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**Concrete Solutions to Liability:
Changing Perspectives in Contract and Delict**

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Abstract

Discusses the concept of third party rights in contract as a possible approach to a number of problems in which the law of negligence in delict (tort) has typically been applied in recent times in Scots and English law. Compares these laws with French and German law, and considers European private law solutions.

Keywords

Contract, delict, negligence, third party rights in contract, Scots law, English law, comparative law, European private law.

Concrete Solutions to Liability:

Changing Perspectives in Contract and Delict

Hector L MacQueen¹

I. LIABILITY BEYOND CONTRACT

70 years ago the most famous litigant of the twentieth century, Mrs May Donoghue or M'Alister, made a fateful day outing from Glasgow to Paisley together with a friend. If the story with which she subsequently presented the courts was true, at the end of the warm day of 26 August 1928 the couple sought refreshment at Francis Minghella's café on the corner of Wellmeadow Street and Lady Lane in Paisley. The friend stood Mrs Donoghue a round of ice-cream, and subsequently purchased for her a bottle of ginger beer. The beverage was manufactured at the factory of Stevenson, a local businessman, and the bottle in which it came was opaque. Mrs Donoghue poured some of the ginger beer over her ice-cream and scooped up some mouthfuls of the mix thus produced. She then poured out some more of the ginger beer into her plate, at which point, and presumably with a splash, there came on the scene what was said to be the decomposed remains of a dead snail. Mrs Donoghue reflected on what she had already consumed and became ill. Later on, she sought treatment for gastroenteritis at Glasgow Royal Infirmary; later still, she sought advice on the incident from the well-known Glasgow solicitor, Walter Leechman.

The rest is history, at least amongst lawyers.² Mrs Donoghue sought damages from the manufacturer Stevenson, alleging a failure to take due care in the preparation of his bottles of ginger beer for consumption by the public. Stevenson argued that Mrs Donoghue's claim had no basis in law. Somewhat surprisingly, considering the state of the authorities at that time, she won in the Outer House of the Court of Session, but orthodoxy was restored in the Inner House, which favoured Stevenson. But upon a final appeal to the House of Lords, Mrs Donoghue won a great if narrow victory, by 3 judges to 2.

Why is this case so famous, apart from its remarkable—if never proved—facts? Nowadays most lawyers would stress the significance of the principles of the law of delict or

¹ Professor of Private Law, University of Edinburgh. This is the revised text of a lecture given to the Concrete Society in Glasgow on 26 February 1998.

² See *Donoghue v Stevenson* 1932 SC (HL) 31; 1932 SLT 317; [1932] AC 562. For fuller accounts of this case which, it is said, has never been properly reported, see A. F. Rodger, 'Mrs Donoghue and Alfenus Varus', (1988) 41 *CLP* 1; W. W. McBryde, 'Donoghue v Stevenson: the story of the "snail in the bottle" case', in A. J. Gamble (ed.), *Obligations in Context: Essays in Honour of David M Walker* (1990), pp. 13ff; P. T. Burns, S. J. Lyons (eds), *Donoghue v Stevenson and the Modern Law of Negligence: The Paisley Papers* (1991); A. F. Rodger, 'Lord Macmillan's speech in *Donoghue v Stevenson*', (1992) 108 *LQR* 236.

tort with which the leading speech in the majority - that of Lord Atkin - found in favour of Mrs Donoghue. In memorable prose drawing upon the parable of the Good Samaritan, Lord Atkin enunciated the “neighbourhood” principle under which if it was reasonably foreseeable that one’s failure to take care would cause injury to another, then one owed that other a duty to take the requisite care, breach of which would give rise to liability in damages. This principle of a duty of care arising from a relationship of “neighbourhood” or, as it is more usually put today, “proximity”, has been the basis since of astonishing developments of delictual and tortious liability, going far beyond the simple situation in the original case. A particularly important aspect of the case was the establishment of a duty of care between the manufacturer of a product and the ultimate consumer of that product, a matter on which there has been relatively recent further development under the Consumer Protection Act 1987. While the *Donoghue* case held that a manufacturer could be liable to the injured consumer only for failure to take care, the Act makes the manufacturer liable for the injuries caused by the defective product even if there is no fault on his part.

