THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

CASE NO: 300/07

CHARTAPROPS 16 (PTY) LTD **First Appellant**

ADVANCED CLEANING SERVICES CC **Second Appellant**

and

MICHELLE SILBERMAN **Respondent**

Neutral citation: ***Chartaprops 16 v Silberman*** **(300/07) [2008] ZASCA 115 (25 September 2008)**

Coram: **SCOTT, NUGENT, PONNAN and MAYA JJA and LEACH AJA**

Heard: **14 MAY 2008**

Delivered: **25 SEPTEMBER 2008**

Summary: **Delict – hazard in shopping mall – liability for acts of independent contractor.**

ORDER

On appeal from: High Court, Johannesburg (Boruchowitz J sitting as court of first instance)

In the result:

1 The appeal of the first appellant is upheld with costs.

2 The appeal of the second appellant is dismissed with costs.

3 The order of the court below is set aside and the following is substituted in its stead:

‘(a) The claim against the first defendant is dismissed with costs.

(b) It is declared that the second defendant is liable to the plaintiff for such damages as might be agreed upon or proved in consequence of the event that is the subject of this claim.

(c) The second defendant is ordered to pay the plaintiff’s costs.’

J U D G M E N T

NUGENT JA

[1] The respondent in this appeal – Mrs Silberman – visited a shopping mall in Johannesburg. In one of the passageways of the mall was a pool of slippery substance – what the substance was has not been established – that had been spilt on the floor. Oblivious to its presence Mrs Silberman slipped on the substance and was injured. The shopping mall was owned by and under the control of the first appellant – Chartaprops – which had contracted with the

second appellant – Advanced Cleaning – to keep the floors of the shopping mall clean. Mrs Silberman sued both appellants in the High Court at Johannesburg for the recovery of her damages. The action was tried by Boruchuwitz J who held both appellants jointly and severally liable (the amount of the damages has yet to be determined) but granted them leave to appeal to this court.

[2] Precisely how the substance came to be on the floor has not been established. It is possible that it was spilt by one of the cleaners but it might just as well have been spilt by a member of the public. The complaint against the appellants is not that they – or those for whose conduct they are legally responsible – created the hazard. The complaint is that they or their employees negligently omitted to detect and remove the hazard and that the respondents are liable for the consequences of the omission.

[3] Advanced Cleaning had a system in place for cleaning the floors the details of which are not important. It is sufficient to say that every part of the floor should ordinarily have been passed over by one or other of the cleaners in the employ of Advanced Cleaning at intervals of no more than five minutes. I think it is clear that the system, if it was adhered to, was adequate to keep the floors in a reasonably safe condition. It is also not disputed that Chartaprops itself kept a regular check on the contractor's performance. Its centre manager consulted each morning with the cleaning supervisor and personally inspected the floors of the shopping mall daily to ensure that they had been properly cleaned. If he encountered litter or a spillage he would arrange for its immediate removal.

[4] But even the best systems sometimes fail. The learned judge in the court below found that the spillage had been on the floor for thirty minutes or more at the time it was encountered by Mrs Silberman. He said that that was 'a sufficiently lengthy period so as to constitute a hazard to members of the public and to the plaintiff in particular', that 'the employees of [Advanced Cleaning] failed to take reasonable steps to detect and remove [the hazard]', and that the

cleaning system was accordingly 'not sufficiently adequate to detect and remove spillages with reasonable promptitude.' On that basis he concluded that Advanced Cleaning was negligent and was liable to Mrs Silberman for her damages and that Chartaprops was vicariously liable for the negligence of Advanced Cleaning.

[5] The factual finding by the court below that the substance had been on the floor for thirty minutes or more at the time the incident occurred – a finding upon which the further conclusions was built – was placed in issue before us but I see no proper grounds to disturb that factual finding. The real questions that arise in this appeal relate rather to the consequences of that finding.

[6] The liability of Chartaprops was held to have arisen vicariously for what was said to be negligence on the part of Advanced Cleaning and in that respect I think the court below was incorrect. Where liability arises vicariously it is because the defendant and the wrongdoer stand in a particular relationship to one another. Various explanations have been offered for the existence of the rule that creates liability merely on account of the existence of that relationship – usefully collected by Hartmut Wicke in his thesis entitled *Vicarious Liability in Modern South African Law*.[1] While none provides a completely satisfactory explanation for the existence of the rule it is nonetheless firmly embedded in our law. It is also well established that the relationships to which the rule applies do not include the relationship with an independent contractor. That appears from the decision of this court in *Colonial Mutual Life Assurance Society Ltd v MacDonald*,[2] which has been consistently followed, accurately reflected in the headnote as follows:

'A principal is liable for the acts of his agent where the agent is a servant but not where the agent is a contractor, sub-contractor or the servant of a contractor or sub-contractor.'

[1] Thesis presented in partial fulfillment of the requirements for a Master of Law degree at the University of Stellenbosch under the supervision of Professor M M Loubser in February 1997.
[2] 1931 AD 412.

