Neutral Citation No: [2017] NIQB 113	*Ref:* HOR10474
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 28/11/2017

2016 No: 026406

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

Between

IAN ORR and ISOBEL ORR

Plaintiffs

and

AES-MARCONI LIMITED

Defendant

_____

HORNER J

A. INTRODUCTION

[1] The plaintiffs are the owners of 3 Larchfield, Portadown ("the Property"). They seek damages, which have been agreed at £55,000, for loss and damage and inconvenience suffered by them following an oil leakage in 2013 from the neighbouring property at 2 Larchfield, Portadown. There had been a previous leakage of oil from 2 Larchfield in December 2011. It is alleged that the further escape of oil on to the property was as a consequence of the negligence of the defendant, its servants and agents, who had remediated the original escape of oil.

[2] The plaintiffs took the decision not to sue the owner of No 2 Larchfield, Portadown, Mrs Conran ("MC") whether in negligence, nuisance or under the rule in *Rylands v Fletcher*. The court can readily understand why such a decision was taken but as a consequence, it is not for this court to explore any potential liability of MC for the second leakage of oil on to the plaintiffs' property in these proceedings.

[3] Finally, I want to record my debt to both legal teams for their helpful and detailed submissions, both written and oral.

B. THE FACTS

[4] The plaintiffs' property comprises a two-storey detached house. It is immediately adjacent to 2 Larchfield, Portadown, which, as I have said, is owned by MC. On 20 December 2011 there had been an oil leak from 2 Larchfield as a consequence of the failure or detachment of a gauge of the above ground oil storage tank ("AST") on MC's premises. There was no failure of the oil supply pipe to the AST. The site was remediated in accordance with the recommendations of Mr Alasdair Bushe, Environmental Scientist. In order to excavate the contaminated soil, it was necessary for the defendant to move the tank and plinth. It was while excavating the contaminated soil, that the oil feedline was damaged at a point close to the position of the oil tank. The defendant replaced the damaged length of pipe with new pipe which was jointed to the remaining pipe. This joint was placed in an inspection chamber. This work was performed only after the existing section of the supply pipe had been pressure tested successfully on two occasions. There was no evidence adduced to show that at this stage the supply pipe line had been obviously compromised whether by corrosion or by any other process.

[5] The plaintiffs obtained an award of damages of £94,000 from Deeny J in respect of this first leak.

[6] It is common case that the current British standards do not recommend jointing but instead require the replacement of the entire section of pipe. BS5410 Part 1 1977 states at 5.42:

> "Where fuel feed pipe work is buried, precautions should be taken to locate the pipe run where the chance of damage from digging or other such activities is minimal. Where this cannot be done the pipe work should be protected, eg by covering with tiles. Pipe work below ground should be jointless; where joints are unavoidable the pipework should be tested for leaks before back filling … Where joints are buried these should always be provided with means of access for inspection."

It is common case that a joint was not unavoidable at this location as the whole section of pipework could have been replaced.

[7] The first remediation works were completed by the defendant on behalf of MC's insurer in November 2012. On 20 March 2013 a second escape of oil from MC's property was discovered. Once again the defendant was asked to remediate the effects of the oil spillage which had occurred.

[8] On the second occasion the plaintiffs' property suffered substantial damage due to contamination of the soil by the escaped oil and the consequent offensive odours which permeated the property. As I have recorded, if the plaintiffs succeed

against the defendant, it has been agreed that they should be entitled to £55,000 damages to compensate them for the effects of this second oil leak.

[9] The remediation work which the defendant was required to carry out following the first spillage involved, inter alia:

(a) The relocation and reconnection of the AST outside the contamination zone.

(b) The excavation of the lawn area over the boundary.

(c) The removal of contaminated soil to a depth of one metre or until clean fill was reached.

(d) A pump and treat system to remove possible free product from the perched ground water.

This work appears to have been carried out on the agents' terms and conditions although these do not appear to have been either signed or dated.

[10] It became clear when Mr Robinson, a plumber employed by the defendant gave his evidence that it was while in the course of carrying out the remediation work that he damaged a section of the oil supply pipe on MC's property. This pipe, it is agreed, did not comply with the present day requirements in that:

(a) It has been placed at a far shallower depth than is presently recommended.

(b) There was no bedding of sand above or below the section as is now required.

(c) There was no protective sleeve of polythene or plastic.

(d) There was no warning tape.

(e) There were sharp stones in the soil.

(f) Part of the pipe travelled under the paviors which might have been laid in land-fill.