Another subsequent development of interest to this audience is liability for defective construction. Initially *Donoghue*, a case about moveable property, was not seen as relevant to land and buildings. So in *Otto v Bolton*³ in 1936, the Court of Appeal found a builder not liable for the defective ceiling which fell on and injured Mrs Bolton. Famously this approach was over-turned in the 1970s, beginning with the collapse of Mrs Dutton’s house;⁴ but after a prolonged and agonising debate throughout the 1980s, the House of Lords decided that the duty in respect of defective construction did not extend to enabling the owner of a building to recover for the cost of remedying the defects unless there was a contract to that effect between the parties. Such loss was purely economic, as distinct from the kind of physical injury suffered by Mrs Donoghue, and with some exceptions the law does not allow recovery of such loss.⁵

This development can be linked with that of the Consumer Protection Act 1987 in the case where a product causes damage to land or a building. The Act defines a product as any goods, including a product comprised in another product (that is, a component). Producers are liable for damage caused by a defect in the product. A defect occurs when the safety of a product is not such as persons are generally entitled to expect with regard to injury to

³ [1936] 2 KB 46.

⁴ *Dutton v Bognor Regis UDC* [1972] 1 QB 373 (CA); *Anns v London Borough of Merton* [1978] AC 728.

⁵ *Murphy v Brentwood District Council* [1991] 1 AC 398. For an excellent account by Kenneth Norrie of the position down to 1996 see *The Laws of Scotland: Stair Memorial Encyclopaedia* [SME] vol 15 (1996) paras 273-83.

property (including land), death or personal injury. Like the common law in this area, therefore, the Act is not concerned with purely economic loss or defects which merely make the building of a lesser quality than it should have. But, further, while land or buildings cannot be “products” for the purposes of the 1987 Act, since they are not recognised as “goods” by the law, the component parts of a building (including concrete) may be, and if relevant damage is found to have been caused to the building by such a component, then there can be liability under the Act. But the property damaged must be of a description such that it is ordinarily intended for private use, occupation or consumption at the time it is damaged. The main example would therefore seem to be a house - although it might be one converted from, say, a warehouse or former office accommodation. The Act also deals with the problem of latent damage where the owner is unaware of the defect caused by the component or product: here damage arises when a person with an interest in the property had knowledge of the material facts about the loss or damage.

In England, *Donoghue* was also seen as significant because the decision rid the law of the “contract-tort fallacy” which had dominated legal thinking in the area since early in the nineteenth century: A in performing under a contract with B cannot become liable to a third party C for damage caused by that performance. This was a development of the idea that only contracting parties have rights in a contractual situation - the principle of privity of contract. Thus Mrs Donoghue recovered although she was a third party to the contract between her friend and the café proprietor, and indeed to the contract between the latter and the manufacturer Stevenson under which the contaminated ginger beer had first made its way to the café. Similarly with liability for defective construction and unsafe products: although contracts will generally be involved in the supply of buildings and goods, the contracting parties may well find that their legal responsibilities stretch well beyond the persons with whom they have contracted.

The impact of *Donoghue* on the “contract-tort fallacy” tends not to receive much attention in Scotland, where the underlying principles of the law were and are distinct. Scots law sees Delict and Contract as different aspects of the law of Obligations - the rights and duties we have generally in respect of particular other persons. Contractual obligations arise because we agree or promise to do things; Delictual ones stem from our responsibility to those injured through our fault. In principle it makes no difference that I caused you an injury while performing a contract with someone else. I can be liable in Delict and Contract at the same time, concurrently or cumulatively.

Also, Scots law has a wider concept of Contract than English law. As we have seen, English law confines contractual obligations to the contracting parties (privity). In addition a contractual obligation only arises where the party to whom the obligation is owed provides consideration, that is, some form of return or exchange. But Scots law knows neither privity nor consideration. Instead, Scots law allows contracts to create enforceable rights for third parties if that is the intention of the original contracting parties (a doctrine with the obscure Latin name of *jus quaesitum tertio* [henceforth JQT], meaning “right acquired by a third party”),⁶ and also gives effect to the gratuitous unilateral promise for which the maker receives nothing in return.⁷ Thus in principle in Scots law, if Mrs Donoghue had been able to show that the contract between Stevenson and Minghella was meant by these parties to give her as the ultimate consumer for whom the goods were intended a right to damages for defects in the goods supplied, her action might well have succeeded without the need to show that Stevenson was responsible for the presence of the snail in the bottle. For the contract between Stevenson and Minghella was one of sale under which a term was implied in law that the goods were of merchantable quality and proof of the supplier’s fault was not needed to make him liable, and it might have been a relatively easy matter to argue that Mrs Donoghue as the intended beneficiary of the contract should also receive the benefit of this implied term. Indeed the liability might go further than in *Donoghue* itself or under the Consumer Protection Act 1987, since it would extend beyond physical injury and safety and cover mere defects in quality and economic loss.