[7] A defendant might nonetheless be liable for harm that arises from negligent conduct on the part of an independent contractor but where that occurs the liability does not arise vicariously. It arises instead from the breach of the defendant's own duty (I use that term to mean the obligation that arises when the reasonable possibility of injury ought to be foreseen in accordance with the classic test for negligence articulated in *Kruger v Coetzee*[3]). It will arise where that duty that is cast upon the defendant to take steps to guard against harm is one that is capable of being discharged only if the steps that are required to guard against the harm are actually taken. The duty that is cast upon a defendant in those circumstances has been described (in the context of English law) as a duty that is not capable of being delegated: 'the performance of the duties, but not the responsibility for that performance, can be delegated to another'.[4] Or as it has been expressed on another occasion it is "a duty not merely to take care, but a duty to provide that care is taken" so that if care is not taken the duty is breached'.[5]

[8] One such case was *Tarry v Ashton*,[6] in which a lamp that the defendant had employed an independent contractor to repair was not securely fastened to the wall of the defendant's house and fell on a passer-by. Finding the defendant to be liable Lord Blackman said the following:

'But it was the defendant's duty to make the lamp reasonably safe, the contractor failed to do that; and the defendant, having the duty, has trusted fulfillment of that duty to another who has not done it. Therefore the defendant has not done his duty, and he is liable to the plaintiff for the consequences.'

Another was *Hardaker v Idle District Council*,[7] in which Lindley LJ described the nature of the duty that was cast upon the council as follows:

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[3] 1966 (2) SA 428 (A) 430E-H.
[4] *Salmond and Heuston* on the *Law of Torts* 19th ed at 544-5, cited with approval by this court in *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A) 8F-H.
[5] *Clerk and Lindsell on Torts* 19 ed para 6-53, citing Langton J in *The Pass of Ballater* [1942] p 112 at 117.
[6] 1876 1 QBD 314 at 319.
[7] 1896 1 QBD 335 at 340.

'But the council cannot, by employing a contractor, get rid of their own duty to other people, whatever that duty may be. If their contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more. They are not responsible for his negligence in other respects, as they would be if he were their servant. Such negligence is sometimes called casual or collateral negligence. If, on the other hand, their contractor fails to do what it is their duty to do or get done, their duty is not performed, and they are responsible accordingly.'

[9] That a duty that is cast upon a defendant might be such that it is discharged only if reasonable precautions to avoid the harm are actually taken – and that the defendant who appoints another to take those steps fails to do will be liable for the failure – was held by this court in *Dukes v Marthinusen*[8] to be consistent with principles of our law of delictual liability. In that case the defendant employed an independent contractor to demolish certain buildings. In a claim for damages arising from the negligent performance of the work Stratford ACJ said the following after considering various cases in this country and in England including the statements of Lord Blackman and Lindley LJ that I have referred to:

'The English law on the subject as I have stated it to be is in complete accord with our own, both systems rest the rule as to the liability of an employer for any damage caused by work he authorises another to do upon the law of negligence. … It follows from the law as I have stated it to be that the first and crucial question in this case is to ascertain on the facts of the case whether there was a duty on the employer who authorised the demolition of these buildings to take precautions to protect the public using the highway from possible injury. If there was such duty it could not be delegated and the employment of an independent contractor is an irrelevant consideration.'[9]

[10] In *Langley Fox Building Partnership (Pty) Ltd v De Valence*[10] this court once more affirmed that the employer of an independent contractor might become liable in that way, though it was careful to emphasise that Stratford ACJ

[8] 1937 AD 12 at 18.
[9] At p 23.
[10] 1991 (1) SA 1 (A).

did not purport to say that 'there might be liability *as an invariable rule* whenever the work entails danger to the public'. Goldstone AJA said in that case that 'the correct approach to the liability of an employer for the negligence of an independent contractor is to apply the fundamental rule that obliges a person to exercise that degree of care which the circumstances demand'.

[11] *Langley Fox* was another case in which the defendant employed an independent contractor to do work on its behalf. The majority held that the defendant should have realized that the work was inherently dangerous and was under a duty to take reasonable steps to guard against the danger. I think it is clear from the following passage that the majority considered that duty to require the defendant to ensure that adequate precautions were taken (and it held the defendant liable because they were not taken):

'Whether such precautions were to be taken by the [defendant] or the contractor, as between them, is a matter depending on their contract. As far as the duty to the public in general and the [plaintiff] in particular is concerned it matters not. That duty rested upon the {defendant}.'[11]

[12] What emerges from those cases is that the basis upon which liability arises for the conduct of an independent contractor is no more than an application of ordinary principles of delictual liability. The liability of the employer rests upon his or her own failure to take reasonable steps to guard against the harm. And as Holmes JA emphasized in *Kruger v Coetzee*,[12] when articulating the classic test for negligence: 'what steps would be reasonable must always depend upon the circumstances of the particular case'. In some cases it will be reasonable to expect the defendant only to take reasonable precautions to prevent the harm. But in other cases it will be reasonable to expect the defendant to ensure that those precautions are taken (whether by himself or herself or by someone else). It is where that higher standard is called for that the duty of the

[11] At p 14.
[12] 1966 (2) SA 428 (A) 430E-H.

defendant is said to be ‘non-delegable’ and is discharged only if the precautions are indeed taken.

[13] The following passage from the decision of the High Court of Australia in *Burnie Port Authority v General Jones (Pty) Ltd*[13] seems to me to reflect the approach that our law also takes to the matter:

‘It has long been recognized that there are certain categories of case in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor. In those categories of case, the nature of the relationship of proximity gives rise to a duty of care of a special and "more stringent" kind, namely a "duty to ensure that reasonable care is taken" (See *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686.). Put differently, the requirement of reasonable care in those categories of case extends to seeing that care is taken. One of the classic statements of the scope of such a duty of care remains that of Lord Blackburn in *Hughes v Percival* (1883) 8 App Case 443 at 446.):

"that duty went as far as to require (the defendant) to see that reasonable skill and care were exercised in those operations … If such a duty was cast upon the defendant he could not get rid of responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfil the duty which the law cast on himself ... but the defendant still remained subject to that duty, and liable for the consequences if it was not fulfilled."’

