ltd* (1982) 56 ALJR 872 at 873; 42 ALR 627 at 629.

**33** See *Kondis v State Transport Authority* (1984) 154 CLR 672 at 688, 689, 694, 695; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 32, 44, 49; *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906 at 919.

**34** (1984) 154 CLR 672 at 694.

**35** [1938] AC 57 at 84.

> "[T]he whole course of authority consistently recognizes a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, *whether the employer be an individual, a firm, or a company, and whether or not the employer takes any share in the conduct of the operations*." (emphasis added)

35 In the present case, Andar seeks to qualify the substantive effect of this proposition. In Andar's submission, Mr Wail's status as a director of Andar and, in particular, his responsibility for the day-to-day operation of Andar's laundry delivery business prevented his recourse to Andar for any breach by Andar of the common law duty to take reasonable care. At bottom, Andar complains that it should not be made liable to Mr Wail, in his capacity as an employee, for a breach of duty committed by him in his capacity as a director.

Statutory obligations

36 The submissions of Andar seek to derive support from decisions given in litigation concerning statutory obligations imposed upon employer and employee alike[36]. One example is the decision of Pearson J in *Ginty v Belmont Building Supplies Ltd*[37]. In that case, the plaintiff employee was injured as a result of failing to use boards to support his weight when working on an asbestos roof. He had been instructed to use the boards by his employer and had been supplied with them. His failure to follow his employer's instructions amounted to a breach of the Building (Safety, Health and Welfare) Regulations 1948 on the part of both himself and his employer. In such circumstances, Pearson J held that the plaintiff was unable to recover damages from the employer for breach of statutory duty. His Lordship observed[38]:

> "[T]he important and fundamental question in a case like this is not whether there was a delegation, but simply the usual question: *Whose fault was it?* ... If the answer to that question is that in substance and reality *the accident was solely due to the fault of the plaintiff*, so that he was the sole author of his own wrong, he is disentitled to recover. But that has to be applied to the particular case and it is not necessarily

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**36** See, generally, Stanton et al, *Statutory Torts*, (2003) at 329-332.

**37** [1959] 1 All ER 414.

**38** [1959] 1 All ER 414 at 423-424.

> conclusive for the employer to show that it was a wrongful act of the employee plaintiff which caused the accident. … One has to inquire whether the fault of the employer under the statutory regulations consists of, and is co-extensive with, the wrongful act of the employee. If there is some fault on the part of the employer which goes beyond or is independent of the wrongful act of the employee, and was a cause of the accident, the employer has some liability." (emphasis added)

Reference may also be made in this context to *Ross v Associated Portland Cement Manufacturers Ltd*[39] and *Boyle v Kodak Ltd*[40].

37 Various rationales have been posited in order to justify the propositions outlined by Pearson J and subsequently developed in *Ross* and *Boyle*[41]. For Pearson J himself, as for the House of Lords in the two later cases, the issue was best seen as one of causation; hence the requirement propounded by Pearson J that the plaintiff will be unsuccessful where the accident was "solely due" to the plaintiff's own conduct[42].

38 The reasoning evident in *Ginty*, *Ross* and *Boyle* suffers from fundamental infirmities. In *March v Stramare (E & M H) Pty Ltd*[43], Mason CJ ascribed the historical concern with the identification of a "sole" or "effective" cause to the existence of the absolute defence of contributory negligence at common law and the absence of any mechanism for the apportionment of liability between plaintiff and defendant. In the joint judgment in *Astley v Austrust Ltd*[44], reference was

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**39** [1964] 1 WLR 768 at 777; [1964] 2 All ER 452 at 455.

**40** [1969] 1 WLR 661 at 668; [1969] 2 All ER 439 at 442.

**41** See, eg, *Shedlezki v Bronte Bakery Pty Ltd* (1970) 72 SR (NSW) 378 at 388-389; *Buckman (H C) & Son Pty Ltd v Flanagan* (1974) 133 CLR 422 at 442; *Nicol v Allyacht Spars Pty Ltd* (1987) 163 CLR 611 at 623-624.

**42** See also *Ross v Associated Portland Cement Manufacturers Ltd* [1964] 1 WLR 768 at 777, 783-784, 787; [1964] 2 All ER 452 at 455, 460, 462; *Boyle v Kodak Ltd* [1969] 1 WLR 661 at 667, 668, 670, 673; [1969] 2 All ER 439 at 441, 442, 444, 446; Stanton et al, *Statutory Torts*, (2003) at 329.

**43** (1991) 171 CLR 506 at 511. Toohey J (at 524) and Gaudron J (at 525) agreed with Mason CJ.

**44** (1999) 197 CLR 1 at 14-15 [31].

made to the course of authority culminating in *Davies v Adelaide Chemical and Fertilizer Co Ltd*[45]. This established that a plaintiff could be guilty of contributory negligence and the defendant have a good defence even though the plaintiff was injured as a result of a breach of a statutory duty whose very purpose was to prevent that type of injury by placing the defendant under a duty to protect people in the class of which the plaintiff was a member.

39 However, since the displacement of the absolute defence by the statutory apportionment of damages between those at fault in accordance with the degree of their individual responsibility, a different situation has applied. In *March*[46], Mason CJ concluded that "the courts are no longer as constrained as they were to find a single cause for a consequence". The propositions contained in *Ginty*, and developed in *Ross* and *Boyle*, would, if adopted, mark a significant exception to that circumstance. To the extent that the reasoning in *Ginty* and cognate decisions was adopted in this Court in *Nicol v Allyacht Spars Pty Ltd*[47], it should now be emphasised that that reasoning has since been undermined by that in *March* which fixed upon the removal of that "fertile source of confusion" in the common law, the defence of contributory negligence, for "the development of a coherent legal concept of causation"[48]. The reasoning in *Ginty* should no longer be accepted. Further, the reasoning of Dawson J in his dissenting judgment in *Nicol* should be preferred.

40 Moreover, the reliance on principles of causation evident in *Ginty* and its successors may more accurately be viewed as a means of masking the introduction of an extraneous policy judgment as to the circumstances in which an employee should be permitted to recover against an employer who has contravened an obligation imposed by statute. That causation has, in truth, only a small role to play is demonstrated by the principle that an employee can recover damages from an employer for breach of a statutory duty notwithstanding that the "sole cause" of the plaintiff's injury is a breach of the same duty committed by a fellow employee[49]. Perhaps with this objection in mind, attempts have been

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**45** (1946) 74 CLR 541 at 545, 547, 549.

**46** (1991) 171 CLR 506 at 512.

**47** (1987) 163 CLR 611.

**48** (1991) 171 CLR 506 at 511.

**49** See *Buckman (H C) & Son Pty Ltd v Flanagan* (1974) 133 CLR 422 at 442.

made to present the reasoning of Pearson J as an aspect of the proper construction of the relevant statutory obligation. The necessary tension that results from such an approach is evident in the judgment of Mason J in *Buckman (H C) & Son Pty Ltd v Flanagan*[50]. There, his Honour observed[51]:

> "The language in which the principle has been expressed, notably that of Lord Reid in *Boyle's Case*[52], tends perhaps to suggest that it is a rule invented by the courts as a proposition of the general law superimposed upon statutory provisions which impose a duty and create a cause of action in favour of private individuals. I would not wish to quarrel with these observations so long as it is understood that the formulation of the principle is not unconnected with the construction of the relevant statutory provisions. Were it otherwise I should feel some difficulty in its application in New South Wales in face of s 2(1) of the *Statutory Duties (Contributory Negligence) Act* [1945 (NSW)] which provides that contributory negligence shall not be a defence to an action for damages for personal injury founded on a breach of a statutory duty imposed on the defendant for the benefit of a class of persons of which the plaintiff was a member[53]."

41 The liability incurred by employers on breach of statutory obligations of the kind considered in cases such as *Ginty* is, ordinarily, strict[54]. In such circumstances, caution should be exercised before implying limitations on the right of an employee to recover for breach of that obligation. Especially is this the case where Parliament has provided a mechanism for the apportionment of responsibility between employee and employer.

