THE SUPREME COURT

[Appeal No: 133/2007]

Denham J.
Fennelly J.
McKechnie J.

BETWEEN/

PATRICK J. LYNCH

PLAINTIFF/APPELLANT

AND

BINNACLE LIMITED TRADING AS CAVAN CO-OP MART

DEFENDANT/RESPONDENT

Judgment delivered on the 9th day of March, 2011 by Denham J.

1. This is an appeal by Patrick J. Lynch, the plaintiff/appellant, referred to in this judgment as "the appellant", from the judgment of the High Court (White J.) delivered on the 7th day of December, 2006, and from the order perfected on the 9th day of December, 2006, whereby the learned High Court judge dismissed the appellant's claim.

2. The appellant is a yard man who was born on the 31st December 1957. He was employed by Binnacle Limited, trading as Cavan Co-op Mart, referred to in this judgment as "the respondent", as a drover of cattle at its mart on the 24th October, 2003, when he suffered a direct kick to the scrotum by a Limousin bullock. The appellant was admitted to Cavan Hospital with swelling of his right testis. He suffered significant trauma to the scrotum and right testis, which gave rise to a haemorrhage, which caused damage to the right testicle.

3. The issue determined by the High Court was that of the liability, and that is the only issue before this Court.

4. At the trial counsel on behalf of the appellant claimed that the respondent was negligent in permitting a system of work which required the appellant to pass by a bullock in a small single pen in order to open a gate to allow the bullock access to the sales ring. Two other employees were absent at the time of the appellant's injury. It was submitted that the respondent was vicariously liable for their negligence in absenting themselves from their proper work station, and that the respondent was responsible for failing to ensure that the system of work was safe and properly implemented.

5. The respondent denied liability and submitted that the appellant was guilty of contributory negligence in failing to exercise reasonable care for his own safety and in exposing himself to a risk of danger. It was submitted further that the appellant was the author of his own misfortune, that no negligence was attributable to the co-employees of the appellant, that there was a proper and appropriate system of work, that the circumstances of the case

were unforeseeable for the employer, and that there was no negligence by the respondent.

6. The learned trial judge dismissed the appellant's claim.

7. In giving judgment, White J. stated:-

> *"On the 24th October, 2003, the [appellant] who was employed by the [respondent] company at its mart in Cavan, sustained personal injuries when he was kicked in the groin by a bullock. At that time the [appellant] was aged 45 years and had considerable experience in the management and handling of cattle, having his own small holding whereon he maintained cattle, and having worked in marts on a regular basis from the age of 15.*
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> *On the day in question the [appellant] was performing a task that he performed regularly, namely, herding cattle from indoor, or covered, pen, in the mart yard of a central aisle to a dividing pen prior to their entering the sales ring. It is the [appellant's] case that the system was one whereby a second drover was positioned at the dividing pens to herd the cattle into two individual pens, and a third drover was positioned in the vicinity of the weighbridge to release the cattle individually into that area to be weighed, prior to their entering the sales ring. Mr. Briody, the [appellant's] agricultural expert, finds no fault with that system.*
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> *It is the [appellant's] case that on the day in question Mr. Drury was the drover positioned in the vicinity of the dividing pen, and Mr. Forde was the drover positioned in the weighbridge area, and that in or about the same time both Mr. Forde and Mr. Drury absented themselves, and that for a period of approximately half-an-hour prior to his receiving his injury, the [appellant] performed their tasks as well as his own. This necessitated his entering the individual pens whilst it was occupied by a beast, and passing behind and along the side of the beast, to open the gate into the weighbridge.*
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> *It is his case that whilst so doing he received a kick to the groin from the bullock then occupying the pen. This was a risk or hazard that in the view of Mr. Briody ought to have been foreseen. On his own evidence, the [appellant] had been told both by Mr. Forde and by Mr. Drury of their respective intentions to absent themselves. However, he considered himself competent to carry on unaided, and he did not seek to have alternative drovers to replace Mr. Forde, and/or Mr. Drury.*
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> *The [appellant] did not call either Mr. Forde or Mr. Drury to give evidence on his behalf, and although the [appellant] asserted in a reply to a Notice of Particulars that his accident was witnessed by a Mr. Gumley, Mr. Gumley was not called to testify before me. Further, notwithstanding that he acknowledged there had been plenty of buyers in the vicinity, no eye witnesses had been called.*

The [respondent] does not accept the veracity of the [appellant's] account, and has called two mart employees, Mr. McNamara and Mr. Irwin, neither of whom witnessed the [appellant] sustain his injury, but both of them stated they had observed the [appellant] walking down the aisle some short distance from the weighbridge area in front of cattle returning to a holding pen. Mr. McNamara estimated that had this occurred a short number of minutes before he saw the [appellant] in distress and holding on to the bars of a pen in the vicinity of where he, Mr. McNamara had last observed him.

