HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 27

on appeal from:[2008] EWCA Civ 181

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Smith (Appellant) *v* Northamptonshire County Council (Respondents)

Appellate Committee

Lord Hope of Craighead
Baroness Hale of Richmond
Lord Carswell
Lord Mance
Lord Neuberger of Abbotsbury

Counsel

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Respondents:
Hugh Preston
(Instructed by Shoosmiths)

Hearing date:

4 FEBRUARY 2009

ON
WEDNESDAY 20 MAY 2009

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LORD HOPE OF CRAIGHEAD

My Lords,

1. The appellant, Mrs Jean Margaret Smith, was employed by the respondents ("the council") as a driver and carer. As part of her job she was required to collect people who were in need of care from their homes and take them by minibus to a day centre. One of those whom she had to collect was Mrs Gina Cotter, who was confined to a wheelchair. To get her out of her house the appellant had to take her down a wooden ramp outside the doors which led from the living room to a patio. It had been placed there about ten years earlier by the National Health Service. This was a task that she performed many times without incident. But as she was doing this on 1 December 2004 an edge of the ramp crumbled beneath her foot, causing her to stumble and sustain injury.

2. The appellant raised proceedings against the council, claiming damages. Her case was pleaded on three bases: breach of the Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306), breach of the Manual Handling Operations Regulations 1992 (SI 1992/2793) and common law negligence. At the end of the first day of the hearing before the trial judge, Judge Metcalf, the allegations of breach of the 1992 Regulations and of common law negligence were withdrawn. The case proceeded on the remaining allegation that the council was in breach of the 1998 Regulations.

3. The question which the judge had to decide was whether the1998 Regulations applied in this case. It was not disputed that, if they did, the council was in breach of them as the ramp was defective and the regime

which the Regulations impose is one of strict liability. The judge held that they did apply because the ramp was "work equipment" as defined by regulation 2(1) and it was being "used at work" within regulation 3(1). It followed that there was a breach of regulation 5(1). The council appealed, and the Court of Appeal allowed the appeal: [2008] EWCA Civ 181; [2008] ICR 826. It held that the ramp was not work equipment used by the appellant at work for the purposes of the Regulations. Waller LJ said that each case will turn on its own facts. The most significant factors in this case were that the ramp had been installed by people other than the council's own employees, that the council had no ability to maintain it and that in ordinary parlance it was part of Mrs Cotter's premises: para 34. The appellant now appeals against that decision to this House.

4. While it is, of course, true that each case will turn on its own facts, her appeal raises a question of general public importance. How are the provisions of the 1998 Regulations which determine its application to be construed in a case of this kind without producing results that, having regard to the purpose they were intended to serve, are excessively burdensome? It is important to bear in mind however that the purpose of the Regulations is to promote health and safety. In other words, they are there primarily to promote a culture of good practice with a view to preventing injury.

The 1998 Regulations

5. The head note to the 1998 Regulations states that they were made by the Secretary of State in the exercise of powers conferred on him by the Health and Safety at Work, etc Act 1974 and for the purpose of giving effect without modifications to proposals submitted to him by the Health and Safety Commission under section 11(2)(d) of that Act. Section 1(1) of the Act provides that the provisions of Part I, which includes the power to make regulations under section 14, shall have effect with a view to (a) securing the health, safety and welfare of persons at work and (b) protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work. In making its proposals the Health and Safety Commission was guided by the need to implement Council Directive 89/655/EEC of 30 November 1989 concerning the minimum safety and health requirements for the use of work equipment by workers at work ("the Equipment Directive"). The Regulations are arranged into five Parts. Part I, which is headed "Introduction", is the Part that is under scrutiny in this appeal. It consists of three regulations

only. Among them is regulation 2 which is headed "Interpretation", and regulation 3 which is headed "Application". Regulation 2(1) defines the expressions "use" and "work equipment" in these terms:

> " 'use' in relation to work equipment means any activity involving work equipment and includes starting, stopping, programming, setting, transporting, repairing, modifying, maintaining, servicing and cleaning;
>
> 'work equipment' means any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not)".

These definitions are qualified in the usual way by the words "unless the context otherwise requires" at the beginning of the subsection, and by its concluding words which state that related expressions shall be construed accordingly.