After referring to various categories of case in which a duty of that kind was said to have arisen in cases before the courts in that country the court went on to say the following:

‘In most, though conceivably not all, of such categories of case, the common "element in the relationship between the parties which generates (the) special responsibility or duty to see that care is taken" is that "the person on whom (the duty) is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised" (*Kondis v State Transport Authority* (1984) 154 CLR at

[13] (1994) 179 CLR 520 at 550.

687; see, also, *Stevens v Brodribb Sawmilling Co. Pty. Ltd* (1986) 160 CLR at 31, 44-46.) … Viewed from the perspective of the person to whom the duty is owed, the relationship of proximity giving rise to the non-delegable duty of care in such cases is marked by special dependence or vulnerability on the part of that person (*The Commonwealth b. Introvigne* (1982) 150 CLR 258 at 271 per Mason J).'

[14] There will no doubt be cases – particularly where special skill is required for precautions to be taken – where no more is required of a reasonable person but to appoint a competent person to guard against the harm. As Van Wyk J said in *Rhodes Fruit Farms Ltd v Cape Town City Council*,[14] in a passage that was cited with approval in *Langley Fox:*

'It is the duty of the employer to take such precautions as a reasonable person would take in the circumstances. I do not, however, consider *Dukes'* case as an authority for the proposition that the employment of a skilled independent contractor, where the extent of the danger and the reasonably practical measures to minimise it can only be determined by such skilled person, cannot in any circumstances constitute a discharge of the employer's aforesaid duty. … There may well be situations in which a reasonable person would rely solely on an independent skilled contractor to take all reasonable precautions to eliminate or minimize damage to another, and in such circumstances it could not be said that he was negligent if such contractor fails to act reasonably. In my opinion, therefore, the duty to take care where the work undertaken is *per se* dangerous could in some cases be discharged by delegating its performance to an expert.'

But there are other cases, as I hope that I have made clear, in which a reasonable person in the position of the defendant is expected to ensure that reasonable precautions are taken to avoid harm. The defendant is free in those cases to appoint someone else to take those precautions but that by itself will not discharge the defendant's duty. As pointed out in the passages from *Langley Fox* and *Kruger v Coetzee* to which I referred earlier that the standard of care that is required of the defendant will be determined by the circumstances of the particular case.

[14] 1968 (3) SA 514 (C) at 519.

[15] But negligence alone is not sufficient to give rise to liability for an omission: the omission must be wrongful as well. In *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd*[15] Brand JA pointed out that

'[w]hen we say that a particular omission…is "wrongful", we mean that public or legal policy considerations require that such conduct, if negligent, is actionable; that legal liability for the resulting damages should follow. Conversely, when we say that negligent conduct…consisting of an omission is not wrongful, we intend to convey that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages, his or her negligence notwithstanding. In such event, the question of fault does not even arise. The defendant enjoys immunity against liability for such conduct, whether negligent or not.'

[16] It can be taken to be settled that an action lies against a shopkeeper for negligently omitting to clear hazards from the shop floor[16] and I think that applies as much to a person in control of a shopping mall in respect of the floors that are under its control. Indeed, that was admitted by Chartaprops in its plea. Moreover a reasonable person in control of a shopping mall would clearly foresee that spillages might occur in the passages and cause harm if they are permitted to remain, and would take reasonable steps to guard against harm occurring (*Kruger v Coetzee*).[17] While acknowledging its duty to take reasonable steps to avoid the harm it was argued on behalf of Chartaprops that it was a sufficient discharge of that duty that it appointed an apparently competent cleaning service to keep the floors of the mall clean and checked on its performance from time to time. I do not think that is correct.

[17] There can be no exhaustive test for determining when a person is expected not merely to take reasonable precautions against harm but instead to ensure that such precautions are taken for as Goldstone AJA emphasised in

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[15] 2006 (3) SA 138 (SCA) para 12.
[16] *Alberts v Engelbrecht* 1961 (2) SA 644 (T); *Probst v Pick 'n Pay Retailers (Pty) Ltd* [1998] 2 All SA 186 (W); *Monteoli v Woolworths (Pty) Ltd* 2000 (4) SA 735 (W); *Brauns v Shoprite Checkers (Pty) Ltd* 2004 (6) SA 211 (E).
[17] Cited above.

Langley Fox that is necessarily bound up with the particular facts. But the High Court of Australia in *Burnie Port Authority* identified one feature that was common to the cases in which that higher duty has been held to exist, which is that the relationship between the plaintiff and the defendant was 'marked by special dependence or vulnerability on the part of [the defendant]'. The court went on to say that a person is in such a relationship of 'special dependence or vulnerability' when he or she

'is specially vulnerable to danger if reasonable precautions are not taken in relation to what is done on the premises. He or she is specially dependent upon the person in control of the premises to ensure that such reasonable precautions are in fact taken. Commonly, he or she will have neither the right nor the opportunity to exercise control over, or even to have foreknowledge of, what is done or allowed by the other party within the premises.'[18]

[18] In a case like this one the parties stand in such relationship to one another and in my view it indeed calls for the higher standard of care that I have referred to. A person who invites the public to frequent a shopping mall will be expected by members of the public to have ensured that the floors of the premises are reasonably safe and will expect to look to that person if they are not. They are not ordinarily able to make their own assessment of the performance of the cleaners who might have been appointed to the task and, unlike the person in control of the premises they are also not ordinarily able to determine where the fault for any failure of the cleaning system lies and who is responsible for that occurring. In short, they are entirely reliant upon the person in control of the premises to ensure that reasonable precautions are taken to keep the floor safe. It seems to me in the circumstances that it is reasonable to expect that a person in control of a shopping mall to ensure that reasonable precautions are taken to keep the floors safe and is liable if those precautions are not taken by a person who he or she has appointed to do so. That is how the duty was described in