The [appellant], Mr. McNamara, and Mr. Irwin, all struck me as being cagey and evasive in the manner in which they answered questions put to them. In addition, I have question marks over the credibility of the [appellant] having regard to the fact that Ms. Fehily, the [appellant's] occasional rehabilitation consultant, was apparently advised by the [appellant] that his work in the mart was part-time and ancillary to his running his own farm, where as Mr. Byrne, the [appellant's] actuary, who was not furnished with any detail of farm income or expenditure, and prepared the figures solely on the basis of the [appellant's] P60, furnished by reference to details supplied by the [respondent]. With more than a degree of hesitation, I am prepared to conclude that the [appellant] sustained his injury in the manner that he stated in evidence. That said, I cannot see any negligence on the part of the [respondent].

It has been argued that the conduct of Mr. Forde and Mr. Drury in absenting themselves was tortious and that the [respondent] was vicariously liable for such tortious acts. An employer is clearly vicariously liable for the tortious acts of its employees, but I really do not see anything tortious in the conduct of either Mr. Forde or Mr. Drury.

Is there any evidence from which I could conclude that the [respondent] knew, or ought to have known of the danger to which the [appellant] was exposed on the day in question? Evidence has been given before me that persons employed by the [respondent] absent themselves from time to time for short periods, but there is no evidence before me that this was a common or habitual feature or practise, nor is there any evidence that the [respondent] knew of or condoned employees temporarily absenting themselves from their posts.

There is nothing to suggest that either Mr. Forde or Mr. Drury sought to obtain the permission of the management to absent themselves on the day in question. Further, there is no evidence before me to suggest that the events of 24 October 2003, namely, two drovers absenting themselves at the same time, were anything other than unique.

Accordingly, I am driven to the conclusion that the [appellant] is the author of his own misfortune, and that there is no negligence on the part of the [respondent]. I should observe that I do not consider the [appellant's] attitude towards returning to work to be reasonable. There is neither psychiatric nor psychological evidence

before me to establish a fear of working with cattle. The [appellant] has never sought to return to his employment with the mart, notwithstanding that in his account to Ms. Fehily he has stated he is unsure whether he could cope there now. He believes he may have lost his confidence for being in such close proximity to so many animals, particularly in that type of environment. Yet, further on in his account to Ms. Fehily, he did indicate to her that he does assist his sister in the handling of her cattle, that he would check on the cattle for a short spell in winter. Once a day he would fodder a few cattle for her, and he would assist her moving them into cattle crushes for dosing, etc. However, he would not attempt to handle an animal now.

I should further add that there is nothing in the evidence to suggest that at any time the [appellant] had been denied a replacement drover, if he sought one. There is nothing to suggest that on the day in question there was a likelihood that he would not have received the cooperation and assistance of the management. Accordingly, the [appellant's] case is dismissed.

Appeal

8. Eight specific grounds of appeal were filed. However, on the hearing of the appeal Mr. Lyons, S.C., counsel on behalf of the appellant, indicated that the net issues being raised were stated in grounds number two and three. These were:-

(ii) That the learned trial judge erred in law in finding that there was nothing tortious in the conduct of the appellant's co-employees Mr. Forde and Mr. Drury in absenting themselves from their work stations at the time of and prior to the appellant sustaining his injury when there was uncontested evidence that a single employee system was unsafe.

(iii) That the learned trial judge erred in law in finding that the respondent was not vicariously liable for the tortious acts of its employees, namely Mr. Forde and Mr. Drury.

Submissions

9. Written submissions were filed by both parties to this appeal, and oral submissions were advanced by counsel for the parties.