6. Regulation 3 contains a series of paragraphs which deal with how the Regulations are to be applied. Those that are relevant to this case are regulations 3(2) and (3), which are in these terms:

> "(2) The requirements imposed by these Regulations on an employer in respect of work equipment shall apply to such equipment provided for use or used by an employee at his work.
>
> (3) The requirements imposed by these Regulations shall also apply –
>
> (a) to a self employed person, in respect of work equipment he uses at work;
>
> (b) subject to paragraph (5), to a person who has control to any extent of –
>
> (i) work equipment;
>
> (ii) a person at work who uses or supervises or manages the use of work equipment; or
>
> (iii) the way in which work equipment is used at work,
>
> and to the extent of his control."

Regulation 3(5) states that the requirements imposed by the Regulations shall not apply to a person in respect of work equipment supplied by him by way of sale, agreement for sale or hire-purchase agreement.

7. Part II, which is headed "General", contains a series of regulations dealing with, among other things, the suitability of work equipment (regulation 4), maintenance (regulation 5) and inspection (regulation 6). Each of these three regulations is introduced by the words "Every employer shall ensure". Regulation 4 states, inter alia:

> "(1) Every employer shall ensure that work equipment is so constructed or adapted as to be suitable for the purpose for which it is used or provided.
>
> (2) In selecting work equipment, every employer shall have regard to the working conditions and to the risk to health and safety of persons which exist in the premises or undertaking in which that work equipment is to be used and any additional risk posed by the use of that equipment."

Regulation 5 states:

> "(1) Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair.
>
> (2) Every employer shall ensure that where any machinery has a maintenance log, the log is kept up to date."

Parts III and IV impose similar duties in regard to mobile work equipment and power presses.

8. In each case the steps that the regulations prescribe must be taken. It is no defence to say that it was impossible to achieve it because there was a latent defect or because its achievement was not reasonably practicable. In *Stark v Post Office* [2000] ICR 1013, 1023, Waller LJ said of regulation 6(1) of the Provision and Use of Work Equipment Regulations 1992 (SI 1992/2932), which was in the same terms as

regulation 5(1) of the 1998 Regulations which has replaced it, that it imposed an absolute obligation. In doing so he followed a long line of authority to the same effect: *Smith v Cammell Laird & Co Ltd* [1940] AC 242; *Galashiels Gas Co Ltd v Millar* [1949] AC 275; *Hamilton v National Coal Board* [1960] AC 633; see also *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107. This point is not now disputed, but it forms an important part of the background.

The facts

9. The appellant had worked for the council for many years. In the course of her employment with them she had been taking Mrs Cotter to the day centre three times a week for about eight years before the accident. Her duties involved wheeling Mrs Cotter from the living room to the patio, then through the back garden into the bus which took her to the day centre. Steps led down from the living room to the patio. A ramp had been provided to assist the movement of the wheelchair over these steps. If it had not been there the council would have had to provide the appellant with some other means of achieving this.

10. The ramp had been installed by the NHS about ten years earlier following an assessment of Mrs Cotter's requirements. It was left outside and was used very frequently. The council carried out their own assessment of it for the purpose of ensuring Mrs Cotter's safety. This was also done to discharge their obligations to the appellant under the Manual Handling Operations Regulations 1992 and at common law. They tested its stability. An employee walked up and down it and stood on it, jiggling up and down to check whether it was sturdy. Their employees were trained to perform a visual check of the ramp every time they visited Mrs Cotter's premises. It was not found to have been in an obvious state of disrepair prior to the accident. This, then, is a case of a latent defect. But that affords no defence to a case brought under regulation 5(1).

11. The judge held that the ramp was equipment that was used by the appellant in the process of carrying out her work, which was the safe transporting of an invalid to the minibus. It was, he said, a necessary, indeed essential, piece of equipment: para 38. The transporting of someone in a wheelchair was the central element of the appellant's work. She used the ramp in order to carry out her work: para 39. He made these further findings in paras 40 and 41:

> "40. In other words, it was work equipment in the form of an appliance or apparatus which was used in the course of her work to transport. In fact, the defendants did also retain some considerable degree of control even though they did not own the premises or the ramp. Even though it had not been supplied by them, they took it upon themselves, as part of their duty in carrying out the work that the claimant was required to do, to inspect, to assess and to receive reports in the event of any problem.
>
> 41. The purpose behind that assessment was to ensure that Mrs Cotter was safely transported. An integral part of that safe transportation, which was the work of the claimant, was the movement down that ramp, using the ramp as a piece of equipment, in order to get Mrs Cotter to the bus properly. The nature of the claimant's work meant that inevitably the equipment or apparatus was not located at her work place on the defendants' premises."

Having made these findings he said that he was satisfied that there had been a breach of regulation 5(1).