[18] At p 551.

comparable circumstances in *Probst v Pick 'n Pay Retailers (Pty) Ltd*,[19] consistent with other decisions,[20] and I respectfully agree. The precautions that should reasonably be taken were described by Stegman J in *Probst v Pick 'n Pay Retailers (Pty) Ltd* (in relation to a shop floor but I think it applies as much in this case) to be

'not so onerous as to require that every spillage must be discovered and cleaned up as soon as it occurs. Nevertheless, it does require a system which will ensure that spillages are not allowed to create potential hazards for any material length of time, and that they will be discovered, and the floor made safe, with reasonable promptitude.'[21]

The learned judge should not be thought to have said that it is enough to have an adequate system in place: I think it is implicit in what he said that the system must be adhered to.

[19] The evidence establishes in this case that the spillage was on the floor for thirty minutes or more at a time that pedestrians could be expected in the mall and I agree with the learned judge in the court below that that was excessive. Whether the fault lay in the system itself (as found by the court below) or whether it lay instead in the failure of employees to adhere to the system, is not material. In either event Chartaprops failed to ensure that reasonable precautions were taken and is liable for the consequent damages. Although the court below found Chartaprops to be liable on other grounds the finding that it is liable must nevertheless stand. The appeal against that order must accordingly be dismissed.

[20] The question that remains is whether Advanced Cleaning is also liable. The learned judge in the court below found that the negligence of Advanced Cleaning lay in the inadequacy of its cleaning system. The only basis upon which

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[19] [1998] 2 All SA 186 (W) at 200g.

[20] *Turner v Arding & Hobbs, Ltd* [1949] All ER 911 (KB) at 912E; *Alberts v Engelbrecht* (1961) 2 SA 644 (T) at 646D; *City of Salisbury v King* 1970 (2) 528 (RAD); *Jones v Maceys of Salisbury (Pvt) Ltd* 1982 (2) 139 (ZHC) at 141H.

[21] Stegmann J in *Probst v Pick 'n Pay Retailers (Pty) Ltd* [1998] 2 All SA 186 (W) at p 200, in which the leading cases in this country and abroad are considered.

the system was said to be inadequate was that the spillage remained on the floor for an excessive time but that reasoning seems to me to be faulty. I do not think criticism can be directed at the system. It seems to me that what occurred in this case is that the system was not adhered to by its employees. But once more I do not think that it is material whether the omission that caused the harm is attributed to Advanced Cleaning or to its employees. If the omission was that of its employees Advanced Cleaning cannot be held vicariously liable unless the employee is himself or herself liable. And in my view liability does not arise from the omission, whether the omission was that of Advanced Cleaning or its employees.

[21] For in our law a person is generally not obliged to act so as to prevent harm to others even though it might be reasonable for him or her to have done so. In order for liability to arise the omission must be not only negligent but also wrongful. And as pointed out in the passage from *Two Oceans Aquarium* that I referred to earlier an omission is wrongful only where the law recognises that an action should lie (that the person concerned had a legal duty not to be negligent).

[22] A person who contracts to clean a floor that is used by members of the public – whether under a contract of employment or some other form of contract – is no doubt bound to his or her employer to fulfill those contractual obligations. But it does not follow that he or she is liable to third parties if he or she omits to do so, even if the omission meets the ordinary test for negligence as it was articulated in *Kruger v Coetzee*. There are indeed cases in which it has been held that the assumption of contractual obligations gives rise to a legal duty to third parties to perform those obligations without negligence. In *Blore v Standard General Insurance Co Ltd,*[22] for example, it was held on exception that a garage that failed to detect a defect in a motor vehicle, in breach of its contractual undertaking to the owner, was liable for damage caused to a third party by the

[22] 1972 (2) SA 89 (O).

defect.[23] In *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd*[24] Van Zyl J expressed the opinion – his opinion was obiter and I express no view on its correctness – that a security firm that had contracted to guard premises had a legal duty to third parties to guard vehicles lawfully parked on the premises. But those cases and others like them do no more than demonstrate that the assumption of contractual obligations is capable of giving rise to delictual liability. Whether it does so in a particular case is a matter that will be determined by legal and public policy. For as Brand JA said in *Two Oceans*,[25] when a court is asked to accept that an omission is wrongful in the absence of precedent it is being asked to extend delictual liability to a situation where none existed before and in that event

'[t]he crucial question…is whether there are any considerations of public or legal policy which require that extension'.[26]

[23] The learned judge in the court below did not pertinently consider whether Advanced Cleaning (or its employees) were under a legal duty towards members of the public not to be negligent and appears to have assumed that their conduct was actionable. In that respect I think it erred.

[24] I am not aware of any precedent that that has pertinently considered and settled that question in the present context. And in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*[27] Grosskopf AJA pointed out that

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[23] In a commentary on that decision Professor Boberg takes issue with its reasoning but he adds that a proper rationale for imposing liability in that case was that the garage would have known that the vehicle would be introduced onto the road in reliance upon proper performance of the contract: P.Q.R. Boberg 'Liability for Omissions – The Case of the Defective Motor-Car' (1972) 89 *SALJ* 207.

[24] 1990 (2) SA 520 (W).

