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PHANG, Andrew B.L.. Exception clauses and negligence-the influence of contract on bailment and tort. (1989). *Oxford Journal of Legal Studies*. 9, (3), 418-424.
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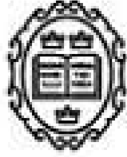

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Source: *Oxford Journal of Legal Studies*, Autumn, 1989, Vol. 9, No. 3 (Autumn, 1989), pp. 418-424
Published by: Oxford University Press
Stable URL: https://www.jstor.org/stable/764427

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Exception Clauses and Negligence—The Influence of Contract on Bailment and Tort

Judgments at first instance have rarely been the subject of comment.[1] The recent decision of Steyn J in *Singer Co (UK) Ltd* v *Tees and Hartlepool Port Authority*,[2] however, merits consideration for at least three reasons. First, it focuses upon important issues in the law of bailment, at least one of which has hitherto *only* been considered at first instance in any event. Secondly, the decision provokes thought on the much broader issue of the effect of exception clauses upon the general duty of care in tort, in particular whether the reasoning in the bailment context could be extended and applied to the wider tortious sphere. This relatively larger issue could not, unfortunately, be discussed in the case itself as there was no finding of negligence as determined by the Court of Appeal in an earlier hearing. Finally, the case throws some light on the application of the reasonableness test in the context of the Unfair Contract Terms Act 1977, although it will be argued that there are persuasive arguments as to why the Act itself ought *not* to be applicable to exception clauses that occur in the *bailment* context.

The facts of the *Singer Co* case itself are unexceptional. The first plaintiffs were an English subsidiary of the parent company, Singer International Securities, which was based in the United States of America. The former was in the process of being shut down and thus arranged for plant and equipment to be shipped to the parent company's subsidiary based in Brazil who were in fact the second plaintiffs. To this end, the first plaintiffs employed a company of international freight forwarders ('Bachman') to crate and deliver machines to ports in the United Kingdom for, presumably, onward shipment to Brazil. One such machine was a Singer drilling machine which, by agreement between the first plaintiffs and Bachman, was to be crated and delivered to the defendant port authority in order that it could be loaded upon a ship for delivery to Brazil. During the loading operation, the crate broke and the machine fell from it and was badly damaged. An action was brought by the plaintiffs[3] in both negligence and bailment. Earlier hearings resulted, as alluded to above, in a finding of no negligence on the part of the defendants, and the instant case (a rehearing) was concerned, in the main, with

[1] Though see Coote [1977] *CLJ* 17, which is a comment on *Johnson Matthey & Co Ltd* v *Constantine Terminals Ltd and International Express Co Ltd* [1976] 2 Lloyd's Rep 215 which, curiously enough, figures rather prominently in the present note.

[2] [1988] 2 Lloyd's Rep 164.

[3] The two plaintiffs in this case 'were joined in order to avoid any complication as to title to sue, bearing in mind that part of the loading operation took place on one side of the ship's rail, and part upon the other. Nothing turns on this aspect.': see [1988] 2 Lloyd's Rep 164 at 165

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whether the defendants could rely upon exception clauses in their contract between them and Bachman with regard to the action in bailment.

Steyn J held that Bachman acted as *principals* in concluding the contract (which contained the exception clauses) with the defendants. Thus faced with the seemingly insurmountable problem of the lack of privity of contract with the plaintiffs, the defendants nevertheless went on to argue, relying upon the (now famous) proposition first established by Lord Denning MR in *Morris* v *CW Martin & Sons Ltd*,[4] that the plaintiffs (as bailors) had either expressly or impliedly consented to the bailee (Bachman) making a sub-bailment containing, *inter alia*, the exception clauses, with the defendants as sub-bailees, and were thus bound by the exception clauses. Whilst this proposition did not receive direct endorsement by the other two judges in *Morris* itself, it has in fact received at least some judicial[5] and rather more academic[6] support. Not surprisingly, therefore, Steyn J endorsed this principle, adroitly distinguishing two potentially problematic precedents in the process,[7] and evincing, it is submitted, a scholarly approach towards adjudication by citing from two leading academic publications of recent vintage.[8] He thus held that as, on the facts, there was implied authorization by the plaintiffs to Bachman to enter into a sub-bailment with the defendants on their (Bachman's) general conditions, the defendants were entitled to rely upon the conditions and the exception clauses contained therein—clauses that had thus to be subjected to, *inter alia*, the statutory test of reasonableness under the Unfair Contract Terms Act 1977, as will be discussed below. It is submitted that the 'Denning principle' in *Morris* should now be taken as settled law despite the absence of subsequent substantial (and higher) English authority[9] not only because it is eminently suited to the bailment context but also because it can, as will be submitted towards the end of this note, form one of the main bases for advancing an argument which, if accepted, will result in a modification of the *tortious* standard of care.