The issues

12. The application of the 1998 Regulations to this case requires two questions to be answered. First, was the ramp "work equipment" within the meaning of that expression as defined by regulation 2(1)? Secondly, was it "provided for use or used by" the appellant "at work" as regulation 3(2) requires?

13. The judge held in para 37 that the ramp was an item of work equipment. It was, he said, an appliance or a piece of apparatus or possibly an installation. He did not think that there would have been any debate about this if the accident had occurred at a factory of the employer. He also concluded that it was "for use at work", for the reasons that he set out in paras 39 to 41 of his judgment. In the Court of Appeal it was submitted that there must be some limitation on the employer's strict liability. It was pointed out that, on a very wide construction of the language, a courier driving his van to deliver a parcel the other side of a bridge which collapses could succeed against his employer on the basis that the bridge was an installation being used by the employee at work. Waller LJ said in para 13 that he would accept

the council's submission that it would be unlikely that the 1998 Regulations should be construed in the very wide way that that example would entail. He found support for that view in *Hammond v Commissioner of Police of the Metropolis* [2004] EWCA Civ 830; [2004] ICR 1467 and *PRP Architects v Reid* [2006] EWCA Civ 1119; [2007] ICR 78. In para 31 he said that in his view Parliament would not have contemplated that either regulation 4 or regulation 5 should impose strict liability on the council in relation to the ramp that the appellant was using when she was at Mrs Cotter's house.

14. To reach that result Waller LJ said that regulations 4 and 5 both contemplate some underlying relationship, from which it would be natural to contemplate *some* responsibility for construction or maintenance [his emphasis] or at the least a right to construct or maintain, before the obligation to "ensure" suitability for performance or maintenance would apply. Richards LJ said in para 38 that he would place particular emphasis on the concept of control in the present context. It seemed to him that the absence of any control by the council over the ramp was a factor militating strongly against their being strictly liable for its construction and maintenance. Rimer LJ was of the same opinion. In para 39 he observed that the difficulty raised by the 1998 Regulations lay in the fact that, considered on its own, the definition of "work equipment" in regulations 2(1) and 3(2) is capable of extending to items which the peripatetic employee may use but of which the employer will often be unaware. In para 40 he said that an employer could only be expected to discharge the obligations that the Regulations impose in relation to equipment which he is, or should be, aware his employee will be using and over which he has the necessary control to enable him to perform them. In para 42 he said that, as the council had no control over the ramp sufficient to enable them to perform the obligations imposed by the Regulations in respect of it, it was not "work equipment" at all.

15. The Court of Appeal's reasoning was directed to the implications of imposing strict liability on the council for the ramp's construction and maintenance. The structure of the Regulations indicates that the answer to the question whether the obligations they impose do not apply where the employer cannot be expected to perform them must lie in the definition of "work equipment" in regulation 2(1) and its application to the facts under regulation 3(2). Regulation 3(2) states that the requirements imposed by the Regulations on an employer in respect of work equipment "shall apply" in the circumstances that it describes. If the court finds that the machinery, appliance, apparatus, tool or installation is work equipment and that the requirements of regulation

3(2) are satisfied, it has no option but to find that the employer must perform the regulations in Part II for breach of which he is strictly liable. Any limitation on that strict liability must be found therefore in an analysis of the wording of regulations 2(1) and 3(2) bearing in mind, as I said at the outset, that the purpose of the Regulations is to promote a culture of good practice with a view to preventing injury.

Regulation 2(1)

16. In *Spencer-Franks v Kellogg Brown and Root Ltd* [2008] UKHL 46; [2008] ICR 863, para 21, Lord Hoffmann said the answer to the difficulty of finding an employer strictly liable for defects in equipment over which he had no control must be found in regulation 3(2), which delimits the area of the employer's responsibility, rather than by giving an artificial and relativist meaning to the definition of work equipment in regulation 2(1). Mr Preston said that, in the light of this guidance, he accepted that qualifications as to the scope of the duty should properly be implied at the stage of considering regulation 3(2). So he conceded that the ramp in question in this case was "work equipment" within the meaning of regulation 2(1). As he put it, both the first and second limbs of that definition were satisfied. In other words the ramp could properly be described as an apparatus, appliance or installation, and it could also be said to be "for use at work". I think that this concession was properly made. The ramp was there to be used by anyone when taking Mrs Cotter in and out of her house in her wheelchair, including people like the appellant who were doing this as part of their work.