[11] There was no evidence before the court that Mr Robinson could or should have been aware of any corrosion of the supply pipeline that would have alerted him to the future risk of the supply pipe leaking. It also has to be recognised that Mr Robinson was not OFTEC registered and had very little experience of this type of oil supply line work. He gave the impression that he did not consider the condition of the oil pipeline to be any of his business in the absence of any obvious defect.

[12] The defendant chose not to replace the entire length of supply pipe but instead to replace the damaged section by jointing it to the existing supply pipeline

and installing an inspection chamber for the joint. The remaining pipework was successfully tested and was found to be in full working order. The cost of replacing the entire length of pipe would been in the region of £600-£1,000. It is not clear who would have been responsible for paying for all this work which involved both remedying a mistake and upgrading what had been in existence. It is likely to have been the primary responsibility of the Defendant with MC having to make a contribution to reflect the betterment. It is not possible to be dogmatic.

[13] I find the following facts:

(a) It was not unusual to find pipes supplying oil to ASTs which did not comply with current standards when carrying out remediation work. Indeed, the BS standards themselves had been changed in 1997. These old supply pipes often reflected the standards which had been previously applicable.

(b) The oil pipeline which leaked in 2013 would have leaked regardless of whether the defendant had carried out any remediation work at all. There was no evidence that the defendant's work to the pipe did anything to increase the risk of it leaking.

(c) The installation of a joint in the pipe was not good practice, and was not consistent with present OFTEC or BS standards. This is because, I understand, it gave rise to a risk of a leak at the joint (which did not happen).

The evidence of the experts

[14] Mr Cosgrove, Consulting Engineer, gave evidence on behalf of the plaintiffs. Mr McLoughlin, Consulting Engineer, gave evidence on behalf of the defendant. Neither expert inspected the site but prepared what were essentially desk top reports. Mr Cosgrove did not know precisely how the second leak had occurred. He said that if the oil supply pipe had been re-laid fully and in accordance with OFTEC or BS during the remedial works after the first leak, the second leak would not have occurred. I am not sure that he is necessarily in a position to reach this conclusion as he had not carried out any inspection. Certainly, he was unable to contradict the proposition that if the defendants had carried out no work to No 2 Larchfield, Portadown, an oil leak would have occurred in exactly the same way. Of course, it was the evidence of Mr Cosgrove, which was not contradicted, that if the entire section of pipe had been replaced by the defendant in carrying out the initial remediation work, there would have been no subsequent leakage. He also criticised the AST as being located too close to the boundary. He invited the court to conclude that this was evidence of sloppy and incompetent work on the part of the defendant. Mr McLoughlin did not disagree that the pipeline did not accord with current British Standards or OFTEC guidelines. But he made the point that the particularly shallow pipeline was discovered by MEL Environmental Solutions.

The cases made by the parties

[15] The plaintiffs' case is that the defendant breached its duty of care by leaving in situ an oil feed pipeline which the defendant knew or ought to have known, was in a condition which did not comply with present standards and recommendations or with good practice. It should have replaced the entire section or at the very least given warnings or advice as to the non-compliant nature of the oil supply pipeline.

[16] The defendant's case is that while it accepts it owed a duty of care to the plaintiff, it does not accept that it was in breach of that duty or that it acted carelessly. Its duty of care did not include a responsibility to inspect the existing pipe work, replace it or to give warnings. The joint was successfully made to the oil supply pipe, the supply pipeline was pressure tested and found to be in proper working order. In effect the oil supply pipeline after the work was carried out by the defendant was in no worse condition than before the defendant's work had been completed. Thus no act on the part of the defendant caused or contributed to the pipe leaking. The defendant further denies that it had assumed any responsibility towards the plaintiffs or that there was any special relationship between it and the plaintiffs which required it to replace the original pipe. Nor was there any duty to warn the plaintiffs that the oil pipeline did not, inter alia, comply with current British standards.

[17] So while the facts of the case are relatively straightforward they do give rise to interesting issues. They include, inter alia, the scope, if any, of the defendant's duty of care to the plaintiffs, causation, the duty to give warnings or advice, the assumption of responsibility and whether or not there was a special relationship between the plaintiffs and the defendant.

Legal Discussion

[18] Negligence has been defined as the breach by the defendant of a legal duty to take care and which results in damage to the claimant: see Osborn's Concise Law Dictionary. There is no dispute in this case that the defendant owed to the plaintiffs a duty of care. The central issue is whether the defendant, its servants and agents, fell below the standard of care demanded by that duty of care. However, as Charlesworth and Percy on Negligence (13th Edition) state at 2-60:

> "No general duty to act.
>
> At least as a general rule, there is a duty to take care not positively to cause physical injury or damage to another. Conversely, where someone is put at risk from a source not connected in some way with the defendant, there is no general duty in tort requiring the defendant to intervene."