What is, however, disappointing is the fact that Steyn J refused to go *further*, and endorse, as an alternative and cumulative argument by the defendants, the proposition enunciated by Donaldson J (as he was then) in *Johnson Matthey & Co Ltd* v *Constantine Terminals Ltd and International Express Co Ltd*[10] where the learned judge, whilst endorsing the 'Denning principle' in *Morris*, went further and held that in a situation such as the present, the bailor is bound by the terms of the sub-bailment *regardless* of consent as he cannot prove the bailment (upon which the

[4] [1966] 1 QB 716 at 729–30. This principle was reiterated by the Master of the Rolls in *Gillespie Brothers & Co Ltd* v *Roy Bowles Transport Ltd* [1973] QB 400 at 412.

[5] See, eg, *BWIA Ltd* v *Bart* (1966) 11 WIR 378; and *Johnson Matthey & Co Ltd* v *Constantine Terminals Ltd and International Express Co Ltd* [1976] 2 Lloyd's Rep 215. See, also, *Mayfair Photographic Supplies (London) Ltd* v *Baxter Hoare and Co Ltd* [1972] 1 Lloyd's Rep 410 at 416; but cf. *Moukataff* v *BOAC* [1967] 1 Lloyd's Rep 396 at 418; and *contra Philip Morris (Aust) Ltd* v *The Transport Commission* [1975] Tas SR 128.

[6] See, eg, N. E. Palmer, *Bailment* (1979) at 1000–4; David Yates, *Exclusion Clauses in Contracts* (1982) at 180–2; Reynolds (1972) 88 *LQR* 179 at 183; Beatson (1977) 55 *Can B Rev* 746 at 749–50; and Coote [1977] *CLJ* 17 at 18–19.

[7] These were the cases of *Lee Cooper* v *CH Jeakins & Sons, Ltd* [1964] 1 Lloyd's Rep 300; and *Learoyd Bros & Co and Huddersfield Fine Worsteds, Ltd* v *Pope & Sons (Dock Carriers), Ltd* [1966] 2 Lloyd's Rep 142, respectively.

[8] Viz, the works by Palmer and Yates, above, n 6, at 1000–6, and 180–4, respectively.

[9] See, above, n 5.

[10] [1976] 1 Lloyd's Rep 215.

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duty and consequent breach and action in negligence are premised) without reference to the very terms of the sub-bailment itself. One can only speculate at Steyn J's reasons for not adopting a bolder approach. There was clearly a lack of weighty authority as *Johnson Matthey* was, and (apparently) remains, the sole decision on this point. In addition, the application of the 'Denning principle' in *Morris* is, more often than not, sufficient to resolve any problems, as was the situation in the instant case.[11] It is, however, respectfully submitted that the further proposition by Donaldson J in *Johnson Matthey* ought to have been endorsed by Steyn J for reasons that will now be briefly considered.