[25] Cited above.

[26] There are numerous other cases in this court to the same effect. For example, *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) 498G-499A; *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) 26I-27I; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 13; *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) para 12; *Local Transitional Council of Delmas v Boshoff* 2005 (5) SA 514 (SCA) para 19; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) paras 14, 15, 16 and 28.

[27] 1985 (1) SA 475 (A) 500D.

our law adopts a conservative approach to the extension of Aquilian liability. I do not think there are any considerations of legal or public policy that call for an extension of liability to a cleaner who is contracted to keep the floors of a shopping mall clean. The same considerations that cast upon the person in control of the shopping mall a duty to ensure that precautions are taken to keep the floors safe seem to me to militate against an action lying against the cleaner. For it is to that person rather than the cleaner that the public rely upon to keep the floor safe. They are protected by the liability of the person in control of the premises if the cleaner who has been deputed to perform that function negligently fails to do so and I see nothing that calls for an action to lie against the cleaner as well. As to the incidence of liability between that person and the cleaner that is capable of being regulated by the terms of their contract, whether the cleaner be an employee or an independent contractor, and requires no intervention by the law. Indeed, I think it would be most unjust if the law were to require as a condition for taking up a mop and a bucket in return for a wage that the cleaner should assume legal responsibility for the safety of the floors. I see no distinction when the person who wields the mop is not an employee but an independent contractor. That the independent contractor is a commercial concern seems to me a distinction only of degree. No doubt an action lies against the cleaner for damages caused by positive conduct but that is another matter.

[25] In my view no legal duty was owed towards the public by Advanced Cleaning or its employees to take reasonable steps to keep the floors safe and any omission to do so on their part is not actionable. In those circumstances Advanced Cleaning should not have been held liable for the damages, whether directly for any omission on its part, or vicariously for any omission of its employees. I think the appeal by Advanced Cleaning should accordingly succeed.

[26] I would dismiss the appeal by Chartaprops, allow the appeal by Advanced Cleaning, and alter the order of the court below accordingly.

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R.W. NUGENT
JUDGE OF APPEAL

PONNAN JA (SCOTT and MAYA JJA and LEACH AJA concurring):

PONNAN JA

[27] I have read the judgment of Nugent JA with which I respectfully am unable to agree. The salient facts, which for the most part are either common cause or undisputed, are set out in the judgment of my learned Colleague.

[28] The general rule in our law is that a principal is not liable for the wrongs committed by an independent contractor or its employees. But, as Glanville Williams put it:

'One of the most disturbing features of the law of tort in recent years is the way in which the courts have extended, seemingly without any reference to considerations of policy, the liability for independent contractors'.[28]

Prominent among the cases that sowed the seeds of the large extension that has since taken place was *Dalton v Angus*[29] and the oft-quoted remark that 'a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor'.

As has been correctly observed, this dictum if literally applied, would create vicarious responsibility for any and every act of negligence performed by an independent contractor in the course of doing the work and would efface the whole distinction between employee and independent contractor.[30]

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[28] Glanville Williams 'Liability for Independent Contractors' (1956) *Cambridge Law Journal* p 180.
[29] (1881) 6 App. Cas. 740 at 829.
[30] Williams p 181.

[29] When a principal will indeed be liable for the negligence of an independent contractor has been the subject of continuing debate in foreign jurisdictions. A legacy of that debate in the terminology of English Law is the concept of non-delegable duty. A more accurate description of what is at play is captured by the alternative name for a non-delegable duty, namely, a 'personal duty'.[31] A duty of this nature involves what has been described as 'a special responsibility or duty to see that care is taken'.[32] Such a duty enables a plaintiff to outflank the general principle that a defendant is not vicariously responsible for the negligence of an independent contractor where the causative agent of the negligence relied on was not an employee of the defendant but an independent contractor.

[30] From a practical standpoint, according to Fleming 'its most perplexing feature is the apparent absence of any coherent theory to explain when, and why, a particular duty should be so classified' and 'whether the resulting uncertainty and complexity of the law is matched by any corresponding advantages'.[33] That complexity and uncertainty may well be compounded in our law, for, as Scott JA observed in *McIntosh v Premier, KwaZulu-Natal*:[34]

'But the word "duty", and sometimes even the expression "legal duty" [in the context of the second leg of the test for negligence as formulated by Holmes JA in *Kruger v Coetzee*],[35] must not be confused with the concept of "legal duty" in the context of wrongfulness which, . . . is distinct from the issue of negligence. . . . The use of the expression "duty of care" is similarly a source of confusion. In English law "duty of care" is used to denote both what in South African law would be the second leg of the inquiry into negligence and legal duty in the context of wrongfulness. As Brand JA observed in the *Trustees, Two Oceans Aquarium Trust* case, at 144F, "duty of care" in English law "straddles both elements of wrongfulness and negligence" '. (See also *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*.[36])

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[31] John Murphy 'The Liability Bases of Common Law Non-Delegable Duties – A Reply to Christian Witting' (2007) 30(1) *UNSW Law Journal* 86 p 98.
[32] *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687.
[33] John G Fleming *The Law of Torts* 9 ed (1998) p 434.
[34] (632/2007) [2008] ZASCA 62 (29 May 2008) para 12.
[35] 1966 (2) SA 428 (A) at 430 E-F.
[36] 2006 (1) SA 461 (SCA) para 14.