[19] JC Smith on Liability on Negligence notes:

> "There is a significant moral difference between causing harm and merely failing to prevent harm from happening."

[20] Winfield and Jolowicz on Tort (16th Edition) at 5.19 states:

> "The basic rule is that it has always been – and seems still to be – that we must take care not to cause injury to others, but there is no general duty to act for the benefit of others. The rule is that I must not harm my neighbour (misfeasance) not that I am required to save him (non-feasance)."

[21] As Lord Diplock said in *The Home Office v Dorset Yacht Company Ltd* [1070] AC 1004 at p1060:

> "The very parable of the Good Samaritan (Luke 10, v.30) which was evoked by Lord Atkin in *Donoghue v Stevenson* illustrates, in the context of the Priests and the Levite who passed by on the other side, an omission which was likely to have as its reasonable and probable consequence damage to the health of the victim of the thieves, but for which the Priests and Levite would have incurred no civil liability in English law."

[22] In *Stovin v Wise* [1994] AC 923 Lord Hoffman (at page 943) explained why actions can give rise to a liability while omissions do not. He said:

> "Omissions, like economic loss, are notoriously a category of law in which Lord Atkins' generalisation in *Donoghue v Stevenson* [1932] AC 562 offers limited help … There are sound reasons why omissions require different treatment from positive conduct. It is one thing for the law to say that a person who undertakes some activity shall take reasonable care not to cause damage to others. It is another thing for the law to require that a person who is doing nothing in particular shall take steps to prevent another from suffering harm from the acts of third parties (like Mrs Wise) or natural causes. One can put the matter in political, moral or economic terms. In political terms it is less of an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect. A moral version of this point may be

> called the **Why pick on me**? A duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another? In economic terms, the efficient allocation of resources usually requires an activity should bear its own costs. If it benefits from being able to impose some of its costs on other people (what economists call **externalities**) the market is distorted because the activity appears cheaper than it really is. So liability to pay compensation for loss caused by negligent conduct acts as a deterrent against increasing the costs of the activity to the community and reduces externalities. But there is no similar justification for requiring a person who is not doing anything to spend money on behalf of someone else. Except in special cases (such as marine salvage) English law does not reward someone who voluntarily confers a benefit on another. So there must be some special reason why he should have to put his hand in his pocket."

[23] It is for these reasons that the common law has decided there should be no liability placed on the by-stander for failing to act to save a drowning person, but that there is a potential liability for the by-stander if he attempts to rescue the drowning person but does so in a careless manner.

[24] Of course there are circumstances in which a third party may be under an obligation to act. The occupier owes a duty to the lawful visitor to take reasonable care for the visitor's safety while he is on the premises and perhaps also to act for the benefit of neighbours: see *Goldman v Hargrave* [1966] 2 All ER 989. There may be cases where a defendant assumes the responsibility to a plaintiff to perform a service and fails to do so. Thus for example in *Welsh v Chief Constable of the Merseyside Police* [1993] 1 All ER 692 it was held that where the police service had given an undertaking to take some action, then an affirmative duty would arise to do so with reasonable care to fulfil that undertaking.

[25] Indeed, such an undertaking can be implied from the behaviour of the defendant: see *Barratt v MOD* [1995] 1 WLR 1217 where it was found that although there was no obligation on the defendant to prevent the plaintiff drinking himself insensible, once he had collapsed and his fellow airmen had taken him to his room, then they and the MOD vicariously had assumed responsibility for his wellbeing. Thus the MOD was liable because no medical assistance was called to attend the plaintiff.

[26] It can, of course, be difficult to distinguish between pure omissions and actions. Clerk and Lindsell (21st Edition) at 8-46 states:

> "A person who creates a danger, however blamelessly, may come under a consequential duty to take precautions to prevent injury resulting. Thus, a motorist who has to leave his vehicle unlit may be under a duty to warn other motorists of the obstruction. A manufacturer aware of a dangerous feature in his product may be under a duty to warn users and this may apply where the dangerous defect is discovered subsequent to the sale of the product … The pure omission principle applies only when the failure to act can be viewed in isolation from other aspects of the defendant's activity and classed as **non-feasance**."