42 It may certainly be accepted that, in the absence of an express provision conferring a cause of action upon employees for breach of their employers' obligation, courts have recognised the plaintiff's right by implication and as an

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**50** (1974) 133 CLR 422. See also the judgment of Mason JA in *Shedlezki v Bronte Bakery Pty Ltd* (1970) 72 SR (NSW) 378 at 389-390.

**51** (1974) 133 CLR 422 at 442.

**52** [*Boyle v Kodak Ltd*] [1969] 1 WLR 661 at 665-666; [1969] 2 All ER 439 at 440.

**53** cf *Sherman v Nymboida Collieries Pty Ltd* (1963) 109 CLR 580 at 591.

**54** See, eg, *Australian Iron and Steel Ltd v Ryan* (1957) 97 CLR 89 at 95-96.

exercise in statutory interpretation[55]. However, that process does not in turn permit the development of a limitation which cannot legitimately be inferred from the nature, scope and terms of the legislation in question. These implications are, as Kitto J put it in *Sovar v Henry Lane Pty Ltd*[56], not to be "conjured up by judges to give effect to their own ideas of policy". There must be read with these qualifications in mind statements to the effect of those in *Nicol* that "[t]he courts, having created the liability, are able to confine it"[57] and that "the approach [in *Ginty*] to the question of an employer's escape from liability for breach of statutory duty may be applied with equal validity to the question of an employer's escape from liability for breach of a common law duty"[58].

Sole duty of employer

43 In any event, it is significant that an underlying threshold requirement for the application of the reasoning propounded in *Ginty* is that the duty breached by both the employer and employee be co-extensive or co-terminous[59]. As will appear, the existence of that requirement is a further bar to the ability of Andar to rely upon those principles in order to avoid liability for the injury incurred by Mr Wail.

44 Unlike the statutory duties construed in *Ginty* and its successors, the common law duty to take reasonable care for the safety of employees is imposed solely upon an employer. No equivalent duty was imposed upon Mr Wail in his capacity as employee. In such circumstances, questions such as "Whose fault was it?" are apt to mislead. This is because any breach of duty committed by Andar was inherently different in scope and effect from any negligence of Mr Wail at the time of the accident. It must follow that the requirement of co-extensiveness necessary in order to take advantage of the reasoning evident in

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**55** *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 404-405.

**56** (1967) 116 CLR 397 at 405.

**57** (1987) 163 CLR 611 at 624.

**58** (1987) 163 CLR 611 at 621.

**59** See *Nicol v Allyacht Spars Pty Ltd* (1987) 163 CLR 611 at 623. See also Stanton et al, *Statutory Torts*, (2003) at 331; Glass, McHugh and Douglas, *The Liability of Employers*, 2nd ed (1979) at 233-234.

cases such as *Ginty* did not exist in the present case. In *Nicol*, in a passage with which we agree, Dawson J said[60]:

> "[I]t does not seem to me that the duty of an employer and an employee in such regard can ever be co-extensive or co-terminous. The duty is that of the employer and even if the employee is entrusted with its performance it remains an independent obligation of the employer of a more comprehensive kind to ensure that reasonable care is taken."

Corporate structure

45 During argument, the submissions of Andar evidenced a reluctance to accept that an individual may act both as a director of a company and that company's employee without unduly affecting the company's legal capacity. However, in *Peate v Federal Commissioner of Taxation*, Windeyer J remarked[61]:

> "It is not in legal theory impossible or incompatible for a person to be both governing director in sole control of a company and servant of that company or its agent to contract on its behalf, 'always assuming', said Lord *Morris*, 'that the company was not a sham'[62]. If a company is duly incorporated and registered under the Act and the proper records are kept in due form and the prescribed returns are made, it continues to exist as a legal entity."

46 So much is now made clear by s 124 of the *Corporations Act* 2001 (Cth). As a company registered pursuant to that Act, Andar enjoys by virtue of that section the legal capacity and powers of an individual. That such powers can only be exercised on Andar's behalf by natural persons in no way impacts upon their force and effect[63]. Thus it has been said that a company may be charged with an offence as principal, and the director charged as an accessory,

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**60** (1987) 163 CLR 611 at 625. See also the judgment of Mason JA in *Shedlezki v Bronte Bakery Pty Ltd* (1970) 72 SR (NSW) 378 at 389-390.

**61** (1964) 111 CLR 443 at 480; affd (1966) 116 CLR 38 (PC); [1967] 1 AC 308. See also *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567 at 577; *Nicol v Allyacht Spars Pty Ltd* (1987) 163 CLR 611 at 616-617.

**62** *Lee v Lee's Air Farming Ltd* [1961] AC 12 at 26.

**63** See *Shedlezki v Bronte Bakery Pty Ltd* (1970) 72 SR (NSW) 378 at 389-390.

notwithstanding that the elements constituting both offences were committed by the director alone[64]. In *R v Goodall*, Bray CJ remarked[65]:

> "[T]he logical consequence of *Salomon's Case*[66] is that the company, being a legal entity apart from its members, is also a legal person apart from the legal personality of the individual controller of the company, and that he in his personal capacity can aid and abet what the company speaking through his mouth or acting through his hand may have done."

That statement of principle was accepted as correct by Mason CJ, Wilson and Toohey JJ in *Hamilton v Whitehead*[67].

47 Reliance was also placed by Andar upon the circumstance that Mr Wail had day-to-day control of that part of the company's business which related to the company's obligations under the Agreement. However, as is indicated by the statements in *Goodall* and *Whitehead*, the circumstance that a company may ultimately be owned or controlled by one person will not affect its status as a legal entity that is distinct from its members or controllers.

48 So much has been recognised in the United States in the context of attempts by the directors of small or one-person companies to claim the Fifth Amendment privilege against self-incrimination and avoid the production of company documents under subpoena. In *Bellis v United States*[68], Marshall J, delivering the opinion of the Supreme Court, noted that "[i]t is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be". This is so even where the disclosure of the

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**64** *Hamilton v Whitehead* (1988) 166 CLR 121. See also *Attorney-General's Reference (No 2 of 1982)* [1984] QB 624; *Macleod v The Queen* (2003) 77 ALJR 1047 at 1052 [28]-[29]; 197 ALR 333 at 340.

**65** (1975) 11 SASR 94 at 101.

**66** *Salomon v Salomon & Co* [1897] AC 22.

**67** (1988) 166 CLR 121 at 128.

**68** 417 US 85 at 100 (1974). See also *Braswell v United States* 487 US 99 at 113 (1988); *United States v Stone* 976 F 2d 909 at 912 (1992). *Braswell* was discussed in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 esp at 492-493, 515, 527-531, 542.

relevant corporate records is likely to incriminate the custodian personally[69]. The rationale for this rule is that where a person holds documents as a custodian for a company they do so in a representative, rather than personal, capacity[70]. Their production of documents is deemed to be an act of the corporation, rather than a personal act[71].

49 In this way, it is possible here to distinguish between the common law duties owed by Andar and those owed by Mr Wail in his personal capacity as director or employee. The common law duty to take reasonable care for the safety of employees is imposed directly upon Andar by virtue of its status as an employer. The duty is not imposed upon individual directors of a corporate employer. (The duties which directors have are different. For the most part, they are found in the applicable corporations law, and are owed to the company, not others.) To seek, as Andar does, to derive some significance from the circumstance that the board of the company is limited to two directors and that one of those directors (Mr Wail) ordinarily manages aspects of the delivery business is therefore to ignore the nature of the obligation relevantly imposed upon Andar by the common law.

50 Similar observations were made by Mason JA in *Shedlezki v Bronte Bakery Pty Ltd*[72] in the context of an alleged breach by an employer of a statutory obligation to fence off dangerous parts of a dough-cutting machine pursuant to s 33(1) of the *Factories and Shops Act* 1912 (NSW). There, his Honour said[73]:

> "The evidence discloses that the plaintiff, who with his wife held the entire share capital of the defendant and who was the managing director of the defendant, was in control of the day-to-day activities of the company. However, except in so far as the evidence justifies the conclusion that the plaintiff was subject in his own right to the duties imposed by the [*Factories and Shops Act*] … it matters not that the

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**69** 417 US 85 at 88 (1974).