17. This concession has important implications when one comes to consider the application of regulation 3(2) to the facts of this case. Leaving that point aside for the moment, however, further thought needs to be given to the way the definition of "work equipment" should be approached in the case of a peripatetic employee such as the appellant. As Lord Rodger of Earlsferry said in *Spencer-Franks v Kellogg Brown and Root Ltd* [2008] ICR 836, para 49, the Regulations are intended to cover all kinds of undertakings. The situation which gives rise to difficulty is of an employee whose place of work is not confined to the employer's premises or a place over which the employer has direct control because he is in charge of what is being done there. The nature of the employer's undertaking may involve sending employees to work elsewhere. Equipment may be needed to enable them to get to and from the remote location. It may also be needed to enable them to carry out the work that they are employed to do when they get there. Where his undertaking is of that kind the employer must, as Lord Rodger put it in

Spencer-Franks, para 35, think constructively and assess the risks to which his employees may be subject. He must be able to determine what items constitute work equipment and what do not. But if injuries are to be prevented, the best guide as to what should be included in the assessment will be the work that the employee is required to do and what he needs to do it rather than who owns or controls the equipment.

18. In some cases the peripatetic employee will be using equipment which has been provided for him by the employer. That was the position in *Stark v Post Office* [2000] ICR 1013. The plaintiff, who was employed as a delivery postman was riding a delivery bicycle provided for him by the Post Office. There was no dispute that this was work equipment with the meaning of the definition of that expression in the 1992 Regulations. The same result will follow where the employee is provided by the employer with the tools or other equipment that he needs to carry out his work in the remote location. That would have been the position if, for example, the council had provided the appellant with her own ramp for her to carry around to her places of work in the minibus. But the definition of "work equipment" is not confined to cases of that kind. It makes no mention of the person by whom the work equipment is provided. So it can include cases where the work equipment is already in the remote location and belongs to or is controlled by someone else. It can extend to work equipment which the worker himself has provided, such as the ladder in *Mason v Satelcom Ltd* [2008] EWCA Civ 494, [2008] ICR 971 where the appellant was left to find and use whatever ladder was available.

19. In *Hammond v Commissioner of Police of the Metropolis* [2004] ICR 1467 a mechanic employed by the first defendant, the Metropolitan Police Commissioner, was working on the wheel of a police dog van belonging to the second defendant, the Metropolitan Police Authority, when a wheel bolt sheered and injured him. He was described as the police equivalent of the AA man. The Court of Appeal was troubled by the fact that the van was not the property of the mechanic's employer, the first defendant. It held that the Regulations did not extend to things that the employee was working on, as distinct from the equipment which he was using to undertake his work: per May LJ, para 25. He said that the ambit of the expression "work equipment" was determined by the equivalent of regulation 3 in the 1992 Regulations It indicated that the Regulations were concerned with what might be loosely be described as the tools of the trade provided by an employer to an employee to carry out his work: para 24. This approach to the problem, which confines the expression to equipment that has been provided by the employer, was

disapproved in *Spencer-Franks v Kellogg Brown and Root Ltd* [2008] ICR 836.

20. In *Spencer-Franks v Kellogg Brown and Root Ltd* the pursuer was one of a number of workers sent by a company which supplies services to the offshore oil industry to work on a platform in the North Sea. The case provides a good example of a situation where the employees of a variety of employers are sent to work on other premises, as happens where a number of sub-contractors are working on a building site. The pursuer was asked to inspect and repair the closer on the door of the central control room. This was a piece of equipment which performed a useful function to which the expression "use" in the phrase "for use at work" in regulation 2(1) could be applied. As Lord Hoffmann explained in para 11, if a simple approach was taken to the question whether the door closer was work equipment the answer was clear. Everyone using the control room was using it for the purposes of their work, as they used it every time they used the door to enter or leave the control room. Having regard to the terms of the Equipment Directive and the main purpose of the Regulations, which was not to give employees a right to damages but to prevent them being injured in the first place, Lord Rodger of Earlsferry said that he saw no reason to limit the ordinary language of the definition of work equipment in order to exclude it: paras 31-34.