10. Counsel for the appellant submitted that there was an unsafe system of work at the time the appellant was injured. As a result of Mr. Drury and Mr. Forde absenting themselves from their place of work, the appellant was injured. There was no evidence of any supervision to ensure that the safe system of work was maintained. Counsel submitted that if Mr. Forde or Mr. Drury or other employees were present there would have been no reason for the appellant to pass the bullock to open the gate to let it into the weighing scales area. Had another employee been there the gate could have been opened without the appellant exposing himself to risk. The safe system broke down when the other two employees left. He submitted that the act of the employees was the cause of the appellant's injury – the absence of Mr. Forde especially from his post was the cause of the injury. If the other employee or employees had done their task correctly the appellant

would not have had to expose himself to danger. It was submitted that the absence of Mr. Forde from his post was a failure to do what was an authorised act and accordingly that the respondent was vicariously liable. The opening of the gate was part of the employment. It was submitted that the respondent was profiting from the sale of the animal that kicked the appellant. In such circumstances, it is not unreasonable that the respondent would be liable for the failure of their work system and the absence of their employee from his post. It was submitted that the respondent should have ensured that the appellant was not obliged to move the animals on his own by ensuring that there were the appropriate number of persons at their posts at all relevant times. In this case Mr. Forde was specifically employed to open the gate into the weighbridge area, and he was absent at the time of the injury.

11. On behalf of the respondent it was submitted that it was not in breach of its duty at common law or pursuant to statute to provide a safe place and system of work. The respondent had addressed the foreseeable risks inherent in the work and had implemented methods and procedures to be followed in carrying out the work which were sufficient to protect the appellant. It was submitted that it was unforeseeable that both of the appellant's two colleagues would absent themselves from their positions at the same time, with the knowledge of the appellant. Also, that it was unforeseeable that the appellant, despite his 30 years experience, would enter a pen (sized 8' 6" x 13' 1" according to the appellant's engineer) and get close behind the animal knowing the nature and form of the animal therein. It was the appellant who decided, when two colleagues had left, to continue with the processing of the animals and to enter the pen which was the proximate cause of the accident.

It was submitted that the respondent had a system of work which the appellant's engineer accepted was safe per se. The respondent could not have foreseen that two men would absent themselves from their positions at the same time. The respondent could not have foreseen that the appellant, knowing that the two men were not in their positions, would take the two men's work upon himself and would enter a pen and get so close behind an animal that the appellant put himself in a position to be kicked by that animal.

In all the circumstances, it was submitted that the appellant was the author of his own misfortune, that no negligence was attributable to the co-employees. There was a proper, suitable and appropriate system of work and that the circumstances of the case were unforeseeable for the respondent. Therefore there was no negligence attributable to the respondent and that the learned trial judge took all of the necessary factors into account in dismissing the appellant's claim, and that the appeal should be dismissed.

Facts

12. There was conflicting evidence as to the circumstances of the injury of the appellant in the High Court. The learned High Court judge, albeit with "more than a degree of hesitation", concluded that the appellant sustained his injury in the manner in which he described in his evidence. Consequently, in all the circumstances, and arising from the jurisprudence; see *Hay v. O'Grady* [1992] 1 I.R. 210; this Court is bound by those findings of fact.

13. The fact was that, in the absence of his two co-employees, the appellant entered a pen, went behind a Limousin bullock, and got kicked. He had been moving forward to open a gate in the pen which would have been opened by one of his co-employees on the other side if the co-employee had remained at his work.

14. The learned High Court judge found that the system of work established by the respondent, with three drovers, was safe. It was described in the report of Leonard Briody B.Eng. M.I.E.I. as:-

> *"The system in place at the moment is good. Once the animals are separated, they are directed in order of their number down through the chute. There is a rising gate in the centre of the chute. Any handling can be carried out with the operative outside the chute.*
>
> *The system in place at the time was adequate provided there were two men present at all times. The first brings the animals from the holding pen and divides them into the single pen. Once the animal is driven into the single pen, the gate can be closed behind him. The second man can then open the exit gate from the other side. This eliminates the need for any person to enter into the pen with the single animal."*

15. Consequently, the evidence was that there was a safe system of work established by the respondent with three drovers. An important aspect of the safety was that the gate could be opened by one employee on the other side, so that there was no need for a drover to enter the pen with the bullock.

16. However, at the time when the appellant was kicked two employees had left their work and the appellant entered the pen to open the gate to move on the bullock.

17. In Mr. Briody's report he stated:-

> *"Animals can be very excited and agitated while being manoeuvred around in marts. This can be reduced while they are kept in numbers. While they are isolated into singles, they can be quite nervous and unpredictable. It is very dangerous to enter into a pen with an isolated animal. [The appellant] was obliged to do this as there was nobody to open the gate the other side. This placed him in a position of danger. This system was unsafe."*

18. The learned trial judge held that the system was unsafe in the absence of the two co-employees.

19. Thus it is necessary to decide whether the respondent, the employer, was liable in the circumstances where two employees were absent from their work.