**70** *United States v White* 322 US 694 at 699 (1944); *Braswell v United States* 487 US 99 at 107, 110 (1988).

**71** *Braswell v United States* 487 US 99 at 110 (1988).

**72** (1970) 72 SR (NSW) 378.

**73** (1970) 72 SR (NSW) 378 at 386.

> plaintiff had control or the capacity to control the defendant's activities, for the principle that a corporation is a legal entity distinct from the corporators applies with equal force to a company which is 'a one man' company[74]."

51 Nor, in the event of a company's insolvency, would it be open to a third party creditor of the company to commence proceedings personally against a director for recovery of the debt merely on the basis that the director had day-to-day control of the company's dealings with the third party[75].

52 For these reasons, the Court of Appeal correctly concluded that Brambles' claim for contribution was not barred by Mr Wail's dual responsibilities as a director and employee of Andar.

Safe system of work

53 Although the exact basis upon which the jury held Brambles negligent to Mr Wail is not entirely clear, it was accepted during argument that the jury had concluded that the trolleys provided by Brambles were not safe to use. No challenge is made to that finding before this Court. On one view, it follows that Andar in turn breached its common law duty to provide its employees with safe equipment and a safe system of work. This was the approach adopted by the Court of Appeal[76]:

> "Brambles supplied Andar with trolleys and linen to deliver to and collect from various hospitals, and the jury's verdict shows that the trolleys were not safe to use. It necessarily follows that since Andar had a duty to take reasonable care in making the trolleys and the system of handling them safe, there was a breach of Andar's duty to Wail to provide a safe system of work."

However, Andar submits that the jury's finding of breach on the part of Brambles does not determine the question of Andar's liability to Mr Wail. In Andar's submission, there was insufficient evidence before Judge Kent (who heard the contribution application without a jury), and the Court of Appeal, to sustain a

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**74** *Lee v Lee's Air Farming Ltd* [1961] AC 12.

**75** See *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567 at 577.

**76** (2002) 5 VR 169 at 182; see also at 178.

finding that Andar had also breached its duty of care to Mr Wail. While the case against Andar was not a particularly strong one, the insufficient-evidence point should not succeed in this Court.

54 Andar's submissions in particular focused upon whether or not it had breached its duty to provide a "safe system of work" to Mr Wail. In *English v Wilsons and Clyde Coal Co Ltd*, Lord Aitchison described a "system of work" in the following terms[77]:

> "[B]roadly stated, the distinction is between the general and the particular, between the practice and method adopted in carrying on the master's business of which the master is presumed to be aware and the insufficiency of which he can guard against, and isolated or day to day acts of the servant of which the master is not presumed to be aware and which he cannot guard against; in short, it is the distinction between what is permanent or continuous on the one hand and what is merely casual and emerges in the day's work on the other hand."

Similarly, it has been said that "[a] system of working normally implies that the work consists of a series of similar or somewhat similar operations"[78]. The loading and unloading of linen trolleys from a delivery truck, pursuant to a contractual arrangement requiring regular repetition of that activity, clearly falls within these descriptions. As a result, Andar was obliged to take reasonable steps to ensure that the loading and unloading was carried out in a safe manner. That obligation in turn required Andar to develop, and maintain, a methodology or system which would achieve that result. As a sub-set of the general common law duty of care outlined earlier in these reasons, the obligation is non-delegable. This Court's decision in *Nicol* demonstrates that an employer may be liable for breach of the duty notwithstanding that the system of work was devised, in part, by an employee who was subsequently injured as a result of carrying out the system[79].

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**77** 1936 SC 883 at 904. See also *Speed v Thomas Swift & Co* [1943] KB 557 at 563.

**78** *Winter v Cardiff Rural District Council* [1950] 1 All ER 819 at 825 per Lord Reid. See also Glass, McHugh and Douglas, *The Liability of Employers*, 2nd ed (1979) at 20-21.

**79** (1987) 163 CLR 611 at 618. See also *Munkman on Employer's Liability*, 13th ed (2001) at 140.

55 In our view, Andar failed to take reasonable steps to develop and maintain a safe system of work for its employees in relation to the loading and unloading of the truck with linen trolleys. On the evidence adduced at trial, it was clear that the loading of 22 trolleys into the truck could result in the jamming of those trolleys by the time they were ready to be unloaded. The significant weight of the trolleys, the circumstance that the trolley wheels were not fixed in one direction, and the level of the gradient upon which the truck was parked were all factors which could be expected to facilitate the jamming of the trolleys if they were not loaded in a particular fashion. That injuries could result from such an occurrence was reasonably foreseeable.

56 However, only limited attempts appear to have been made by Andar to prevent such jamming from occurring. The primary mechanism provided by Andar to its employees in this regard was a strap designed to be tied around the trolleys closest to the rear of the truck. Although the purpose of the strap is not entirely clear from the evidence, it appears to have been designed to assist in preventing the movement of the trolleys *after* loading. The strap, of itself, provided no assistance to Mr Wail when loading the trolleys. Thus, on the day of the accident, the trolleys had jammed notwithstanding the use of the strap.

57 That circumstance indicates the need for particular consideration to have been given to the best method of loading the trolleys in order to enable the strap to work to full effect. No such consideration appears to have been given by Andar to that aspect of its employees' work. It is not difficult to conceive of steps which reasonably could have been taken to reduce the likelihood of injury. Those steps might have involved a change in the design of the trolleys, a reduction in the amount of linen carried within them, or the alteration of the truck to ensure the correct placement of the trolleys during loading. To rely, as Andar does, on the circumstance that the trolleys had been in use by Brambles for many years previously is to ignore Andar's independent obligation to satisfy itself of the safety of the system. In any event, that a system has been in place for a significant period of time does not mean that an employer's obligations in respect of that system have been therefore complied with[80].

58 Nor can it be said that Mr Wail's injury was the result of a casual departure by him from an otherwise safe system of work. This is because the evidence did not suggest that Mr Wail had loaded the trolleys on the day of the

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**80** See, eg, *Ferraloro v Preston Timber Pty Ltd* (1982) 56 ALJR 872 at 873; 42 ALR 627 at 629; *Ross v Tennant Caledonian Breweries Ltd* 1983 SLT 676.

accident differently from previous occasions. Accordingly, it is clear that Andar did not do all that was reasonable to ensure that a safe system of work was created and maintained in respect of the loading and unloading of the linen trolleys. It is also clear that Mr Wail was injured as a result of that failure. Andar is therefore liable to Mr Wail for the damage suffered by him on that occasion.

Just and equitable

59 Given the conclusion reached earlier in these reasons that Brambles cannot rely upon the indemnity contained in cl 8 of the Agreement, further consideration need be given to the quantum of contribution to which Brambles is entitled pursuant to s 24(2) of the Wrongs Act. That inquiry is more appropriately conducted by the Court of Appeal.

60 It is, however, necessary to say something further concerning the significance to be attached to the jury's determination that Mr Wail's damages should be reduced by reference to his contributory negligence. Before this Court, Andar submitted that Andar should be exempted from paying contribution because the "causative fault" of Mr Wail in respect of his injury was "precisely equivalent" to the fault of Andar. As a result of the contributory negligence finding and subsequent apportionment at trial, Andar submitted that Brambles' responsibility for Mr Wail's injury had been identified as 65 per cent. It was said to follow that an award of contribution, after a reduction had already been made to establish the true levels of responsibility, would be inappropriate. Andar relied in part upon the decision of Jackson J in *Doyle v Pick and Rickwood*[81]. There, his Honour had said[82]:

> "As the damages awarded against the defendant correspond exclusively to his own share of the responsibility and the negligence of the third party has already been taken into account in arriving at those damages, it would not be just and equitable that the defendant should have any recovery against the third party. If it were otherwise, then the third party would have to pay twice, because he is liable at the suit of the plaintiff for his share of the responsibility for the damage."

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**81** [1965] WAR 95.

**82** [1965] WAR 95 at 96.

Andar further submitted that, in circumstances where Andar had inherited the relevant system of work from Brambles, to permit an award of contribution would be to reward Brambles for its own negligence.

61 The power of exemption invested in a judge or jury pursuant to s 24(2) is not lightly to be constrained by judicial pronouncement[83]. As this Court noted in *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc*[84]:

> "It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words[85]."