The approach by Donaldson J in *Johnson Matthey* is both logical and fair. It has long been established that a bailment may arise *independently* of a contract, and thereby engender various rights and obligations, the chief duty of which is to avoid negligence;[12] this is clearly the case in the situation presently considered which concerns a bailment for reward. If this, however, be the case, it must, in turn, be ascertained from whence the *substance* of the duty may be ascertained. It is clear, then, that the terms of the sub-bailment must necessarily be taken into account, and that the consent of the bailor, express or otherwise, is irrelevant. But this was precisely Donaldson J's point. To argue otherwise would be to accept that a bailment (and its corresponding rights and duties) may arise independently of a contract and yet deny the very source from which the actual 'body', so to speak, of the bailment itself may be derived. Yates, further, argues from the perspective of *fairness* to the sub-bailee. He argues that the sub-bailee ought to be entitled to specify the terms upon which he assumes the duty to the bailor 'and this entitlement ought not to be lost simply because there is no means of direct communication between himself and the owner'—a point that is rendered even clearer when the situation of an *involuntary* bailee is taken into account.[13] It is, however, admitted that such a principle must be confined to the bailment context, and rightly so, simply because its rationale, as just considered, lies exclusively within this particular sphere. Palmer also adds that the exception clauses in the secondary or sub-bailment should be 'invoked only when they clearly amount to a proclamation of the sub-bailee's *duty* towards the owner of the goods';[14] he adds that such terms should therefore 'constitute the essential or indispensable terms upon which the sub-bailee took possession. They should, in Donaldson J's own words, represent an essential part of the sub-bailee's consideration; for not every provision in the contract of sub-bailment will necessarily be central to the separate relationship between owner and sub-bailee'.[15] It ought, further, to be noted that the burden of proof is on the sub-bailee to prove that he was not negligent, so that it is unlikely that acceptance of the *Johnson Matthey* principle would result in unwarranted injustice for the plaintiff. It is therefore unfortunate that Steyn J did not add his support to the proposition by Donaldson J in *Johnson Matthey*, for,

[11] As Steyn J himself stressed: see [1988] 2 Lloyd's Rep 164 at 168.
[12] See the *Morris* case itself; see, also, generally, Palmer, above, n 6, Chapter I.
[13] See Yates, above, n 6 at 182
[14] See Palmer, above, n 6 at 820.
[15] Ibid.

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given the English common law system, support 'begets' further support, save where there is a pronouncement by a court at a higher level.

What is more interesting but which, as already mentioned, could not be considered on the legal and factual findings in the present case itself, is whether the 'Denning principle', which obtains in the bailment context, could be *generalized* so as to found an argument for the modification of the standard of the duty of care in tort. This is a rather controversial proposition, especially since it concerns the imposition, in effect, of the *burden* of an exception clause upon a *non*-party to the contract.[16] Even Donaldson J in *Johnson Matthey* declined to pronounce on such a situation,[17] such an approach being understandable in view of the fact that the position is, as yet, unclear as to other situations concerning non-parties to the contract itself. There is, for example, presently a controversy as to whether exception clauses in contracts should be construed as negating the duty of care altogether, thus taking the defendant out of the purview of the Unfair Contract Terms Act 1977 altogether—a controversy that in effect 'resurrects' in a practical context the juristic innovation proposed by Professor Coote in his seminal work on exclusion clauses.[18] One ought, in this regard, to compare the two Court of Appeal decisions of *Smith* v *Eric S Bush (a firm)*,[19] and *Harris* v *Wyre Forest District Council*,[20] respectively. The difference in judicial approach is well summarized by McNeill J in *Davies* v *Parry*.[21] One awaits the pronouncement of the House of Lords which is expected soon[21a]. It would, however, appear that the *Smith* v *Bush* approach has more support not only because of the views of McNeill J in *Davies* v *Parry* but also because of the general principle that only in a *contractual* situation ought the parties to be allowed to modify or even exclude the duty of care, in the absence of any vitiating factors.[22]

Notwithstanding the above, it is submitted that the issue as to whether such an extension of the 'Denning principle' in *Morris* is desirable ought, at the very least, to be seriously considered for several reasons. First, what authority there is appears to favour the extension. The starting-point is Lord Roskill's *dictum* in *Junior Books Ltd* v *Veitchi Co Ltd*[23] which was, however, criticized by Lord Brandon in *Leigh*

[16] I leave aside discussion of the device of the implied contract which, it is submitted, is too artificial a means with which to impose the burden of an exception clause on a third party. It has, in fact, been rarely, if ever, used. See *Pyrene Co* v *Scindia Navigation Co* [1954] 2 QB 402.