[31] Indeed it has been said that the classification of a duty as non-delegable in the circumstances of particular cases rests on little more than assertion.[37] According to Kirby J,

'The law governing non-delegable duties of care has been described as a "mess", comprising "a random group of cases" giving rise to a basis of liability that is "remarkably under-theorised". The instances in which a non-delegable duty has been upheld have been variously labelled "an inexplicable rag-bag of cases" comprising an erroneous feature of the "über-tort of negligence" and an "embarrassing coda" to judicial and scholarly writings on the scope of vicarious liability for wrongs done by others. Judges have been taken to task for their reluctance, or incapacity, to express a clear theory to account for the nature and ambit of non-delegable duties of care. The whole field has been assailed as one involving serious defects, containing numerous "aberrations" that have plunged this area of the law of tort into "juridical darkness" and "conceptual uncertainty". Courts of high authority have been accused of coming to the right result for the wrong reasons; or the wrong result despite adopting the right reasons'.[38]

[32] *Kondis v State Transport Authority* (1984) 154 CLR 672, identified some of the principal categories of case in which the duty to take reasonable care under the ordinary law of negligence is non-delegable: namely - adjoining owners of land in relation to work threatening support or common walls; master and servant in relation to a safe system of work; hospital and patient; school authority and pupil.[39] (See also *Saayman v Visser*.[40])

[33] One further category of case to which *Kondis* alluded was that of invitor and invitee. However, certainly in Australia, it must now be taken as settled that in relation to a person in the position of an invitee, the duty of an invitor is no

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[37] *Kondis* p 684.
[38] *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 at 37.
[39] See also *Australian Safeway Stores Proprietary Limited v Zaluzna* (1987) 61 ALJR 180 p 184, Clerk & Lindsell on Torts 19 ed (2006) 6-57 – 6-67.
[40] 411/2007) [2008] ZASCA 71 (30 May 2008) para 19.

more and no less than the ordinary duty to take reasonable care. For, as it was put in *Voli v Inglewood Shire Council and Another*,[41]

'But, even without the aid of a statue such as now exists in England, the trend of judicial authority has been to treat the liability of an occupier for mishaps upon his premises as governed by a duty of care arising from the general principles of the law of negligence. The special rules concerning invitees, licensees and others are ultimately subservient to those general principles. Instead of first looking at the capacity in which the plaintiff comes upon the premises, and putting him into a category by which his rights are measured, the tendency now is to look at all the circumstances of the case, including the activities of the occupier upon, or in respect of, the premises, and to measure his liability against the conduct that would be expected of a reasonably careful man in such circumstances. . . . . It seems better to appreciate that the ultimate question is one of fact and governed by general rules, than to create new categories and distinctions.'

[34] According to John Murphy,

'[i]f we consider various classic examples of a non-delegable duty – such as the duty owed by an employer to his employees…, by a health authority to hospital patients… or by an education authority to school children… – we can see in each case the presence of especial vulnerability. Employees in the workplace, patients in hospital beds and children at single-teacher schools all have in common the fact that they find themselves in an environment the safety of which is controlled by some other person in whom they are required to place some measure of trust and reliance. Even if we turn to the various non-classic, but equally well established, categories of non-delegable duty – that is, where the defendant was in control of an abnormally dangerous person, or an abnormally dangerous thing… – we can again see the presence of either abnormal risk or heightened vulnerability'.

But as Murphy is himself quick to point out 'it must be conceded at the outset that any explanatory account of the kind or kinds of liability attached to non-delegable duties based on the existing case law requires an exercise in selectivity. This is because the judges are as divided in their views as academics'.[42]

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[41] (1962-1963) 110 CLR 74 at 89.
[42] Murphy p 94.

[35] Some cases have been explained as turning on strict liability whilst others, as a form of vicarious liability. As to the former, Kirby J noted,

'It is sufficient to notice that decisions of this Court after *Kondis*, … point out the many difficulties that lie behind adopting principles cast in terms of non-delegable duties. Not least of these difficulties is that a non-delegable duty is a form of strict liability and *Burnie Port Authority*[43] *…* shows the disfavour with which strict liability is now viewed."[44]

Strict liability, I may add, is viewed with similar disfavour by our courts (see *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA)). Vicarious liability as a postulate is equally untenable for it flies in the face of the general principle that a person is not liable for an accident occurring without his own fault or that of his servants in the course of their employment. Little wonder then that Fleming would describe those cases as a disguised form of vicarious liability under the fictitious guise of non-delegable duties.[45] To once again borrow from Glanville Williams,

'[w]e need some sensible reason why, in any particular case, he should be liable where the injury occurs without his fault but through the fault of an independent contractor employed by him. No reason is furnished in the judgments under discussion. Instead, we are merely treated to the logical fraud of the "nondelegable duty" '.[46]

[36] Many of the statements explaining the nature and consequences of a non-delegable duty, have been criticized on the ground that they offer no criteria distinguishing those duties which are non-delegable from those which are not.[47] But apart from true instances of strict liability particularly where the duty is a statutory one, the distinction between delegable and non-delegable duties does not, it seems, really amount to more than the adoption of convenient headings for those cases in which defendants have been held not liable for the negligence of independent contractors and cases in which they have. However, the explanation

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[43] *Burnie Port Authority v General Jones Pty. Limited* (1992-1994) 179 CLR 520.
[44] *Leichhardt Municipal Council* p 75.
[45] Christian Witting 'Breach of the Non-Delegable Duty: Defending Limited Strict Liability in Tort' (2006) 29(3) *UNSW Law Journal* p 33 at 42 and 47, Williams p 185, Fleming p 434, *Burnie Port* p 75.
[46] Williams p 198.
[47] Williams p 183-4.