It may therefore be doubted whether s 24(2) categorically requires or denies that the submissions of Andar be adopted. Nevertheless, several points may be made which should inform the exercise of the discretion. In respect of Andar's first submission, the above reasons have sought to demonstrate that the negligence of Mr Wail and that of Andar are not to be equated. The apportionment of liability between Mr Wail and Brambles carried out at trial was a distinct and separate inquiry from that now required by s 24(2) of the Wrongs Act regarding the liability incurred by Brambles and Andar in respect of Mr Wail's injury. The Court of Appeal was therefore correct in concluding that the apportionment of liability between Mr Wail and Brambles should not determine the quantum of contribution, if any, to which Brambles was entitled against Andar[86].

62 With respect to Andar's second submission, Andar possessed an independent personal obligation to take reasonable steps to ensure that a safe system of work was established and maintained for its employees. Reliance upon the "inheritance" of a defective system cannot therefore absolve Andar from a conclusion that it breached its common law duty. However, given the width of the power conferred upon the court by s 24(2), caution should be exercised

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**83** *Soblusky v Egan* (1960) 103 CLR 215 at 235; *Amaca Pty Ltd v New South Wales* (2003) 77 ALJR 1509 at 1513 [20]; 199 ALR 596 at 601.

**84** (1994) 181 CLR 404 at 421.

**85** *See FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283-284, 290. See also *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 185, 202-203, 205.

**86** (2002) 5 VR 169 at 184.

before concluding that it would be impermissible for Andar's submission to be taken into account when considering whether or not the company should be exempted from liability. It will be for the Court of Appeal to determine whether, in all the circumstances of the case, the statutory power of exemption invested in it by s 24(2) of the Wrongs Act should be exercised on this, or any other, basis.

Conclusion

63 The appeal should be allowed with costs, the orders of the Court of Appeal dated 21 November 2002 should be set aside and the matter should be remitted to that Court for further consideration. Costs of the whole of the proceedings in the Court of Appeal will be for that Court to determine.

64 KIRBY J. The issues presented by this appeal are set out in the reasons of Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ ("the joint reasons") along with the facts[87] and the statutory provisions[88] necessary for its resolution. Because I agree in the outcome reached and orders proposed by the joint reasons, and substantially with the reasoning, I can provide my own reasons briefly, by reference to what is written there.

The three issues in the appeal

65 The three issues to be decided are:

(1) *The contractual indemnity issue*: Whether as a matter of law the terms of the indemnity clause in the written agreement between the respondent, Brambles Limited ("Brambles") and the appellant, Andar Transport Pty Ltd ("Andar") ("the Agreement") indemnified Brambles from legal liability[89];

(2) *The statutory contribution issue*: Whether the provisions of the *Wrongs Act* 1958 (Vic) ("the Wrongs Act") permitted recovery by Brambles against Andar for contribution, having regard to the suggested coextensiveness of the relevant legal positions of Andar and the plaintiff, Mr Wail; and

(3) *The scope of the contribution issue*: Whether the jury's verdict in the recovery proceedings brought by Mr Wail against Brambles for negligence, reducing his recovery against Brambles by 35 per cent for Mr Wail's contributory negligence, was determinative of, or relevant to, the contribution that a court should order in favour of Brambles against Andar.

The contract afforded no applicable indemnity

66 As to the contractual indemnity issue, it must be conceded that a first reading of the very broad language of the Agreement, and its apparent purpose as gleaned from that language, lend support to the conclusion of the Court of Appeal of Victoria[90] that the Agreement afforded Brambles a complete indemnity

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**87** Joint reasons at [1]-[16].

**88** Joint reasons at [30]-[32] setting out the relevant provisions of ss 23A and 23B of the *Wrongs Act* 1958 (Vic).

**89** Joint reasons at [15]-[16].

**90** *Brambles Ltd v Wail* (2002) 5 VR 169.

against Mr Wail's action. Thus, it can be argued that the Agreement provided the indemnity on the footing that Mr Wail's action represented a claim for "damages arising from operation of the Vehicle" (cl 4.6) and a "claim" or "demand" arising "in respect of any … damage … or injury to any person of any nature or kind in the conduct of the Delivery Round by [Andar]" (cl 8.1). Alternatively, it can be argued that the claim or demand was for "damages" for which Brambles had become liable arising out of "injury from any cause to … [a] person occasioned or contributed to by the neglect or default of [Andar]" or "caused or contributed to by the conduct of the Delivery Round by [Andar]" (cll 8.2.1 and 8.2.2)[91].

67 Two reasons suggest modification of this first impression. The first derives from the internal indication, in the language of cll 8.2.2 and 8.2.3, of the limited operation of the indemnity necessary to ensure consistency in the operation of the clause in a way apparently contemplated by cl 4.6[92]. The second reason arises from the conventional rule of construction of such indemnity clauses requiring that they be interpreted, especially in the case of any ambiguity or uncertainty, in favour of the party thereby rendered liable to afford a complete indemnity.

68 Indemnity clauses are provisions that purport to exempt one party from civil liability which the law would otherwise impose upon it. They are provisions that shift to another party the civil liability otherwise attached by law to the first party. Self-evidently this is a serious thing to do or to attempt to do. Where such indemnities are said to arise out of contracts which are ambiguous or unclear, it is not unreasonable that their provisions should be construed so that any uncertainty is resolved favourably to the party thereby burdened by legal obligations that would not otherwise attach to it[93]. In every case judges must struggle with the language of the contract. They must not use mechanical formulae. Nor do rules of interpretation provide easy answers to the judicial task[94]. However, it is sometimes useful to remember, and apply, time honoured approaches. A feature that makes doing so specially appropriate is that the propounded interpretation would shift legal liability from that which the law would otherwise normally provide.

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**91** See the terms of the indemnity provisions set out in the joint reasons at [15].

**92** Joint reasons at [28].

**93** cf *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 602 [74.4]; *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2004) 78 ALJR 508 at 537 [167]; 205 ALR 232 at 272.

**94** cf reasons of Callinan J at [122]-[124].

69 This is also a principle of construction more readily applied where, as here, the contractual indemnity appears in a standard form of contract designed to impose upon a party in a weaker bargaining position the obligations demanded by a party in a stronger economic position, which party drafts and presents the written contract for execution. It has special significance in a case like the present where there are features of the factual relationship between the parties that are designed to give an appearance to outsiders of a different relationship from that purportedly established in law by the written agreement. Here the object of the Agreement was to maintain the appearance of Brambles' control (the use of Brambles' signs and livery on the delivery truck and Brambles' supervision and power over the use of particular truck drivers). The Agreement was designed to establish a different regime of legal liability from that which therefore appeared to be the case and that which had formerly been the case. That was an employment relationship between Brambles and the truck driver engaged in driving and using the truck with Brambles' marking according to a delivery round substantially, or exclusively, designed to meet Brambles' requirements, standards and conditions.

70 It is on this footing that I agree with the reasoning of the joint reasons that a strict construction should be adopted with respect to the terms of the contractual indemnity contained in the Agreement upon the basis of which Brambles sued Andar seeking indemnity.

71 I would reserve my opinion about the general principles applicable to the construction of contracts of guarantee[95]. Clearly in Australian law, as in English law, the surety is a favoured debtor[96]. In the United States of America, a variation upon (or qualification to) this theme has been developed in the case of so-called compensated sureties[97]. An illustration of the United States approach can be seen in the decision of the Supreme Court in *Chapman v Hoage*[98]. Under that approach, a compensated surety in the United States is not favoured with the solicitude shown to private uncompensated sureties, "either with regard to interpretation of his contract or definition of his defenses"[99].

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**95** Joint reasons at [17]-[23].

**96** Holdsworth, *A History of English Law*, 3rd ed (1945), vol 5 at 298.

**97** Arnold, "The Compensated Surety", (1926) 26 *Columbia Law Review* 171; Stearns, *The Law of Suretyship*, 5th ed (1951) at 89-92.

**98** 296 US 526 (1936).

**99** Williston, *A Treatise on the Law of Contracts*, 3rd ed (1967), vol 10 at 706-707.

72 There is much to be said for this more nuanced approach to interpretation of contracts of guarantee. An acceptance of such a differentiation seems more consonant with the general moves in Australian law to interpret private contracts in accordance with their meaning and purposes freed from rigid rules inherited unquestioningly from earlier doctrines, sometimes expressed long ago in different factual, economic and social circumstances[100].