20. There was evidence of employees absenting themselves from their work. In evidence, Day 1, 5th December, 2006, at pages 28 and 29 of the transcript, the appellant responded to questions as follows:-

"Q. Was it usual that people would go off on business as you have described?

A. Yes, now and again maybe to get something to eat or something but the help was not there and that was it.

Q. When you were left on your own, can you just explain what you were doing, how you were managing to get cattle into the single pen?

A. I was dividing like and trying to get them in by one at a time. I had already put one in the pen along that wall, put the other lad in here, and I just came up behind him and he drew out [sic]."

21. Also, on the same day, at pages 42, 43 and 44 of the transcript, the evidence of the appellant was:-

"Q. You did not either say to the men or, particularly, to Mr. Forde, the second man to go; 'listen, you cannot go because Mr. Drury has already gone'. You were quite happy for the two of them … (INTERJECTION)?

A. It was just I had done it all the days before on me own before too, I had done it before. He said that he would not be long anyway. He said he would be about five or ten minutes. I was gone when he came back, I was after getting the kick.

Q. Were you prepared to wait the five minutes until he … (INTERJECTION)?

A. He said he would not be long he was only going up to sell off the cow and calves above and he said he would be back in five or ten minutes sure.

Q. Did you intend to stop the work until he came back?

A. What?

Q. Did you decide you were going to stop doing work while the two men ahead of you were gone or were you going to continue on without them?

A. At the time he left you carry on.

Q. Were you happy that you could do this job without those two men there?

A. I was not too happy, what could I do, sure, there was no one else.

Q. You did not seem to have any fear or difficulty doing the job because you never said to either of the men; 'listen, you have got to hang on, at least one of you has to hang on to open up the gates ahead of me'?

A. I thought I would just carry on. Glen Forde said he would be back in five or ten minutes and I just said; 'I will carry on until you come back'.

Q. Without those two men up ahead that meant that you were going to have to pass by the animals and open up the gate ahead?

A. I was after putting in five or six bullocks before that and passing by them up and down to open the gates before.

Q. When the men were there you did not have to do that?

A. If the men were there I would not have to do it, no.

Q. No, but you were satisfied yourself, you were happy yourself and your experience with the animals, with the men gone that you were able, from your experience, to pass by an animal safely, is that right?

A. I thought I was.

Q. Because of you, yourself when you were asked about whether anybody saw the accident or came to you after the accident, you said there plenty of men around, is that right?

A. There was plenty of men lying up to the bars there, farmers, there was no workers.

Q. But, you certainly did not think to tell the two men with you to hold on and you certainly did not think it was necessary for you to go and get assistance from anywhere else?

A. There was no one else about to get any assistance off.

Q. How would you have know that, Mr. Lynch, because on your account you were perfectly happy to let the two men go and you did not make any enquiries about other assistance?

A. There was no one else to come to my assistance.

Q. You would not have known that because you did not go looking for them?

A. I knew there was the men, there was not much help about on the day anyway and that was it.

Q. There were plenty of other drovers?

A. No, there was not, there were three rings going that day.

Q. You simply cannot say that there would not have been help available to you because on your own account it never occurred to you to go and get help. You were quite happy for the men to go off and for you to do it on your own?

A. I knew Forde would be back in five or ten minutes and I just said I would carry on until he came back. If he had of come back it took some of the pressure off me, that is the truth.

Q. I suggest to you that you didn't even get to the point where we can say that had you looked for assistance it would have been available. There would have been assistance there but it did not even occur to you to look at that stage, is that right?

A. There was no assistance to look for."

22. Mr. James Irwin, an employee of the respondent, gave evidence that employees would leave their work positions. On Day 2, 6th December, 2006, at pages 15-16 of the transcript, it is stated:-

"Q. ... Would it be fair to say in the course of the mart, employees would sometimes go off and sell heifers or animals of their own?

A. They might.

Q. Was that a common feature of the system of work in the mart?

A. It wouldn't be a common feature to leave your job and go off to sell cattle?

Q. But it did happen?

A. But you'd have to tell someone you were going.

Q. Did it happen?

A. It could happen an odd time all right.

Q. Would you accept if it happened somebody should have been notified so that their space could have been filled in?

A. I suppose that would be right.

Q. Do you accept, Mr. Irwin, that the Limousin bullock is a feistier animal than the more domestic type of bullocks?

A. Yeah, they'd be a bit sharper all right.

Q. Would you accept if they are in a single pen, in other words when they are removed from the herd that they get even more agitated?