[17] [1976] 2 Lloyd's Rep 215 at 222.

[18] See Brian Coote, *Exception Clauses* (1964), Chapter 1. See, also, N. Y. Chin, *Excluding Liability in Contracts* (1985) at 58–72.

[19] [1988] QB 743.

[20] [1988] QB 835.

[21] [1988] 21 EG 74 at 74–80.

[21a] See now [1989] 2 WLR 790.

[22] See, in this regard, the very recent decision of the Court of Appeal in *Greater Nottingham Co-operative Society Ltd* v *Cementation Piling and Foundations Ltd* [1989] QB 71, as well as its earlier decision in *William Hill Organisation Ltd* v *Bernard Sunley & Sons Ltd* (1982) 22 BLR 1, especially at 29–30. See, also, *Pacific Associates Inc* v *Baxter* [1989] 2 All ER 159 which, however, arose in a slightly different and, it is submitted, somewhat more novel context; cf, though, the 'benefit' situation discussed below. The House of Lords has very recently affirmed the *Smith* v *Bush* approach: see [1989] 2 WLR 790. And cf in the realm of exclusions of liability for misrepresentation (under s 8 of the Unfair Contract Terms Act 1977) the somewhat contrasting decisions of *Cremdean Properties Ltd* v *Nash* (1977) 244 EG 547 on the one hand and *Overbrooke Estates Ltd* v *Glencombe Properties Ltd* [1974] 1 WLR 1335; and *Collins* v *Howell-Jones* (1981) 259 EG 330 on the other.

[23] [1983] 1 AC 520 at 546. See also *per* Robert Goff LJ in *Muirhead* v *Industrial Specialities Ltd* [1986] 1 QB 507.

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and Sillavan Ltd v *Aliakmon Shipping Co Ltd, (The Aliakmon)*.[24] There are, however, other cases (albeit at first instance) arising out of building contracts that suggest that an extension by *analogy* is possible in at least this particular context: see, eg, Judge Edgar Fay (an Official Referee) in *Rumbelows Ltd* v *AMK (a firm) and Firesnow Sprinkler Installations Ltd*;[25] Judge Lewis Hawser (also an Official Referee) in *Twins Transport Ltd* v *Patrick and Brocklehurst*;[26] and Macpherson J in *Welsh Health Technical Services Organisation* v *Haden Young*.[27] Garland J declined, however, to apply the analogy in the bailment cases to building contracts in *Norwich City Council* v *Paul Clarke Harvey*, with ultimate reliance in a more general sense on what was 'just and reasonable'.[28] It is significant, though, that such an analogy will not be applied lightly, as is evident from the two decisions of *Rumbelows Ltd* and *Twins Transport Ltd*[29]—a point that, it is submitted, actually supports the extension of the 'Denning principle'.

Secondly, in so far as the *benefit* of an exception clause is concerned, at least one decision has held that, if the somewhat artificial contractual 'device' first successful in *New Zealand Shipping Co Ltd* v *AM Satterthwaite and Co Ltd, (The Eurymedon)*[30] is unavailable, the exception clause concerned might nevertheless go toward negativing the duty of care which would otherwise have been owed to the plaintiff: see *Southern Water Authority* v *Carey* which was, however, once again a decision at first instance.[31] It is admitted that the present situation is one concerning the *burden* of an exception clause, and Professor Treitel, for example, argues that in the former (ie 'benefit') situation, the party against whom the exception clause is sought to be utilized has in fact *assented* to it since it occurs in a contract to which he is a party, whereas in the latter (ie 'burden') situation, the party against whom the exception clause is sought to be utilized is necessarily a *stranger* to the contract concerned; there is thus less objection in negativing the duty of care in the former as opposed to the latter situation.[32] It is, however, respectfully submitted that even in a 'burden' situation, there could be a negativing of the duty of care in tort. This is where the *rationale* of the 'Denning principle' in *Morris* applies. If, in other words, the plaintiff expressly or impliedly consented to the defendant contracting with a third party on terms that included one or more exception clauses, then he ought to be bound by such clauses to the extent that they may be taken to negative

[24] [1986] AC 785 at 817

[25] (1980) 19 BLR 25 at 48–9.