73 The unyielding application of the *strictissimi juris* rule to *all* contracts of guarantee can certainly lead to results that strike untutored observers as unrealistic and even commercially absurd. The decision in *Tricontinental Corporation Ltd v HDFI Ltd*[101] may be such a case. For this reason, at some future time, and in a proper case, it might be appropriate for this Court to revisit some of the observations appearing in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd*[102]. This is not such a case. *Ankar* was not challenged in this appeal. The issue of the liability of compensated entities was not argued. The decision in this appeal can therefore be reached without venturing upon the question. It can await another day.

74 Otherwise, for the reasons contained in the joint reasons, the contractual indemnity issue should be decided in favour of Andar. This conclusion requires that the appeal from the Court of Appeal be allowed.

Statutory contribution was available in this case

75 As to the statutory contribution issue, I agree with the general analysis in the joint reasons[103]. Andar is a corporation, a legal entity separate from Mr Wail. He may have been its effective moving spirit and public manifestation. But in law, Andar was a separate legal body. It was Mr Wail's employer. Subject to any question of fraud or any conclusion of false representation, Andar therefore owed to Mr Wail the legal duties owed by an employer to an employee. It owed those duties personally. In accordance with established doctrine, those duties were not delegable to an employee or officer of the employer, including Mr Wail. This was simply the consequence of interposing a corporate structure between

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**100** *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 at 510; *Nissho Iwai Australia Ltd v Malaysian International Shipping Corporation Berhad* (1989) 167 CLR 219 at 227.

**101** (1990) 21 NSWLR 689.

**102** (1987) 162 CLR 549 at 561. See the joint reasons at [17]-[18]. See also *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 at 256.

**103** Joint reasons at [30]-[62].

Mr Wail and Brambles, accepting that it was legally a real and not a fraudulent or purely fictitious or contrived corporate arrangement.

76 No party to this appeal argued a challenge so fundamental as to the doctrine in *Salomon's* case[104]. It is too late in the day, and inappropriate in this case, to suggest that, in law, Mr Wail and Andar were the same legal entity. In law, they had different duties and responsibilities. Legal liability, and, dare I say it, insurance arrangements and premiums, are dependent upon the dichotomy that the law draws in such cases. In accordance with basic legal doctrine it is neither possible, nor would it be desirable[105], to obscure the difference between the legal positions of Andar and Mr Wail, any more than between Andar and Brambles.

77 It was therefore the personal duty of Andar to provide Mr Wail, as its employee, with a safe system of work, so far as this was within its proper functions and powers and not the sole responsibility of third parties. Mr Wail's complaint in his action against Brambles concerned aspects of the system of workplace activities in which he was engaged. Certain of these activities appear to have been under the direct or indirect control of Brambles. However, that left Andar owing its own separate duties to Mr Wail, as his employer, relevant to the way the accident occurred. It would be wrong in legal principle to minimise or circumscribe Andar's responsibilities as employer in accordance with settled doctrine. They were separate from, and different to, those of Brambles to Mr Wail or Mr Wail's obligations in respect of his own safety. Obviously, such responsibilities overlapped in factual and evidentiary terms. But in law they are distinct and must be kept so.

78 I therefore agree with the joint reasons that the evidence adduced at first instance suggests that Andar failed to take reasonable steps as Mr Wail's employer to develop and maintain a safe system of work relevant to the way Mr Wail's injury occurred[106]. There was no present contest that Brambles was itself liable to Mr Wail. There was thus a concurrence of several liabilities of the kind for which the Wrongs Act provides[107].

79 It follows that the determination of the recovery of compensation by Brambles against Andar fell to be decided. The Court of Appeal was correct to so conclude. Andar's challenge against that conclusion fails. I agree with what the joint reasons have written on this subject.

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**104** *Salomon v Salomon & Co* [1897] AC 22.

**105** cf *Lee v Lee's Air Farming Ltd* [1961] AC 12.

**106** Joint reasons at [55].

**107** Wrongs Act, ss 23A, 23B. See the joint reasons at [31]-[32].

The scope of contribution is not yet determined

80 I also agree with the joint reasons in respect of the scope of contribution issue. It is for the Court of Appeal, in light of the foregoing, to determine what, if any, contribution by Andar to Brambles would be "just and equitable"[108] in the case.

81 For the reasons given[109], the jury's determination of Mr Wail's contributory negligence is not, in law or fact, determinative of, or coextensive with, Andar's liability to contribute to Brambles under the Wrongs Act. However, the decision on Mr Wail's contributory negligence is plainly relevant to that determination.

82 Given the close factual and evidentiary interrelationship of Mr Wail and Andar, the judicial consideration of what is "just and equitable" will obviously take into account the jury's verdict on contributory negligence. At the very least, this must be done to avoid double-counting or ignoring a relevant overlap of responsibilities. It would be unjust and inequitable to ignore the elements common to the legal liability of Andar to Mr Wail and Mr Wail's own obligation to be careful as to his personal safety. The two are not the same. However, they overlap in fact.

83 The fact that Brambles has already received the benefit of the jury's discount for Mr Wail's contributory negligence would therefore be at the forefront of the determination of what different, and (effectively) additional, allowance should be made, if any, to cover the additional and separate defaults of Andar to Mr Wail. The statutory formula permits the tribunal deciding what is "just and equitable" to cut through legal forms and to reach a conclusion that reflects the substantial justice of the case. It should be left to the Court of Appeal, in the light of the decision of this Court, to do that.

Orders

84 I agree in the orders proposed in the joint reasons.

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**108** Wrongs Act, s 24(2).

**109** Joint reasons at [59]-[62].

85 CALLINAN J. This appeal raises questions about the effect of a contract the term of which has expired but in accordance with which the parties have continued to act, and the responsibility and liability of a company to and for its employees.

Facts

86 Mr Wail had earned his living as a truck driver for many years. In about 1988, he became a driver for Princes Linen Service which operated a commercial laundry and cleaning service involving collection from, and deliveries to hospitals and nursing homes in Melbourne. His duties included the loading and unloading of trolleys containing laundry from a truck owned by his employer.

87 Subsequently the respondent acquired the business of Princes Laundry. Mr Wail became an employee of it. The respondent maintained the same methods of delivery and collection as Princes Linen Services.

88 The respondent decided however to make different arrangements with its drivers, that is, to cease to employ them, but to enter into a contract for services with companies controlled by them. Mr Wail and Mr Parker incorporated the appellant. There were only two directors, and two shareholders, Mr Wail and Mr Parker. Mr Wail's employment with the respondent ceased in April 1990. The respondent entered into a written agreement with the appellant for services, and the appellant purchased the truck which he had previously driven. Mr Wail continued to do exactly the same work in the same way as formerly. He was not only a director of the appellant, but he was also the person responsible for the day to day performance of the work from which it derived its profits. The other director, Mr Parker, was responsible only for the books and other financial matters. The appellant also owned and operated another truck, and employed two other employees from time to time.

89 The written agreement, entitled "Independent Trucking Contractor Agreement" was for a term of 3 years and provided for an "operator fee" of $1600 per week. The appellant was to procure a suitably qualified driver, in practice, Mr Wail to operate an Hino 1985 10-tonne truck with van body and hydraulic tailgate as specified in the agreement ("the vehicle"). By cl 1 the respondent and the appellant agreed that the appellant would make the vehicle available for use in connexion with the respondent's cleaning business from 4 April 1990, for the term of the agreement. Clause 3.11 required the appellant to repair, maintain and fit out the vehicle as prescribed by the respondent.

90 The agreement made provision for an indemnity by the appellant in favour of the respondent. By cl 4.6 the appellant agreed:

> "To assume sole and entire responsibility for and indemnify [the respondent] against all claims liabilities losses expenses and damages

arising from operation of the Vehicle by reason of any happening not attributable to the wilful negligent or malicious act or omission of [the respondent]."