A. I suppose, some of them are steamy enough all right. I've seen a lot of them in my time.

Q. So if they were in the single pen the safe way to let them into where the weigh bridge is would be to have another man to open the gate where the weigh bridge is?

A. There's generally a man there at the gate to open it.

Q. Is that not because that's the safe way to do it?

A. That would be right, that's what the man is there for to do at the gate.

Q. Would you accept if a man had to go into the single pen to open the gate in other words to let the animal into the weigh bridge, that that involves a certain amount of risk?

A. Well if you had only one in it, it wouldn't be that bad.

Q. But there would be a certain element of risk; is that right?

A. Probably a bit of risk but it wouldn't be that bad."

23. Thus the evidence was that the respondent had established a safe system of work with three drovers. The system became unsafe when there was only one drover present. This analysis is relevant to the particular circumstances of the case and is not to be taken as a general rule. The case is fact dependent on the circumstances of the case.

Safe System of Work

24. The respondent had a duty to provide a safe system of work for the appellant. There was expert evidence that the system of work was safe when three drovers were present. However, when two drovers were absent the system became unsafe. When the appellant was injured the system was unsafe. In *Kinsella v. Hammond Lane Industries Limited* [1962] 96 ILTR 1 at p.4, McLoughlin J. stated:-

> *"If an accident causes injury to a workman and the accident results from a risk, of an unsafe system of work, against which the employer should have but did not take, reasonable precautions to guard, then the employer is liable for damages."*

25. In this case the facts are not in issue. Two employees left their work, thereby turning a safe system of work into an unsafe system. It is clear from the evidence that no provision was made for a situation where one, or two, drovers left their work. It is also clear from the evidence that the drovers were given no orders or directions as to what should happen in such circumstances. There was no evidence of supervision or of a procedure to be followed if one or more drovers left their work. The question then arises as to whether the respondent employer is vicariously liable.

Vicarious Liability

26. The traditional test, the Salmond test, was stated in Salmond's The Law of Torts (1st ed., 1907) p.83:-

> *"A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master.*
>
> *But a master … is liable even for the acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes – although improper modes – of doing them."*

27. An employer may be vicariously liable for the wrongs of an employee, even when the employer may not have been at fault. Murnaghan J. pointed out in *Byrne v. Ireland* [1972] I.R. 241 at 280 (SC):-

> *"The doctrine is not invalidated by showing that the principal cannot commit the particular tort. It rests not on the notion of the principal's wrong but on the duty of the principal to make good the damage done by his servants or agents in carrying on the principal's affairs."*

28. In *McMahon & Binchy's Law of Torts, 3rd edn. (Butterworths Ireland Ltd., 2000)*, at paragraph 43.02, it is stated:-

> *"Historically speaking this example of strict liability can be traced to earliest times although its modern form in England dates from the end of the seventeenth century. It survived the "no liability without fault" era, to some extent as an anomaly, but nowadays with the trend towards no-fault concepts it can be sustained by more modern justifications such as risk creation and enterprise liability. In other words, the concept of vicarious liability has dovetailed nicely with the more modern ideas that the person who creates the risk, or the enterprise which benefits from the activity causing the damage, should bear the loss. Such persons or enterprises are in a good position to absorb and distribute the loss by price controls and through proper liability insurance. Liability in these cases should, it is felt, follow "the deep pocket"."*

29. In the recent Supreme Court decision of *O'Keeffe v. Hickey* [2009] 2 I.R. 302, the Court held that the State were not liable for actionable wrongs committed by the first named defendant in the action, who was a teacher, as there was no direct employment relationship between the teacher and the State. However, in several judgments there were discussions on vicarious liability, which were obiter dicta. The law at home and abroad was considered.

30. Having addressed the law in this jurisdiction, in Canada, and in the United Kingdom, Hardiman J. concluded that the law in Ireland is still that as stated in the *Salmond* test, and said any changes should be by legislation. Hardiman J. stated at paragraph 121:-

"I am not satisfied that it would be proper to ground vicarious liability on any of the theories expounded in the Canadian cases. I do not believe that the requirements of either fair compensation or deterrence justify the novel imposition of strict liability on an innocent employer for acts quite outside the well established Salmond test. It seems to me, as I have already said in this judgment, lacking in fundamental justice to impose a liability on a person simply because he is, or is thought to be, in a position to pay compensation. Equally, and perhaps even more obviously, it is wrong to impose the status of wrongdoer and the liability to pay compensation without fault for acts outside the scope of employment on the basis of pour encourager les autres."