given for the non-delegable relationship has been very general – no more than the existence of 'some element' that 'makes it appropriate' to impose on the defendant a duty to ensure that the safety of the person and property of others is observed – a duty not discharged merely by securing a competent contractor.[48] The truth, according to Glanville Williams, 'seems to be that the cases are decided on no rational grounds, but depend merely on whether a judge is attracted by the language of nondelegable duty'.[49]

[37] It would be fair to say that there has been great expansion in recent years of the use of independent contractors, and out-sourcing in the place of employees. It is unlikely that vicarious liability for servants would ever have developed if servants as a class had been capable of paying damages and costs. The historical rationale for imputing liability to a master, namely that they had deeper pockets hardly applies, I daresay, to most modern contractors, who may in fact be wealthier than their principals. Where both principal and independent contractor are large firms or covered by insurance the incidence of liability may not matter much. But where the principal is an individual without insurance, the imposition of liability upon him may cause grave hardship. From the point of view of a plaintiff, the only case in which the liability of a principal is advantageous is where the independent contractor is unable to pay damages. Whether indeed this situation is sufficiently frequent to warrant provision being made for it must be open to doubt, particularly when it adds so greatly to the difficulty of the law.[50] Courts have to be pragmatic and realistic, and have to take into account the wider implications of their findings on matters such as these (*Tsogo Sun Holdings (Pty) Ltd v Qing-He Shan* 2006 (6) SA 537 (SCA) para 10).

[38] It must be accepted that the content of the ordinary common law duty is to exercise reasonable care (and skill) or to take reasonable steps to avoid risk of harm to a person to whom the duty is owed. The degree or standard of care

[48] *Leichhardt Municipal Council* p 63.
[49] Williams p 186.
[50] Williams p 195.

required varies with the risk involved. It follows that those who engage in inherently dangerous operations must take precautions not required of persons engaged in routine activities. This involves no departure from the standard of reasonable care for it predicates that the reasonable person will take more stringent precautions to avoid the risk of injury arising from dangerous operations.[51] The concept of personal duty departs from the basic principles of liability in negligence by substituting for the duty to take reasonable care a more stringent duty - a duty to ensure that reasonable care is taken.

[39] Traditionally, non-delegable duties have been held to apply in instances where; first, the defendant's enterprise carries with it a substantial risk and secondly, the defendant assumed a particular responsibility towards the claimant. Neither of which in my view is present in this case. As already stated, our 'ordinary' law of negligence does take proper account of the presence of abnormally high risks and especial vulnerabilities. Thus where those features are found to be present our law expects greater vigilance from a defendant to prevent the risk of harm from materialising, for that according to our law is what a reasonable person in the position of the defendant would do. In the nature of a coherent legal doctrine, the response of our law in those circumstances should not be to impose strict liability or to resort to a disguised form of vicarious liability but rather to insist on a higher standard of care. It follows that the correct approach to the liability of a principal for the negligence of an independent contractor is to apply the fundamental rule of our law that obliges a person to exercise that degree of care that the circumstances demand. In *Cape Town Municipality v Paine*,[52] Innes CJ said:

'The question whether, in any given situation, a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon a consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the *diligens paterfamilia*s, the duty to take care is established, and it only remains to ascertain whether it has been

[51] *Kondis* p 679.
[52] 1923 AD 207 at 217.

discharged. Now, the English Courts have adopted certain hard and fast rules governing enquiries into the existence of the duty and the standard of care required in particular cases. Speaking generally, these rules are based upon considerations which, under our practice, also would be properly taken into account as affecting the judgment of a reasonable man; and the cases which embody them are of great assistance and instruction. But, as pointed out in *Transvaal and Rhodesian Estates Ltd v Golding* 1917 AD 18 and *Farmer v Robinson Gold Mining Co* 1917 AD 501, there is an advantage in adhering to the general principle of the Aquilian law and in determining the existence or non-existence of *culpa* by applying the test of a reasonable man's judgment to the facts of each case. The larger latitude allowed in such an enquiry is to be preferred to restriction within the more rigid limits of the English rules. It must be noted, however, ─ and the above remarks are subject to that proviso – that mere omission did not under the *lex aquilia* constitute *culpa*; it only did so when connected with prior conduct.'

[40] There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, as happened in this case (the first category), and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted (the second category). In this regard Colman AJ stated in *Crawhall v Minister of Transport*:[53]

'Nor, in my judgment, is the occupier of premises liable for the consequences of the negligent conduct on those premises of an independent contractor whom he has engaged to do work thereon, if the negligent act or omission was not one which was authorised by or known to the occupier or one which could reasonably have been foreseen, provided that the work which the independent contractor was engaged to do was not pregnant with danger to persons expected to be on the property. But if work has to be done on premises to which the public have access, and that work can reasonably be expected to cause damage unless proper precautions are taken, the duty of the occupier to see that those precautions are taken and that the premises are safe persists, whether he does the work himself or through his own servants or delegates it to an independent contractor. That seems to me to be the effect of the judgment of Stratford, ACJ, in *Dukes v Marthinusen*, 1937 AD 12, and ...'.

[53] 1963 (3) SA 614 (T) at 617 F-H.