And by cl 8.2 the appellant (referred to in the agreement as "the Operator") agreed to:

"8.2 Indemnify [the respondent] from and against all actions, claims, demands, losses, damages, proceedings, compensation, costs, charges and expenses for which [the respondent] shall or may be or become liable whether during or after the currency of the Agreement and any variation renewal or extension in respect of or arising from –

8.2.1 loss damage or injury from any cause to property or person occasioned or contributed to by the neglect or default of the Operator to fully, duly, punctually and properly pay, observe and perform the obligations, covenants, terms and conditions contained in the Agreement and on the part of the Operator to be paid, observed and performed.

8.2.2 loss, damage, injury or accidental death from any cause to property or person caused or contributed to by the conduct of the Delivery Round by the Operator.

8.2.3 loss, damage, injury or accidental death from any cause to property or person occasioned or contributed to by any act, omission, neglect or breach or default of the Operator.

notwithstanding that any of such actions, claims, demands, losses, damages, proceedings, compensation, costs, charges, and expenses shall have resulted from any act or thing which the Operator may be authorised or obliged to do under the Agreement and notwithstanding that any time waiver or other indulgence has been given to the Operator in respect of any obligation of the Operator under the Agreement AND PROVIDED ALWAYS it is agreed and declared that the obligations of the Operator under this Clause shall continue after variation or termination of the Agreement and any renewal or extension in respect of any act, deed, matter or thing happening before such termination."

91 Clause 9 is important. Its unmistakable purpose was to make it clear that although the respondent could insist upon the employment by the appellant of an efficient driver, the last was not on any account to be regarded as an employee, nominee, or agent of the respondent:

"**Direction and Control**

The Driver shall not form part of [the respondent's] organisation and the Driver and any other employee nominee or agent of the Operator shall not be under the direction or control of [the respondent] but [the respondent] shall have the right to notify the Operator that it is dissatisfied with the manner in which the Delivery Round is being completed and in that event the Operator (if required by [the respondent]) may substitute another Driver."

92 Mr Wail went to the respondent's laundry at Box Hill early on 26 July 1993. He was then about 30 years old and experienced in the job. He loaded his truck with trolleys of clean linen. About three quarters of an hour later, he arrived at the Cotham Private Hospital in Cotham Road, Kew, where he was required to unload some of the trolleys. He reversed the vehicle into a driveway adjacent to the delivery bay of the hospital. The rear of the vehicle was higher than its front. He opened the rear of the truck, lowered its hydraulic tailgate, and untied the trolleys which were to be delivered. He placed his left hand on the roof of the truck and his right hand on a trolley which was at the end of a line of trolleys. He moved to pull it up the slight slope towards the hydraulic tailgate. He felt a searing pain across his lower back which made him sink to his knees. He sat down to ease the pain. After 10 minutes he was able to continue unloading laundry. Despite that he was in "considerable pain" he was able to complete his deliveries.

93 Mr Wail, it was subsequently established, had damaged the lumbosacral disc in his lower back. The injury has disabled him from working as a truck driver. The appellant's business declined. Mr Wail was forced to seek to earn a living by other means.

The trial

94 Mr Wail sued the respondent in negligence for damages for personal injuries in the County Court of Victoria. The appellant was joined as a third party by the respondent. The proceedings were governed by the *Accident Compensation Act* 1985 (Vic) which relevantly limited Mr Wail to "pecuniary loss damages" and "pain and suffering damages" up to specified limits[110].

95 The case was tried by a judge with a jury. Despite that the case against the respondent was at best a slight one, the jury gave a verdict in favour of Mr Wail. Damages were assessed at $100,000 for pain and suffering and at $315,000 for economic loss. The jury also found that Mr Wail's damages should

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**110** See s 135A(7).

be reduced by 35% for contributory negligence. The effect of that, and the Act to which I have referred, was that the total damages were reduced to $201,822.46 plus interest.

96 The appellant and the respondent agreed that the issues between them should be determined by a judge without the jury. Those issues had to be decided in the light of the jury's verdict against the respondent. His Honour (Judge Kent) made these findings. Mr Wail conducted the affairs of the appellant: he effectively controlled it and its decisions were in reality his. The system of work had been established by the respondent and pre-dated the appellant's contract with the respondent. The contract continued to bind the parties as they had both acted in accordance with it. He rejected however that the respondent had an entitlement to indemnity under it. In consequence the third party claim was dismissed.

The appeal to the Court of Appeal

97 The respondent appealed to the Court of Appeal of Victoria (Winneke P, Charles and Batt JJA)[111]. The appeal against the verdict in favour of Mr Wail failed. The appeal against the dismissal of the third party proceedings succeeded.

98 The members of the Court of Appeal were of the same opinion as the trial judge as to the continued operation of the terms of the written agreement. They thought however that his Honour had taken a very narrow view of the provisions in it with respect to indemnity. They said[112]:

> "Clause 8.2.2 covers a situation of injury to a person contributed to by the conduct of the delivery round by [the appellant]. Clause 8.2.3 covers a situation of injury to a person contributed to by any neglect or breach or default of [the appellant]. We have already found that the injury to Wail was contributed to by [the appellant's] breach of its obligation to provide a safe system of work, an obligation quite separate and distinct, and of quite a different kind, from any owed by Wail. In their plain and ordinary meaning both clauses are apt to cover the occurrence of the injury to Wail. His injury clearly arose out of and was contributed to by the conduct of the delivery round, the injury having been in part caused by [the appellant's] breach of its obligation to provide a safe system of work. We see no justification for reading down the clauses so as to exclude a situation in which [the respondent's] negligence was partly responsible for the occurrence of the injury.

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**111** *Brambles Ltd v Wail* (2002) 5 VR 169.

**112** *Brambles Ltd v Wail* (2002) 5 VR 169 at 191-192 [71]-[74].

...

It follows that [the respondent] is, by virtue of either of cl 8.2.2 or 8.2.3, entitled to be indemnified by [the appellant] against [the respondent's] own liability to Wail. Since a complete indemnity is given by these clauses it is unnecessary to consider further the question of contribution as between [the respondent] and [the appellant]."

The appeal to this Court

99 Several questions arise in this appeal as to the nature and extent of the liability of a company to and for its employees: also whether the terms of a written agreement which has expired, but in accordance with which the parties are still conducting themselves, continue to bind them; as to the proper construction of those terms; and, assuming that they can and do otherwise bind the parties, the effect of Pt IV of the *Wrongs Act* 1958 (Vic) ("the Act") on the parties.

The relationship between Mr Wail and the appellant

100 Let it be assumed that Mr Wail had sued the appellant. It seems to me that had he done so he would have been bound to fail. It was Mr Wail who parked the truck on the incline where it was parked. It was he who was responsible for the method (subject to the role of the respondent in devising or acquiescing in it, a matter to which I will return) of transferring the trolleys to and from the truck. He was under no direct supervision by the respondent. No other person had any involvement in fact in the events which led to Mr Wail's injury and subsequent incapacity. Mr Parker, the other director, was not an executive director in any way responsible for, or even remotely involved in the design of the method, or the performance of the work of the appellant or its drivers.

101 The matters to which I have referred distinguish this case from *Nicol v Allyacht Spars Pty Ltd*[113]. As Mason CJ, Toohey and Gaudron JJ pointed out[114], the plaintiff there, although a director of the defendant company, was not, or certainly not solely, the author of the dangerous method of work adopted. Brennan J was of a similar view. His Honour said[115]:

"His injury was caused by his failure *and* by the failure of other executive directors to prescribe a safe system for reaching the horizontal arm. The

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**113** (1987) 163 CLR 611.

**114** (1987) 163 CLR 611 at 616.

**115** (1987) 163 CLR 611 at 621-622.

> function of prescribing the system fell to all the executive directors who were involved in the discussion, and the failure of the executive directors other than the plaintiff to prescribe a safe system is a failure for which the company is responsible. It is immaterial whether the company's liability rests on its vicarious liability for their negligence or on its failure by its agents to discharge the duty of care which it owed to the plaintiff. The failure of the plaintiff and the failure of the other executive directors to prescribe a safe system for reaching the horizontal arm of the flag-pole together caused the plaintiff's injuries." (original emphasis)

102 It follows that if the appellant were negligent, its negligence was co-extensive with, and in all respects the negligence also of the relevant executive director, here, Mr Wail. His negligence was the appellant's negligence and vice versa. If Mr Parker had been the person carrying out the work of the appellant, or had he been in any way involved in the operation or driving of its vehicle, and had Mr Wail been injured in consequence thereof, the appellant would have been entitled to recover the damages payable to Mr Wail, for which it would then have been vicariously liable, from Mr Parker to the extent of his negligence[116]. Why should the practical and legal result be any different when Mr Wail was both the person entirely responsible for devising the method of carrying out the employing company's work, and suffering injury in the course of doing so? In my opinion there is every reason why it should not be.