The merits of such an argument on the facts of *Donoghue* might well be disputed, and probably successfully; but a stronger example may be another Scottish case decided by the House of Lords on the basis of delict, negligence and the duty of care, *Junior Books v The Veitchi Co Ltd*.⁸ Here Junior Books had contracted with Ogilvie for the construction of a warehouse in Grangemouth. Ogilvie had sub-contracted with Veitchi for the laying of the warehouse floor. After completion of the contracts, cracks appeared in the flooring and Junior Books were compelled to carry out repair work and lost profitable business as a result. Their loss was purely financial and they were held entitled to recover it, not from Ogilvie, the party with whom they had contracted, but from Veitchi. The House of Lords held that Veitchi owed Junior Books a duty of care under which a satisfactory floor would be provided. The House of Lords handed down this decision in 1982 and it still stands despite the court’s

⁶ I have tried to set out the current law on JQT in *SME*, vol 15, paras 824-52.

⁷ See *ibid*, paras 611-18 (by Robert Black) for the law on promises.

⁸ 1982 SC (HL) 244.

subsequently developed aversion to recovery of pure economic loss, particularly in construction contexts. It may be, however, that its survival is only accidental and only because the opportunity to over-rule has not yet arisen, at least to judge by these comments by Lord Goff:⁹

In many cases in which a contractual chain ... is constructed it may well prove to be inconsistent with an assumption of responsibility which has the effect of, so to speak, short-circuiting the contractual structure so put in place by the parties. ... Let me take the ... common case of an ordinary building contract, under which main contractors contract with the building owner for the construction of the relevant building, and the main contractor sub-contracts with sub-contractors or suppliers (often nominated by the building owner) for the performance of work or the supply of materials in accordance with standards and subject to terms established in the sub-contract. I put on one side cases in which the sub-contractor causes physical damage to property of the building owner, where the claim does not depend on an assumption of responsibility by the sub-contractor to the building owner; though the sub-contractor may be protected from liability by a contractual exemption clause authorised by the building owner. But if the sub-contracted work or materials do not in the result conform to the required standard, it will not ordinarily be open to the building owner to sue the sub-contractor or supplier direct ... For there is generally no assumption of responsibility by the sub-contractor or supplier direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility.

But if *Junior Books* is viewed, not as a negligence case, but as one about third party rights in contracts, there may seem to be less danger of unseating complex contractual allocations of risk. Thus *Junior Books* might be seen as third parties to the sub-contract between Ogilvie and Veitchi, performance of which by the latter was intended to benefit *Junior Books* as employers and owners of the property being worked upon; therefore, *Junior Books* were entitled to sue Veitchi for their defective performance. The attraction of this approach is that it forces examination of the contracts. What standard of performance was contractually required of Veitchi? The flooring could only be defective judged by the standards set expressly or impliedly in the contract. Finally, did the contract manifest an intention to benefit *Junior Books*, giving them a right to sue for that benefit or damages in lieu?

⁹ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 195-6.

Lest it seem that this is the absolutely abstract approach of the law professor, it should be noted that it has been successfully argued in the Court of Session. The *Scott Lithgow* case in 1989¹⁰ concerned the construction of a submarine for the Ministry of Defence by Scott Lithgow. The electrical works were sub-contracted to GEC. A delictual claim by the Ministry against GEC for defects in the electrical work, based on *Junior Books*, was rejected by Lord Clyde, but a contractual claim between the same parties, based on JQT, succeeded. In allowing the claim to go forward to proof, Lord Clyde was troubled by the lack of detail available to him on the content of the clauses in this contractual arrangement, but he was not prepared to say that it could never be relevant.

Another interesting recent case, albeit with an outcome in contrast to *Scott Lithgow*, is *Strathford East Kilbride v HLM Design*.¹¹ Ford Motor Company (F) contracted with HLM Design, a firm of architects, to design and supervise the construction of a dealership facility. Strathford (SF), a company affiliated with F, were to lease the premises and operate the dealership after construction was complete. F's contract with HLM provided that the "Owner" was to be "indemnified by HLM against all costs, charges and expenses arising from actions of HLM including but not limited to inaccuracies of design which necessitate corrective or remedial work". "Owners" was defined twice in the contract: (1) as F; (2) as including "F, its affiliates and/or subsidiaries". SF raised an action against HLM in which it averred the appearance in the facility of significant structural defects caused by HLM's negligence (delict). SF also claimed a contractual indemnity as a party included within the definition of "Owner" in the contract, invoking the doctrine of JQT. Lord MacLean refused both claims, holding that HLM did not owe a duty of care in respect of the financial loss suffered by the pursuers, and that in the contract "owner" meant whichever party concluded the contract with HLM and was not intended to create a JQT in favour of SF. But his decision was essentially on the interpretation of the contract before him and not a rejection of the applicability of JQT in a network of construction and development contracts.