[26] (1983) 25 BLR 70 at 86–7.

[27] (1987) 37 BLR 135 at 142–3. And see Beatson (1977) 55 *Can B Rev* 746 at 751.

[28] (1987) 39 BLR 75 at 84, 87–8 (the criterion of 'just and reasonable' being derived from Lord Keith's judgment in *Governors of the Peabody Donation Fund* v *Sir Lindsay Parkinson & Co Ltd* [1985] 1 AC 210 at 240–1). Garland J's decision has been affirmed very recently by the Court of Appeal: see *Norwich City Council* v *Harvey* [1989] 1 All ER 1180 but without any detailed discussion of the 'Denning principle'.

[29] The pronouncements of Macpherson J in the *Welsh Health Technical Services Organisation* case were *obiter dicta*.

[30] [1975] AC 154, PC, and re-affirmed since in, notably, *Port Jackson Stevedoring Pty Ltd* v *Salmond and Spraggon Australia Pty Ltd, (The New York Star)* [1981] 1 WLR 138. There has been a veritable plethora of literature concerning this device, more so than the present point which is concerned with the *converse* situation, viz, the burden of an exception clause *vis-à-vis* a third party.

[31] [1985] 2 All ER 1077.

[32] See G. H. Treitel, *The Law of Contract* (7th ed, 1987) at 481–2; and, by the same author [1986] *LMCLQ* 294 at 302. Cf, also, the *Norwich City Council* case, above, n 28 at 88. But cf B.S. Markesinis (1987) 103 *LQR* 354 at 395.

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the duty of care. In such a situation, there would, it is submitted, be little difference in substance between a 'benefit' and 'burden' situation. It might even be argued that this is, in effect, an invocation of the general defence of *volenti non fit injuria*.[33] The authorities are, however, clear that the defence as such is extremely difficult to establish.[34] Might it not, then, be argued that it is not the *defence* of *volenti non fit injuria* that is sought to be argued but, rather, a modification of the standard of care itself? This would, of course, be but a semantic difference if the effect was the *total negation* of the duty of care altogether.[35] But that would be applying *volenti non fit injuria* as a *defence*. Why could it not be argued, rather, that the element of *volens* goes towards a *reduction* in the *standard* of care only, which reduced standard might still not be met by the defendant concerned? In such an instance, the phrase 'negative the duty of care', as utilized above, is, of course, inapposite. The problem, however, with such an argument (pertaining to a reduction in the standard of care as opposed to a total negation of the duty of care) is that there would be varying standards of negligence, which has long been eschewed by the courts because of the generation of uncertainty.[36] It is, however, submitted that the point is at least open for further consideration by the courts simply because the situation concerned is somewhat different and, in any event, has some precedential support as described above. It is also submitted that, with the recent retreat from what appeared to be the rather broad implications of Lord Roskill's judgment in *Junior Books* in the sphere of recovery for pure economic loss in tort,[37] there ought, as a matter of policy, to be fewer objections to the consideration of exception clauses *vis-à-vis* the duty and/or standard of care in tortious negligence. There are, however, admittedly problems centring around the (at least indirect) incursion into the well-entrenched doctrine of privity of contract,[38] although insistence on full compliance with the 'Denning principle' in *Morris* (which, as we have seen above, will not be lightly applied) ought, it is submitted, to alleviate, in part at least, any fears on the part of the 'traditionalists'.

Given the above state of affairs, it is unfortunate that virtually all the decisions thus far are precedents at first instance which are limited, in the main, to building contracts. It is hoped that a more definitive ruling will emerge from the courts in the not too distant future.

A few brief words on Steyn J's application of the reasonableness test under the

[33] See Reynolds (1972) 88 *LQR* 179 at 183; but cf Palmer, above, n 6 at 44. See, also, Reynolds (1985) 11 *NZULR* 215 at 221–2; and, by the same author, [1986] *LMCLQ* 97 at 106–7.