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**116** See *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555. In some jurisdictions, but not in Victoria, the rule established in this case has been abolished by legislation. See the discussion in Fleming, *The Law of Torts*, 9th ed (1998) at 298-300. The correctness and application of *Lister* in Australia appear to have been assumed in *Commercial and General Insurance Co Ltd v Government Insurance Office (NSW)* (1973) 129 CLR 374 at 380-381. In *FAI General Insurance Co Ltd v A R Griffiths & Sons Pty Ltd* (1997) 71 ALJR 651, on application for special leave to appeal from the Court of Appeal of Queensland, the Court said:

> "The applicant seeks special leave to canvass in this Court the decision of the House of Lords in *Lister v Romford Ice & Cold Storage Co Ltd* and its application in Australia. However, that question necessarily arises on the footing that the employer was under the statutory obligation contained in s 3 of the *Motor Vehicle Insurance Act* 1936 (Qld). That provision has been repealed. Moreover, the principle which *Lister* expresses has been legislatively overruled in some jurisdictions and, in circumstances of which this case is an example, it is desirable that a legislative rather than a judicial solution be found. In those circumstances, this is not a suitable case for the grant of special leave. Accordingly special leave is refused."

103 Corporations can only think, decide and act by natural persons. If as Dawson J thought correct in *Nicol*[117], and as the appellant here contended, the duty of an employer and employee can never be coterminous, in practice a corporate employer, obliged as it is to think and act by natural persons, would always be at risk, no matter how diligent it may have been, of being held not to have discharged its duty to its employees. I am unable to accept that there is some robotic unidentifiable agency remote from human agency for which a company may be held to be responsible. If it were otherwise there would have been no need for the majority in *Nicol* to undertake the careful examination that it did of the conduct of the injured plaintiff and other directors. It was only because another human agency on behalf of the company was involved, another director or directors who participated in the devising and adoption of the unsafe method of work there, that the injured director was able to succeed in his claim against the company.

104 Legislation[118] imposing criminal or quasi-criminal liability upon both directors of a company and the company itself falls to be construed according to the language used. Neither it, nor other legislation imposing statutory duties giving rise to civil rights of action for breach can provide a solution, or indeed even a reliable guide to the common law as stated in *Lister v Romford Ice and Cold Storage Co Ltd*[119] and by this Court in *Nicol*, in the latter of which the Court clearly regarded as decisive, the answer to the question, was the director who was injured the director who in fact [solely] devised the system.

105 I have proceeded so far on the basis that the appellant (by Mr Wail) was negligent, and that its negligence caused or contributed to Mr Wail's injury. As to this the Court of Appeal said[120]:

> "[The respondent] supplied [the appellant] with trolleys and linen to deliver to and collect from various hospitals, and the jury's verdict shows that the trolleys were not safe to use. It necessarily follows that since [the appellant] had a duty to take reasonable care in making the trolleys and the system of handling them safe, there was a breach of [the appellant's] duty to Wail to provide a safe system of work."

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**117** (1987) 163 CLR 611 at 624-625.

**118** See for example s 124 of the *Corporations Act* 2001 (Cth).

**119** [1957] AC 555.

**120** *Brambles Ltd v Wail* (2002) 5 VR 169 at 182 [45].

106 The appellant submits that this holding suffers from the defect that it does not identify the respects in which, in continuing to implement the respondent's system of work, the appellant had acted unreasonably or negligently.

107 The difficulty for the appellant is however that it owed its employees an independent duty of care. That duty included a duty to provide a safe system of work. The duty, of course, could only in reality be discharged by a natural person or persons on behalf of the company, in this case, unlike in *Nicol*, by one person, Mr Wail, the director assuming responsibility for all relevant aspects of the work. It was a duty not to be discharged however, by accepting, or uncritically implementing a system of work devised by the party with whom it had a contract. The jury has held that the respondent was negligent and that as between it and Mr Wail, the latter was guilty personally of contributory negligence to the extent of 35%. And the trial judge has found that his personal negligence was also the negligence of the appellant. These are findings of fact. The last was inevitable. I do not think that this Court can disturb them. There was clearly evidence upon which the findings could be made. It included the evidence about the way and place in which the vehicle was parked, the placement of the trolleys in the truck, the means adopted to pull or push them to and from the truck, the failure of the appellant (by Mr Wail) to notice that a trolley was perhaps defective, and, in particular, the decision of Mr Wail to pull a trolley from the truck out of the stack in the way in which he did.

The operation and effect of the agreement between the parties

108 It is convenient to deal next with the effect of the written agreement of the parties. The first of the questions arising in relation to it is whether the parties continued to be bound by its terms despite that its stated period of operation had expired. As to that, cl 15.5 is of relevance:

> "15.5 [E]xpiry or determination of the Agreement shall operate without prejudice to the rights and obligations of [the respondent] and the Operator which have accrued prior to the date of expiry or termination and shall not affect the parties [sic] respective continued rights and obligations under the Agreement and in particular shall not prejudice the rights –
>
> 15.5.1 to require the payment of all monies due and payable, and
>
> 15.5.2 to pursue any other remedy existing at law or in equity by either party against the other party or any other person."

109 No formal renewal was effected but the parties continued to deal with each other in the same way as previously. Payment was made in accordance with the written agreement. In all respects the course of dealings between the parties and the work done were exactly the same as they had been.

110 In *Brogden v Metropolitan Railway Co*[121] a slightly different problem arose. The parties there had failed to execute an agreement for the supply of a commodity that had been settled in all essential respects (except as to the identity of an arbitrator). The form of the agreement had been the subject of voluminous correspondence. But of more significance was the fact that for some years the course of dealings between the parties, including the price payable for the coal, was in accordance with the written but unexecuted contract.

111 By parity of reasoning the parties here should be held to be in a similar situation, that is, of being bound by the terms of the written contract (except as to duration). Indeed it may be that the continued allocation of work by the respondent to the appellant and payment in accordance with the agreement should be regarded as the exercise of a discretion by the respondent to renew the contract. It is unnecessary however to reach a conclusion about this. I doubt whether it would ever have occurred to the parties that their arrangements were governed other than by the terms of the written contract.

112 It is to the terms of the contract that I now go. This observation should be made at the outset. The whole of the contract manifests in the plainest of language the intention that no relationship of, or indeed in any respect similar to a relationship of employer and employee is to exist between the appellant or its employees and the respondent for any purpose. An entirely new relationship of independent contractor with independent contractor was created to replace the former relationship of employer and employee. Anything that the parties thereafter accepted and agreed was based on that premise, including the financial terms of the contract.

113 I agree generally with the reasoning and conclusion of the Court of Appeal with respect to the effect of the contract. There can be readily discerned in it the clearest possible intention on the part of the parties to ensure that the respondent is not to be liable for any *loss* arising out of the performance of the work by the appellant. That intention is not manifested by cl 8 alone. The summary of the rights and obligations at the beginning of the agreement contained two items intended to put beyond doubt that the appellant was to be, and the respondent not to be, responsible for the negligence of the appellant, and that the driver of the truck was to be directed and controlled by the appellant:

> "25. <u>INDEMNITY</u> Operator to conduct Delivery Round at his sole risk and

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**121** (1877) 2 App Cas 666 at 678 per Lord Cairns, 686 per Lord Hatherley, 690 per Lord Selborne.

indemnify [the respondent] against all liabilities.

26. DIRECTION & CONTROL — The Driver will remain under the Direction and Control of the Operator, but if unsatisfactory substitute driver to be appointed."

114 As to cl 4.6, I would suspect that "wilful" when used there was intended as "wilfully" but it must be read according to its terms, that is, as entitling the respondent to an indemnity except in the case of its own wilful, or negligent, or malicious act or omission *arising from the operation of the motor vehicle*, something quite different from the circumstances, I would observe, of Mr Wail's injury here. It may be that liability on the part of the respondent of the kind referred to by McHugh J in *Hollis v Vabu Pty Ltd*[122] was in the contemplation of the parties in settling cl 4.6, but it is unnecessary to speculate about that.