Having thus set up the argument for the relevance of JQT linking parties across a network of contracts, I should now note that elsewhere I have expressed some doubts about such an approach to these cases.¹² Such contractual chains, it may well be argued, are meant to keep parties at either end of the chain apart rather than showing an intention to confer a right to sue for the benefit to be conferred by proper performance of the contract. If it were

¹⁰ *Scott Lithgow v GEC* 1989 SC 412 (Lord Clyde).

¹¹ 1997 SCLR 877 (Lord MacLean).

¹² *SME*, vol 15, para 836.

otherwise, the sub-contractor in the typical construction arrangement might be thought to have a direct right to claim payment from the employer, an idea firmly rejected in *J B Mackenzie (Edinburgh) Ltd v Lord Advocate*.¹³ The general intention might therefore be that parties are confined to claims against their direct contractual partners. But in the end in every case it is a matter of determining what the contracts in issue mean and what the parties intended, viewed of course from an objective rather than a subjective standpoint.

In two other recent cases arising in situations not involving construction the Court of Session has found that a JQT arose. *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd*¹⁴ is an important decision about the contractual analysis of the supply of software where the supplier and the manufacturer of the software are different persons. Lord Penrose found that there was a contract between the supplier and the customer only when the latter accepted the manufacturer's licence for the use of the software. Under this contract the manufacturer had a JQT enabling him to enforce the licence conditions. The analysis seems very suspect, unfortunately, for reasons which I have set out in detail elsewhere;¹⁵ in particular, the manufacturer's rights in the software spring, not from any contract between the supplier and the customer, but from its copyright. Much more acceptable, however, is the same judge's decision in *Mercedes-Benz Finance Ltd v Clydesdale Bank plc*.¹⁶ Mercedes-Benz (MB) supplied cars to Glen Henderson (Stuttgart) Ltd (GH) for re-sale to customers in Scotland. When GH sold a car, the proceeds were lodged in an account held with the Clydesdale Bank (CB). GH and CB had agreed that appropriate transfers should then be made to MB. GH went into receivership indebted to both CB and MB, but with funds sitting in GH's account with CB which had been due to be transferred to MB. Lord Penrose found that the agreement between GH and CB could give a JQT to MB. He rejected CB's main legal argument against this conclusion, which had been to the effect that a JQT could only arise where the third party alone had a substantial interest in the performance, whereas in this case CB clearly also had an interest in ensuring the payment to themselves of the debt which they were owed by GH. In my view the rejection of this argument was correct.

These cases show that the doctrine of JQT is thriving, and that accordingly the possibility that contractual liability will extend beyond that owed to one's co-contractor must

¹³ 1972 SC 231.

¹⁴ 1996 SLT 604 (Lord Penrose).

¹⁵ See "Software transactions and contract law", in L. Edwards and C. Waelde (eds.), *Law and the Internet: Regulating Cyberspace* (1997), at p. 123.

¹⁶ 1997 SLT 905 (Lord Penrose).

be kept in view. It is perhaps particularly interesting that the *Mercedes-Benz* case concerned an implied JQT rather than one where the intention was apparent on the face of the contract.