[34] See, eg, *Street on the Law of Torts* (8th ed, 1988, by Margaret Brazier) at 248 ff; *Salmond and Heuston on the Law of Torts* (19th ed, 1987) at 556 ff; *Winfield and Jolowicz on Tort* (12th ed, 1984, by W. V. H. Rogers) at 700 ff; and John G. Fleming, *The Law of Torts* (7th ed, 1987), Chapter 13. And see s 2 (3) of the Unfair Contract Terms Act 1977, whose language, however, suggests that *volenti non fit injuria* is unavailable as a complete defence only, and does not, it is submitted, detract from the arguments which follow.

[35] See Jaffey [1985] *CLJ* 87 at 105.

[36] See, eg, *Nettleship* v *Weston* [1971] 2 QB 691. See, also, Jaffey [1985] *CLJ* 87 at 106.

[37] There are many reported decisions, of which the latest include *Simaan General Contracting Co* v *Pilkington Glass Ltd (No 2)* [1988] QB 758; *Greater Nottingham Co-operative Society Ltd* v *Cementation Piling and Foundations Ltd* [1989] QB 71; and *D & F Estates Ltd* v *Church Commissioners for England* [1988] 3 WLR 368.

[38] See, eg, G. H. Treitel, *The Law of Contract*, above, n 32, at 458–60 and the authorities cited therein.

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Unfair Contract Terms Act 1977 conclude this note.[39] This is one of the few cases in which the court attempts to grapple with and apply a whole cluster of factors in order to ascertain the reasonableness or otherwise of the clauses in question;[40] in the event, Steyn J found that both clauses satisfied the reasonableness test. The approach is very factual in nature, and supports the view that in so far as the application of the statutory test under the Act is concerned, the process is one of ad hoc weighing and balancing. This, however, makes for *unpredictability*,[41] and might even result in a 'shying away' by lawyers from reliance on the Act, save when in extremely desperate straits.[42]

Secondly, there is further support from the instant case for the view that even if Schedule 2 of the Act is not, strictly speaking, applicable,[43] it nevertheless contains relevant factors which may be taken into account when applying the reasonableness test.[44] This approach, it is submitted, accords with commonsense, for even if courts were proscribed from considering them, such factors, being so general in nature, would have been considered by courts in any event. This proposition has, however, only been hinted at in previous cases.[45]

Finally—and this was a point not considered by Steyn J—it might not even have been necessary to have considered the Act at all. It has been persuasively argued that clauses such as those in the instant case, occurring as they do in a special bailment context, constitute 'a *bona fide* delineation of duty [and] must fall beyond section 13(1)',[46] thus taking them outside the purview of the Act altogether. This brings into focus, once again, the point first raised by Professor Coote whose views continue to have practical currency in more than one context.[47]

Andrew B. L. Phang*

[39] Steyn J had earlier held that, as a matter of common law construction, the exception clauses concerned were applicable: see [1988] 2 Lloyd's Rep 164 at 168–9.

[40] See [1988] 2 Lloyd's Rep 164 at 169–70.

[41] Cf Adams and Brownsword, (1988) 104 *LQR* 94.

[42] Some, such as the critical legal scholars, may argue that the notion of predictability is a myth, but in so far as this notion has taken root in the *psyche* of common lawyers, the points just made must be taken seriously.

[43] This Schedule only comes into play when either section 6 or 7 of the Act is involved. *Singer*, in fact, involved consideration of sections 2 and 3 of the Act.

[44] Though arguably such an approach in *Singer* may have been the result of common consent by both counsel involved: see [1988] 2 Lloyd's Rep 164 at 169 ('But it is further *common ground* . . .') (emphasis added).

[45] See, eg, *Woodman* v *Photo Trade Processing Ltd* (1981) 131 NLJ 933; and *Phillips Products Ltd* v *Hyland* [1987] 1 WLR 659, esp at 667.

[46] See Yates, above, n 6 at 183. See also, Palmer and Yates [1981] *CLJ* 108 at 131–4.

[47] See, eg, above, nn 18 to 22, and the accompanying main text.

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