31. Fennelly J. also analysed cases from Canada and England and Wales . He took a different approach, and stated at paragraph 237:-

"The theoretical underpinnings of the doctrine of vicarious liability are much debated but no clear conclusion emerges. The result is that strict liability is imposed on an employer regardless of personal fault, which is especially striking when the acts are criminal and could not conceivably have been authorised even impliedly. Lord Steyn thought the imposition would be fair and just, if the necessary circumstances existed. Among the reasons suggested in the cases mentioned above is that the employer should bear the burden because he has "set the whole thing in motion" (Lord Brougham) or "has put the agent in his place…" (Willes J) or "is better able to make good any damage…" (Lord Pearce).

Also, commencing at paragraph 243, he stated:-

*"Ultimately, I am satisfied that it is appropriate to adopt a test based on a close connection between the acts which the employee is engaged to perform and which fall truly within the scope of his employment and the tortious act of which complaint is made. That test, as the cases have shown, has enabled liability to be imposed on the solicitor's clerk defrauding the client (*Lloyd v Grace Smith & Company *[1912] 1 A.C. 716); the employee stealing the fur stole left in for cleaning (*Morris v C.W. Martin & Sons Ltd *[1966] 1 Q.B. 716) and the security officer facilitating thefts from the premises he was guarding (*Johnson & Johnson v C.P. Security*). In each of these cases, the action of the servant was the very antithesis of what he was supposed to be doing. But that action was closely connected with the employment. In* Delahunty v South Eastern Health Board *[2003] 4 I.R. 361, O'Higgins, rightly in my view, held that there was no such close connection. The employee of the orphanage had abused a visitor, not an inmate.*

The close connection test is both well established by authority and practical in its content. It is essentially focussed on the facts of the situation. It does not, in principle, exclude vicarious liability for criminal acts or for acts which are intrinsically of a type which would not be authorised by the employer. The law regards it as fair and just to impose liability on the employer rather than to let the loss fall on the injured party. To do otherwise would be to impose the loss on the

entirely innocent party who has engaged the employer to perform the service. The employer is, of course, also innocent, but he has, at least, engaged the dishonest servant and has disappointed the expectations of the person to whom he has undertaken to provide the service. There is no reason, in principle, to exclude sexual abuse from this type of liability. That is very far, as I would emphasise, from saying that liability should be automatically imposed. The decision of O'Higgins J provides an excellent example of practical and balanced application of the test. All will depend on a careful and balanced analysis of the facts of the particular case. In Bazley v. Curry (1999) 174 D.L.R. (4th) 45, the employees of the care home were required to provide intimate physical care for the residents. The sexual abuse was held to be closely connected."

32. It is not necessary to consider a wider analysis in this case. In this case it is not necessary to advance beyond the traditional statement of the law in the Salmond test. This case is fact specific. The circumstances were that two other employee drovers left their work. While this was unauthorised it clearly was known that drovers did absent themselves from work on occasions. There was no evidence of any system of supervision by the employer. The drovers were authorised to herd the cattle. It was improper to absent themselves. Their absence was connected with the act they were authorised to do. This was so connected with the acts that they were authorised to do, droving the cattle, as to result in an improper mode of doing the work, an unsafe system of work. If they had not absented themselves the appellant would not have been exposed to danger. In this case one of the absent drovers was specifically employed to open the gate to the weighbridge, and it was in the absence of his co-employees that the appellant moved behind the bullock to open the gate and so expose himself to danger.

33. In all the circumstances of the case I am satisfied that the respondent is liable for the actions of the two employees, the two drovers, who absented themselves from work and so transformed a safe system of work and caused an unsafe system of work, a situation where the appellant was exposed to risk, and to injury.

Contributory negligence

34. However, the appellant also has a degree of responsibility. He did not ask the two other drovers to remain at work, nor did he even ask one to remain. He did not ask anyone to help him. He did not stop processing the cattle. He sought no assistance. The appellant has been a drover for many years, he is skilled and experienced in droving cattle, and would know of the nature of cattle and of a Limousin bullock. He had been employed as a drover for many years at the mart. Also, he managed cattle on his own farm. Consequently he is experienced in droving cattle. In all the circumstances I am satisfied that the appellant would have a contributory negligence of 33%.

35. Consequently, I would allow the appeal on the issue of liability and remit the matter to the High Court for an assessment of damages.