A final point in this section is the use of JQT to exclude rather than to create liability. The issue is raised by the case of *British Telecommunications plc v James Thomson & Sons (Engineers) Ltd*¹⁷ (under appeal to the House of Lords at the time of writing). The scenario is a familiar one. BT employed a contractor under the Standard Form of Building Contract (Local Authorities Edition with Quantities) (1980 Edition) to carry out repair works on a sub-station. The contract made the contractor liable for loss, injury or damage to the employer's property caused by the contractor's negligence; but this was subject to other clauses requiring the employer to take out insurance against damage caused by fire. JT were steelworks sub-contractors, and the sub-contract provided for the incorporation of the terms and conditions of the main contract. Due to the negligence of the sub-contractors the works were damaged by fire, and the employers raised a delictual claim against the sub-contractors. Lord Rodger in the Outer House and the Second Division (Lord Morison dissenting) held that the contractual arrangements meant that it would not be fair, just and reasonable to impose a duty of care upon the sub-contractors in relation to the employers. In this decision they were following a line of cases beginning with *Scottish Special Housing Association v Wimpey Construction (UK) Ltd*,¹⁸ *Norwich City Council v Harvey*,¹⁹ and *Aberdeen Harbour Board v Heating Enterprises (Aberdeen) Ltd*.²⁰ There has been no discussion in these cases of whether the terms of the main contract conferred upon the sub-contractor a right not to be sued for negligence—that is, a negative JQT—or, alternatively, whether the sub-contract's incorporation of the main contract terms and conditions excluded a JQT in favour of the employer. The possibility has been raised by commentators,²¹ and it has been observed that “it may not only be conceptually tidier, but practically desirable, ... to furnish a contractual solution instead of relying on a delictual solution”.²² Unfortunately, it appears that this approach to the matter will not be put before the House of Lords, although it has the very welcome feature of concentrating on what the contracts say, the intention of the parties, and the contractual allocation of risks. The danger of the delictual approach is the risk of

¹⁷ 1997 SC 59 (Second Division).

¹⁸ 1986 SC (HL) 57.

¹⁹ [1989] 1 WLR 828.

²⁰ 1990 SLT 416. This case also involves discussion of another aspect of JQT; for analysis, see *SME*, vol 15, para 846.

²¹ *SME*, vol 15, para 846; J Convery, “Contractual structures and duty of care”, 1997 SLT (News) 113. See also G C Borland, “Contractual structures and duty of care: an alternative analysis”, 1997 SLT (News) 232, suggesting a solution in the concept of *volenti*.

²² Convery, p. 118.

interference with carefully balanced contractual arrangements, including the decision as to who can insure most efficiently, through the uncertain mechanism of fairness, reasonableness and justice expressed through the concepts of proximity and the duty of care.²³

II. THE UK AND EUROPEAN FUTURE

In this section of the paper I turn to the UK and European future of the topics so far discussed, bearing in mind the imminent arrival of a Scottish Parliament. One of the things we can safely predict with the Scottish Parliament is the continued existence of Scots private law, since it is specifically included amongst the devolved matters.²⁴ But the development of that law by the Parliament is nonetheless bound to be strongly influenced, as it is now, by the forces for legal convergence inside the UK—the existence of a single economy unaffected by the border, with people and organisations operating on both sides of the border seeking the famous level playing field.

But another factor in this debate which has so far not attracted nearly enough attention in this country, at least with regard to private and commercial law, is Europe. It is reasonably well-known that Scots law is much more akin to the great European systems—France, Germany, the Netherlands—than English law. The areas of liability at which we have been looking exemplify this—especially JQT. England, with its governing concept of privity, is the odd man out here. But in 1996 the Law Commission of England & Wales issued a report recommending the abolition of privity and the introduction of a system of third party rights in contract where the contracting parties so intend.²⁵ One of the factors explicitly taken into account by the Commission in making its recommendations was bringing English law into line with the rest of Europe.²⁶ So in this area at least UK convergence, informed by the need for European harmonisation, is more likely to go down the Scottish than the English route.

A European dimension is making a gradual entry into the arena of the private law of liability. In part an impulse comes from the European Union, in which the pursuit of the single market has sometimes necessitated the harmonisation of areas of private law. Leading examples are product liability and the regulation of unfair contracts, where European legislative initiatives have reflected a policy favouring the creation of minimum standards of

²³ But note the comments of Lord Goff in *Henderson v Merrett*, already quoted above at note 9, seeming to say that even in physical damage cases contracts and sub-contracts may be so structured as to negate any assumption of responsibility by, and so any delictual liability of, the sub-contractor to the employer.

²⁴ Scotland Bill, clauses 28, 111(3) and Schedule 5.

²⁵ Report on Privity of Contract: Contracts for the Benefit of Third Parties, Law Com No 242.

²⁶ *Ibid*, para 3.8. The reform would also bring England into line with most of the rest of the Common Law world.

protection for the European consumer. But the principle of subsidiarity generally keeps the European institutions out of private law.

But the limits of the European Union do not define or constrain the possibility of further developments towards harmonisation and convergence in the sphere of private law. Sometimes, as the example of the Law Commission shows, official organisations work towards this goal at national level. This can include the courts: some judges are showing an interest in using the law of other European countries for guidance in developing their own in an appropriate manner.²⁷ At least in this country, the process is being facilitated by the production of translations of foreign texts and court decisions.²⁸ And across Europe there are large numbers of initiatives, generally run by academics but often backed by government and commercial organisations, which are working in various ways to produce unofficial statements of what a European private law might look like.