[27] There is no general legal obligation under the common law to give warnings or advice. Charlesworth and Percy on Negligence (11th Edition) at 2-80 point out that there is no general legal obligation at common law to give warnings or advice. It goes on to say:

> "The mere fact that a person is in a position to warn another of danger is no sufficient reason for imposing a legal duty to warn. In a much cited example, Lord Keith maintained that there would be no liability in negligence on the part of one who sees another about to walk over a cliff and fails to shout a warning … But there may be a duty to act if one has undertaken to do so or induced a person to rely upon one doing so."

[28] But if there is a duty to warn or to give advice, then the next issue must be whether or not the person so advised or warned would, on the balance of probabilities, act on that information. The plaintiffs have to prove their case on the balance of probabilities and that requires evidence establishing what response there would have been to warning or advice that the supply pipeline did not meet current British standards, as I have said, a not uncommon situation. To put it as neutrally as possible, I am not persuaded that anyone, if warned or advised that the pipeline did not comply with current standards would have expended up to £1,000 to replace a supply pipeline that displayed no visible signs of decay, that had been functioning satisfactorily and that had been fully pressure tested.

[29] Finally, there is much discussion in some of the older cases about the difference between "causa sine qua non" and "causa causans". At present the emphasis is placed on the facts "but for" which the accident would not have happened. In this case the evidence is clear. The defendant did nothing to increase the risk of a future oil leak given that I have found that the joint was expertly made and that the cause of the subsequent leak was wholly extraneous to the work carried out by the defendant. In those circumstances there can be no causative effect unless

the defendant had assumed a responsibility to the plaintiffs or that there was a special relationship between the defendant and the plaintiffs that required it and its servants and agents to replace the entire section of pipe.

C. CONCLUSION

[30] On the facts of this case the defendant, its servants and agents, owed to the plaintiffs a duty to carry out its remediation work to 2 Larchfield with reasonable care. It is "fair, just and reasonable" to so hold that the defendant, its servants and agents, in carrying out this work owed a duty of care to the owners of the adjoining property. However, as Lord Goff said in *Smith v Littlewoods Organisation Ltd* [1987] AC 241 at 242 there is a fundamental principle that "the common law does not impose liability for what are called omissions". In the instant case I am satisfied that Mr Robinson having damaged the oil supply pipe carried out a repair to it by creating a joint and constructing an inspection chamber. Furthermore, the pipe was pressure tested on two occasions to ensure that it was fully operational. Following the repair the pipeline was in no material respect any different from what existed before the defendant carried out its work, and certainly there was no increased risk of a leakage occurring in the future. Furthermore, there was, I find, nothing untoward about the pipeline to have alerted the defendant or its servants and agents that there was a risk of a leakage occurring in the future. The pipeline visible to Mr Robinson, was typical of many pipelines that had been installed pre-1997 and which were working perfectly effectively and efficiently. The evidence was the defendant and its employees came across these oil supply pipelines, which did not comply with the present British Standards, on many occasions.

[31] The cause of the leak subsequent to the defendant carrying out its work had nothing to do with the damage caused by Mr Robinson to the supply pipeline or the repair affected by the defendant. This was a case of a pure omission because it could not be said that "but for" the act of the plaintiff there would have been no leakage. It was the omission of the defendant to replace the entire section of the supply pipeline which it could not know was going to leak months in the future that permitted the escape of oil in the Spring of 2013. If the defendant, its servants and agents, had never done any work at all at the Property the leak would have occurred in exactly the same manner and at exactly the same time. Accordingly, the negligence of Mr Robinson made no material contribution to the subsequent leak.

[32] The supply pipeline at MC's property did not comply with the present BS or OFTEC requirements but this was commonplace and encountered by the defendant, its servants and agents, on many occasions. The pressure testing of the pipeline by the defendant provided assurance that the supply pipeline was intact, that it was not compromised and there was no increased risk of leakage from the pipe itself. Further, the leak that did occur subsequently had absolutely nothing to do with the joint constructed by the defendant. This was not a case where the defendant had assumed responsibility towards the plaintiffs. There was no obligation on the defendant to replace the entire section of pipeline. Nor did there exist a special

relationship between the defendant and the plaintiffs which might require the defendant to replace the pipe or to give advice or warnings. Indeed, no evidence was adduced that the giving of advice or warnings that the oil supply pipeline did not comply with current best practice would have resulted in any action being taken for the reasons which I have set out above.

[33] In the circumstances, and for the reasons given, I conclude that the plaintiffs' claim against the defendant must fail. I will hear the parties on the issue of costs.