115 The respondent is correct in its submission that the express exception in respect of negligence on its part arising from the operation of the motor vehicle in cl 4.6 argues against the reading of a like exception into cll 8.2, 8.2.2 and 8.2.3 of the agreement.

116 Clause 8.1 obliges the appellant to conduct the delivery round at its sole risk, and goes on to provide that the appellant releases the respondent from all liabilities, injuries and damages of any nature or kind in connexion with it. This is a very clear indication of the parties' intention, that is that the respondent is to have no liability with respect to claims arising out of the performance of the contract by the appellant, except for a case within the narrow category of instances with which cl 4.6 is concerned.

117 The appellant argues that the reference in cl 8.2.2 to "operator" should be read as a reference to "operator by its driver". That being so, it said that it would be an unlikely interpretation of the clause to regard it as encompassing an injury to the driver. The appellant makes effectively the same submission in respect of the meaning of cl 8.2.3.

118 The submissions should be rejected. They ignore the separateness of the legal personalities involved, the operator, the corporate appellant, and the natural persons including Mr Wail who were its employees. They also overlook the several references in the agreement to, and separate treatment of each of the driver and the operator, and the numerous requirements imposed on the latter

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**122** (2001) 207 CLR 21 at 47 [64]-[65].

with respect to the ways in which the former is to carry out the work that the appellant has agreed to undertake for reward for the respondent.

119 The submissions would require the Court to insert by implication an expression at odds with the clear thrust of the arrangements between the parties, that they are to be at arms length legally, and that not only was the respondent not to be liable in respect of the operation of the vehicle, except as agreed in cl 4.6, but also that any potential liability it might have in respect of the neglect or default of the appellant in the performance of the contract was to be the subject of an indemnity by the latter.

120 The fact that the contract was in a standard form prepared by the respondent does not avail the appellant. There is nothing ambiguous in its terms. The contract can be seen to be an arrangement accepted by the appellant by its directors, not just to change a business practice of the respondent, but to effect a radical change in the *legal* relationship between the respondent and its former employees, and a different legal personality which Mr Wail must have preferred to substitute as a contracting party. To treat the relationship, for any legal purpose, between Mr Wail and the respondent, as if this express radical change had not occurred would be to subvert the whole intention of the parties. They were free to make their own arrangements for insurance on the basis of the contract. Its terms as a whole, including its financial terms, were similarly no doubt agreed upon the basis of the changed respective legal rights and obligations to which it gave rise. As Lord Diplock said in a case of exclusion of liability by contract, *Photo Production Ltd v Securicor Transport Ltd*[123]:

> "It is generally more economical for the person by whom the loss will be directly sustained to do so rather than that it should be covered by the other party by liability insurance."

121 It would be an unlikely construction, one which the plain words do not in any event in my opinion permit, that the indemnity is to be in favour of the respondent in respect of injury or damage to anyone in the whole world, except one of the persons most likely to suffer it, Mr Wail as the driver of the vehicle on a day to day basis.

122 I would reject the submission that this is a case in which the *contra proferentem* rule has any role to play. In *Darlington Futures Ltd v Delco Australia Pty Ltd*[124] Mason, Wilson, Brennan, Deane and Dawson JJ said this:

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**123** [1980] AC 827 at 851.

**124** (1986) 161 CLR 500 at 510.

> "[T]he interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause contra proferentem in case of ambiguity."

123 This is not, as I have pointed out, a case of an ambiguity of language in a contract. Nor does the application of the ordinary meaning of its words produce any absurdity, indeed the contrary, the consequences for which the parties plainly contracted. To allow the appellant to escape its liability to indemnify would be to put Mr Wail in the position in which he had been before, as if no presently relevant change had been made in his relationship with the respondent.

124 As Kirby J in *McCann v Switzerland Insurance Australia Ltd* said[125]:

> "Courts now generally regard the contra proferentem rule (as it is called) as one of last resort because it is widely accepted that it is preferable that judges should struggle with the words actually used as applied to the unique circumstances of the case and reach their own conclusions by reference to the logic of the matter, rather than by using mechanical formulae." (footnote omitted)

125 The Court of Appeal was right to hold that the appellant was contractually bound to indemnify the respondent. The relevant provisions of Pt IV of the Wrongs Act are set out in the judgment of Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ. There is nothing in them to prevent the operation of the agreement as to indemnity. Indeed, again the contrary is the case because contractual rights in that regard are expressly preserved[126].

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**125** (2000) 203 CLR 579 at 602 [74]. See also *Johnson v American Home Assurance Co* (1998) 192 CLR 266 at 274-275 [19] per Kirby J.

**126** See s 24AD(4) which provides:

> "(4) The right to recover contribution in accordance with section 23B supersedes any right, other than an express contractual right, to recover contribution (as distinct from indemnity) otherwise than under this Part in corresponding circumstances but nothing in this Part shall affect –
>
> (a) any express or implied contractual or other right to indemnity; or
>
> (b) any express contractual provision regulating or excluding contribution –

(Footnote continues on next page)

126 The appellant advanced a further argument. It involved these propositions. The damages payable by the respondent in the principal proceedings were reduced by the jury in consequence of the finding of contributory negligence. That reduction necessarily took into account the "causative fault" of Mr Wail: the causative fault of Mr Wail was precisely equivalent to the fault of the appellant. It would not, in those circumstances, be just and reasonable to award the respondent any amount by way of contribution.

127 In support of this argument the appellant relied on a passage in the judgment of Jackson J in *Doyle v Pick and Rickwood*[127], contending that a similar conclusion should be reached here:

> "[T]he amount recoverable is such as is found to be just and equitable. As the damages awarded against the defendant correspond exclusively to his own share of the responsibility and the negligence of the third party has already been taken into account in arriving at those damages, it would not be just and equitable that the defendant should have any recovery against the third party. If it were otherwise, then the third party would have to pay twice, because he is liable at the suit of the plaintiff for his share of the responsibility for the damage. This opinion, which I advanced during argument at the hearing, has, I am glad to find, the support of Professor Glanville Williams in his book on *Joint Torts and Contributory Negligence*".

128 The second proposition was that as the appellant had inherited the system of work from the respondent and had continued to implement it, any allowance for contribution would constitute an inequitable or unfair "windfall" for the respondent.

129 I disagree with both propositions. The parties were bound by a contract. Whether, viewed subjectively or even objectively, its provisions may appear to have operated unfairly and inequitably in relation to one or other of them would be beside the point. The event in question, the contributory negligence of the appellant, necessarily by one or other of its employees, in this instance the injured person, was precisely the sort of event which the parties' agreement had in contemplation. It is likely, as I have already said, that provision was made for it as the price of an adjustment to some other term or terms of the contract. The

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> which would be enforceable apart from this Part or render enforceable any agreement for indemnity or contribution which would not be enforceable apart from this Part."

**127** [1965] WAR 95 at 96.

parties were free to effect their own arrangements for insurance and otherwise on the basis of the contract. It is not for the Court to say that a consequence different from the one bargained for should ensue, that the appellant should not be answerable to, and obliged to indemnify the respondent for its own (by Mr Wail) negligence.

130 There are two answers to the second proposition. One is the answer that I have just made to the appellant's first contention on this aspect of the case. The second is that inheritance of the respondent's system of work did not relieve the appellant of its own continuing obligation, in this case assumed and undertaken by Mr Wail himself, to devise and maintain a safe system of work.

131 For the reasons that I have given, Mr Wail's contributory negligence should and would have been held to be the complete and only contributory cause as between him and the appellant of his injuries. Any action by him against the appellant would therefore have failed. The fact that the respondent has been held liable to Mr Wail has nothing to say about the contractual indemnity owed by the appellant to the respondent. Even if otherwise the appellant's submissions about justness and equity were correct, they could provide no answer to cl 8 of the agreement. It entitles the respondent to an indemnity against the appellant in the circumstances here, of an injury arising out of the performance by the operator (in this case the appellant) of the work.

132 The appeal should be dismissed with costs.