I myself am the Scottish representative on one such initiative, the European Contract Commission which is producing a set of “Principles of European Contract Law”.²⁹ The aim is not necessarily to write a contract code which one day will be adopted across Europe, but rather to provide a scheme of contract rules which can be used for a variety of less grand but nonetheless important purposes. These include university teaching, law reform at national level, gap-filling and development by the courts in national systems, and provision of a set of principles to inform European Union initiatives touching on contract law. An important practical goal is also to provide a system which can be used by parties to cross-border contracts. Where parties are of different nationalities, or the contract requires performance in more than one country, there can be real problems in determining which of the potentially relevant laws is to apply, and in which of the potentially relevant courts disputes are to be settled. A solution to the latter problem is to provide for arbitration or amicable composition, but the problem of choice of law is more difficult. Our hope is that in such cases parties may choose to have their contract governed by our Principles.

Returning to the issues with which this paper is mainly concerned, the draft Principles of European Contract Law provide for third party rights as follows:

²⁷ Notably Lord Goff in the House of Lords: see e.g. *Henderson v Merrett* at 184; *White v Jones* [1995] 2 AC 207 at 262-4.

²⁸ See e.g. B. S. Markesinis, W. Lorenz and G. Danneman, *The German Law of Obligations* (2 vols, 1997); W. van Gerven, *Cases, Materials and Text on National, Supranational and International Tort Law: Scope of Protection* (1998).

²⁹ This is partially published as O. Lando and H. Beale (eds.), *Principles of European Contract Law Part I: Performance, Non-performance and Remedies* (1995). Part II will be published in late 1998 or 1999, and work has commenced on Part III. The current text may be examined on the Internet at http://itl.irv.uit.no/trade_law/doc/EU.ContractPrinciples.1997.preview.toc.html.

Article 2.115: Stipulation in Favour of a Third Party³⁰

1. A third party may require performance of a contractual obligation when his right to do so has been expressly agreed upon between the promisor and the promisee, or when such agreement is to be inferred from the purpose of the contract or the circumstances of the case. The third party need not be identified at the time the agreement is concluded.
2. If the third party renounces the right to performance the right is treated as never having accrued to him.
3. The promisee may by notice to the promisor deprive the third party of the right to performance unless:
 - (a) the third party has received notice from the promisee that the right has been made irrevocable; or
 - (b) the promisor or the promisee has received notice from the third party that the latter accepts the right.

As will be seen, the principles are couched in fairly broad and general language. How would these provisions apply in the situations already discussed in this paper? Perhaps the only way of testing the matter at the moment is by examination of how liability to third parties in such situations has been treated in other European countries. This can also show some of the lines down which the process of convergence outside the Principles may carry us.

Perhaps the most interesting cases have arisen in France, where third party rights have developed out of a background in the nineteenth century emphasising the principle of privity as pre-eminent, although not to the same extent as in English law.³¹ Thus a party who suffers damage as the result of non-performance or misperformance of a contract between two others has a delictual action against the party responsible; there is no “contract-tort fallacy” in French law. In addition there is a contractual claim for the ultimate or latest buyer in a chain of contracts of supply against the original supplier or any subsequent seller in respect of latent defects in the material supplied. This, it has been held, enables the buyer of a house to sue its architect in respect of defects in design. Strictly speaking, this liability is not JQT, since it is not dependent upon the intention of the original contracting parties, but it is nonetheless interesting to compare the approach here with that of the Scottish courts in the *Scott Lithgow* and *Strathford* cases. It is also very similar to the alternative analysis of

³⁰ This will become Article 6.110 in the revised version of the Principles.

³¹ See the Code Civil arts 1121, 1165. My account of French law is drawn from B. Nicholas, *The French Law of Contract* (2nd edn., 1992), pp. 169-93 and S. J. Whittaker, “Privity of contract and tort law: the French experience” (1995) 15 *OJLS* 327.

Donoghue v Stevenson offered earlier. Above all, the liability is seen as essentially contractual rather than delictual.