[41] That distinction emerges as well from the decision of *Minister of Posts and Telegraphs v Jo'burg Consolidated Investment Co., Ltd* 1918 TPD 253, which held (at p 260): 'where an act which is carried out with proper precautions will ordinarily speaking not cause danger, the doctrine of the independent contractor applies'. Whilst it may be just to hold the party authorising the work in the first category of case exempt from liability for injury resulting from negligence which he had no reason to anticipate, there may well be, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented. That it seems to me, as I have attempted to demonstrate, is consistent with our 'ordinary' law of negligence. In the second category, if liability is to attach to the principal it would be in consequence of his/her negligence in failing to take preventative measures to prevent the risk of harm from materialising that a reasonable person in those circumstances would have taken, rather than in accordance with a proposition framed in terms of a non-delegable duty. That proposition according to Hayne J, on examination, not only has 'no sound doctrinal foundation' but 'cannot stand with the restatement of the [Australian] common law of negligence …'.[54]

[42] More recently *Langley Fox Building Partnership (Pty) Ltd v De Valence*[55] acknowledged the general rule of no liability of a principal for the civil wrongs of an independent contractor except where the principal was personally at fault. The test for negligence in a case such as this, consonant with the classic test for *culpa* laid down in *Kruger v Coetzee*,[56] was set out by Goldstone AJA as follows:

'(a) would a reasonable man have foreseen the risk of danger in consequence of the work he employed the contractor to perform? If so,

(b) would a reasonable man have taken steps to guard against the danger? If so,

(c) were such steps duly taken in the case in question?'

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[54] *Leichhardt* p 70.
[55] 1991 (1) SA 1 (A).
[56] Above n 34.

[43] In determining the answer to the second enquiry into negligence, Goldstone AJA emphasized the following, albeit by no means exhaustive list of factors:

'[t]he nature of the danger; the context in which the danger may arise; the degree of expertise available to the employer and the independent contractor respectively; and the means available to the employer to avert the danger.'

Applying this test of negligence to the facts, Goldstone AJA held that it was foreseeable to a reasonable person in the position of Langley Fox that the workmen erecting the ceiling would require some form of construction to raise it above the level of the sidewalk, as an obstruction of such a nature would necessarily constitute a source of serious potential danger to pedestrians using the sidewalk. Accordingly, '[T]o place it there, and no more, was an inherently dangerous act.'[57]

[44] It is not easy to see why an exception should be specifically carved out allowing a person injured to recover from a principal in addition to the normal rights that the person enjoys against the independent contractor posited as the effective cause of the wrong. In particular, it is difficult to see why the general policy of the law that the economic cost of the wrong should be borne by the legal entity immediately responsible for it, should not be enforced in this case. Furthermore, to shift the economic cost of negligent acts and omissions from Advanced Cleaning, the independent contractor with primary responsibility, to Chartaprops, because of the legal fiction of non-delegability, appears to me to be undesirable.

[45] There are few operations entrusted to an independent contractor by a principal that are not capable, if due precautions are not observed, of being sources of danger to others. If a principal were to be held liable for that reason alone the distinction between 'employee' and 'independent contractor' will all but

[57] At 12I.

disappear from our law. This plainly is not the type of case where it can be said that Chartaprops negligently selected an independent contractor or that it so interfered with the work that damage results or that it authorised or ratified the wrongful act. The matter thus falls to be decided on the basis that the damage complained of was caused solely by the wrongful act or omission of the independent contractor, Advanced Cleaning or its employee.

[46] Chartaprops did not merely content itself with contracting Advanced Cleaning to perform the cleaning services in the shopping mall. It did more. Its centre manager consulted with the cleaning supervisor each morning and personally inspected the floors of the shopping mall on a regular basis to ensure that it had been properly cleaned. If any spillage or litter was observed, he ensured its immediate removal. That being so it seems to me that Chartaprops did all that a reasonable person could do towards seeing that the floors of the shopping mall were safe. Where, as here, the duty is to take care that the premises are safe I cannot see how it can be discharged better than by the employment of a competent contractor. That was done by Chartaprops in this case, who had no means of knowing that the work of Advanced Cleaning was defective. Chartaprops, as a matter of fact, had taken the care which was incumbent on it to make the premises reasonably safe.

[47] Neither the terms of Advanced Cleaning's engagement, nor the terms of its contract with Chartaprops, can operate to discharge it from a legal duty to persons who are strangers to those contracts. Nor can they directly determine what it must do to satisfy its duty to such persons. That duty is cast upon it by law, not because it made a contract, but because it entered upon the work. Nevertheless its contract with the building owner is not an irrelevant circumstance, for it determines the task entered upon.

[48] Chartaprops was obliged to take no more than reasonable steps to guard against foreseeable harm to the public. In this regard, it is well to recall the words of Scott JA in *Pretoria City Council v De Jager*:[58]

'Whether in any particular case the steps actually taken are to be regarded as reasonable or not depends upon a consideration of all the facts and circumstances of the case. It follows that merely because the harm which was foreseeable did eventuate does not mean that the steps taken were necessarily unreasonable. Ultimately the inquiry involves a value judgement.'

Applying that test I am satisfied that the High Court erred in holding Chartaprops liable. Its finding in relation to Advanced Cleaning, however, cannot be faulted.

[49] As to costs. In my view no warrant exists for a departure from the general rule that costs should follow the result in this case.

[50] In the result:

1 The appeal of the first appellant is upheld with costs.

2 The appeal of the second appellant is dismissed with costs.

3 The order of the court below is set aside and the following is substituted in its stead:

'(a) The claim against the first defendant is dismissed with costs.

(b) It is declared that the second defendant is liable to the plaintiff for such damages as might be agreed upon or proved in consequence of the event that is the subject of this claim.

(c) The second defendant is ordered to pay the plaintiff's costs.'

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V M PONNAN
JUDGE OF APPEAL

[58] 1997 (2) SA 46 (A) at 55H-56C.

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