Further, in France clauses excluding liability cannot be used against delictual claims; this makes it necessary to decide whether the basis of a claim is delictual or contractual when an exclusion clause is involved. There are several interesting decisions of the French courts in this area, and they may be usefully compared with *BT v Thomson*. In the *Clic Clac* case in 1988, P gave photographic slides to CC for enlargement. CC sub-contracted the work to D, who lost the slides. There was an exclusion clause in the contract between CC and P. P sued D in delict. The action was held to be contractual, and that the exclusion clause protected D as well as CC. The court reasoned that where a debtor has sub-contracted performance, the creditor's claim against the substitute debtor is necessarily in contract, and cannot exceed the claim against the principal debtor, while the substitute debtor's liability cannot exceed that which he owes to the principal debtor. In the *Paris Airport* case, also in 1988, P's aircraft was damaged by a tractor belonging to the airport authority. The accident was a consequence of defects in components of the tractor manufactured by D1 and D2. P, whose contract with the airport authority contained a clause excluding any liability for the latter, sued D1 and D2. It was again held that the action was contractual and not delictual, with the exclusion clause restricting P's claim against the Ds, even though this was not a sub-contract case. The basis of the decision was the "linkage" between Ds' misperformance and that of the airport authority. These two decisions may however be contrasted with the plumbing case, in which A built a house for B with C as a sub-contractor for the plumbing work. B sued C for defects in the plumbing, but this was held to be a delictual claim subject to delictual rather than contractual prescription.

§ 328 of the German Civil Code (the BGB) gives clear recognition to third party rights in contract. In addition the German courts have developed the concept of "the contract with protective effects vis-a-vis third parties", partly to meet the problem that delictual claims are not available in cases of pure economic loss.³² Thus it seems that in the *Junior Books* situation a German court would test the *Ogilvie-Veitchi* contract to see whether it had such protective effects in relation to the economic interests of *Junior Books*; if so, a contractual action would be available. German law is also like French law in allowing contractual liability to extend down a chain of contracts of supply to enable the ultimate user to sue the

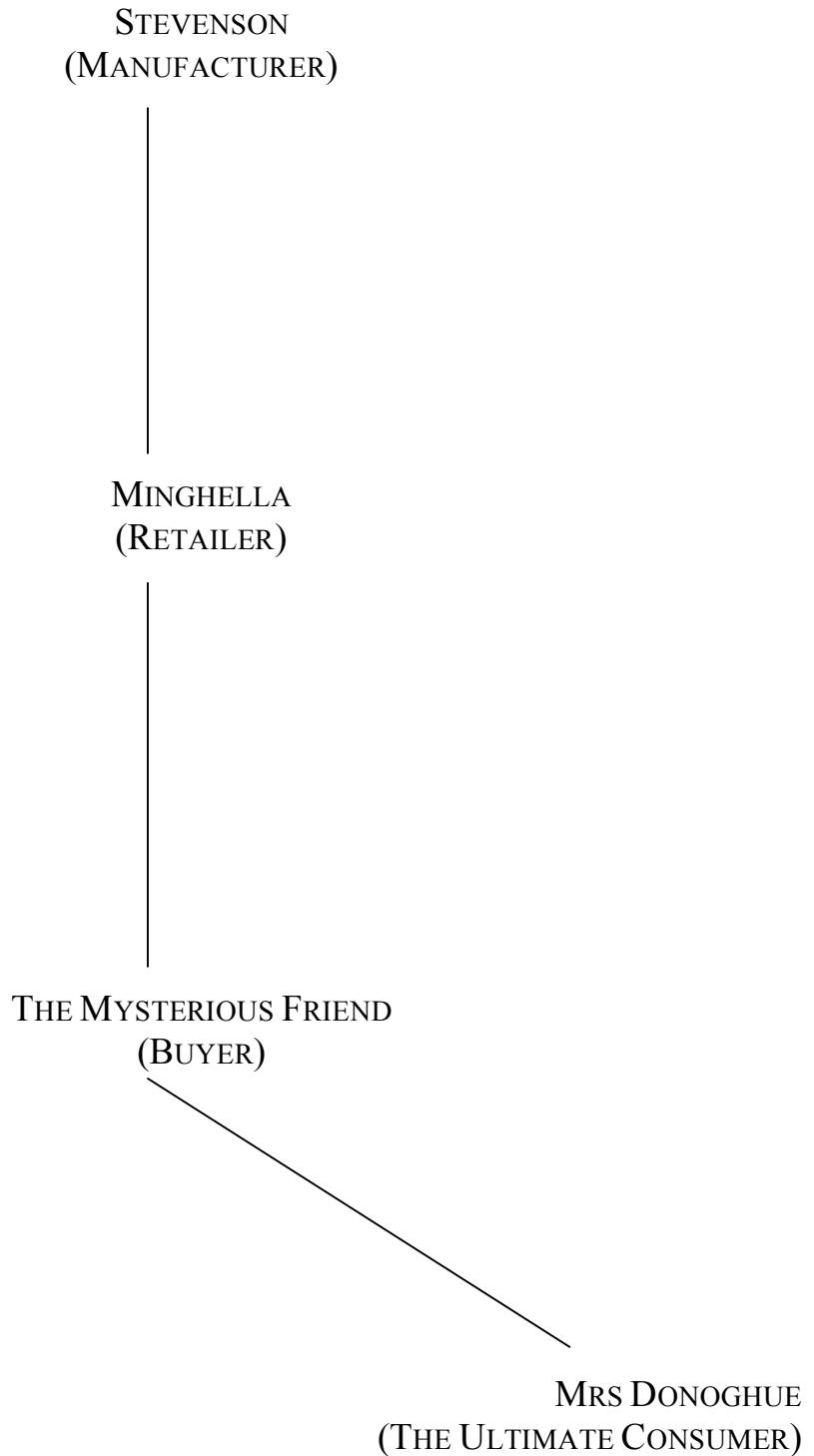
³² BGB § 823. My account of German law is drawn from Markesinis et al, *German Law of Obligations*, ch. 4. See also W. Lorenz, "Contract beneficiaries in German law", in B. S. Markesinis (ed.), *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century* (1994), pp. 65ff.

original supplier under guarantees given in the initial contract of supply.³³ Exclusion clauses have taken effect against third parties by the application of general third party rights doctrine. Under § 334 of the BGB a debtor can plead against a third party defences available against the principal creditor. In a 1971 case, a contract between an employer and a main contractor contained an exemption clause regarding the latter's use of the employer's plant and equipment on site. Scaffolding provided by the employer collapsed owing to a hidden defect, causing injury to a sub-contractor and its work-force. It was held that the effects of the exclusion clause extended to the third party sub-contractor and its workforce, who could not sue the employer as a result.

I do not intend to suggest that there are any immediate or very precise lessons to be learned from these brief overviews of some French and German cases, or that our convergent European future will necessarily lead us down the chains of reasoning with which the French and German courts have supported their decisions. But it is important to realise that problems like the ones we face in this country have already been addressed elsewhere. I find it significant that other systems have for the most part dealt with these problems by way of contract rather than delict. True, that choice of solution was dictated to some extent by casuistic avoidance of the awkward consequences of other rules in the system concerned: in France, the different rules about exclusion clauses in contractual and delictual claims, in Germany, the non-recoverability of economic loss in delict. But there are also underlying ideas that, where issues about liability arise against a contractual background, the proper start point of legal analysis is in the contract or contracts concerned. We need also to gain a better understanding of the idea that contractual liability extends beyond that of the contracting parties. For too long in Scotland lawyers' thinking has been dominated by the belief that the English rule of privity represents a norm against which our own doctrine of JQT is to be seen as but a limited exception. The perspective is transformed if we extend the picture into Europe; we are dealing with contract law, and contract law in the wide sense in which Scots law has traditionally understood it.

³³ There is a difference in that the German rules apply only to guarantees expressly given in the contract, whereas the French rules apply to the statutory guarantees against latent defects - in UK terminology, the terms implied by law.

DONOGHUE V STEVENSON



CONTRACT-TORT FALLACY

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B

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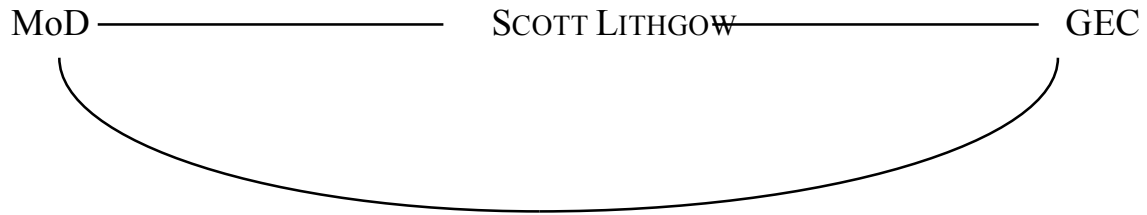
JUNIOR BOOKS v THE VEITCHI Co

JUNIOR BOOKS

OGILVIE BUILDERS

THE VEITCHI Co

Scott Lithgow v GEC



British Telecom v James Thomson Engineers