21. Finding a satisfactory limit to the scope of the duty imposed by the Regulations is not easy, for the reasons given in that case by my noble and learned friends Lord Mance and Lord Neuberger of Abbotsbury. As Lord Neuberger said in para 98, it was not necessary to decide in *Spencer-Franks v Kellogg Brown and Root Ltd* what its limits are. The following points can however be made about the definition of "work equipment" in regulation 2(1). First, it must be approached without regard to the tests that are set out in regulation 3. Deciding whether or not something is work equipment is a separate exercise from that of applying the definition to the cases described in regulation 3. As Lord Hoffmann put it in *Spencer-Franks v Kellogg Brown and Root Ltd*, para 19, you must first decide whether some apparatus is work equipment or not and then you decide whether the regulations apply in respect of it. Then there are the words in regulation 2(1) "any machinery, appliance, apparatus, tool or installation". They refer to items that can be expected to perform a useful function within and in relation to the employer's business: Lord Rodger, para 51; Lord Mance, para 86. Their scope is limited by the words "for use at work (whether exclusively or not)". The words "for use at work" indicate that the item must have some practical purpose in connection with work. This

excludes items that are for storage only or for decoration for example, or which cannot be "used" at all such as the floors, walls or ceilings of a building. Whether those words are satisfied will depend on what is done in or by the undertaking that is under consideration. But there is nothing in the definition that restricts its scope to items that are located within that undertaking's own premises or to things that are provided by the employer. He must take into consideration items for use at work, wherever they are located and by whomsoever they are provided, that may be used at their work by his employees for the purposes of his undertaking wherever it is carried on.

22. Your Lordships have not been asked to decide whether the ramp was "work equipment", as this point is no longer disputed by the council. Had it been there for use only by members of Mrs Cotter's family as a means of transporting her to and from her house in her wheelchair for their own purposes it would not have qualified as work equipment at all. But I would hold that the definition was satisfied in this case. Like the lift in *PRP Architects v Reid* [2007] ICR 78, the ramp was there for use by anybody including employees of the council such as the appellant who in the course of their work had to move Mrs Cotter in and out of her house by means of her wheelchair. Ramps are like ladders. They are simple pieces of equipment which serve a useful and practical function. It matters not by whom this ramp was provided. The definition directs attention at this stage only to the ability of the item to be used at work, not to the question by whom or for whom it was made available.

Regulation 3(2)

23. In *Spencer-Franks v Kellogg Brown and Root Ltd*, para 55 Lord Rodger said that the terms of regulation 3(2) are broadly formulated and that they are capable of producing results that in some cases might be regarded as questionable. It was therefore to this aspect of it that Mr Preston directed his argument in his response to Lord Hoffmann's indication that it was in this provision that the solution to the difficulty must be found as it delimited the area of the employer's responsibility. The phrase "shall apply to work equipment provided for use or used by an employee at his work" does introduce a limiting factor. It applies to equipment for use at work that is provided for use or is used by the employee. It is questionable whether the ramp was "provided" by the council within the meaning of this phrase. But there is no doubt that it was being "used" by the appellant. As Smith LJ said in *Couzens v T McGee & Co Ltd* [2009] EWCA Civ 95, para 33, it is not conceivable

that Parliament could have intended to impose strict liability on an employer in respect of an item of equipment about which he did not know and could not reasonably have been expected to know. But in this case it is plain that the council knew that the appellant would be likely to use the ramp. So the simple answer to this case is that, as the ramp was work equipment and the appellant was using it at her work when she had her accident, the Regulations applied to it.

24. That however, says Mr Preston, is too simple. Various extreme examples were mentioned in the course of the argument of things being used where it would be, to say the least, surprising if the Regulations were meant to apply. A defective chair that just happened to be in premises that an employee was visiting, such in as your Lordships' Committee Room, was one example. A defective escalator in the London Underground was another. Extreme though those examples were, they served to underline an important point. The mere fact that an item such as a chair or an escalator which may be described as "work equipment" happened to be used by the employee who was working for an entirely different undertaking than that for whose purposes it was provided ought not to be enough to impose strict liability on his employer in the event of an accident. That result may not be at all surprising where the accident takes place in the employer's own premises. But it may be harsh on an employer whose activities are not confined to the premises which he controls or occupies. The situations contemplated by the legislation which the modern regulations have superseded such as the Mines and Quarries Act 1954, the Factories Act 1961 and the Offices, Shops and Railway Premises Act 1963 were not of that kind. Even against the background of the Equipment Directive, it is hard to see where the justification lies for imposing strict liability on an employer for something that he has not provided or authorised for use at work, about which he does not know and cannot reasonably be expected to know and is not able to do anything about.

25. I should say at once that I do not think that the present case answers to that description. The ramp was not installed by the council. It did not belong to them, and they had no right to require Mrs Cotter or the NHS to repair it if it was defective. But they knew that it was there and they were able to and did inspect it. As the judge found, their employees were trained to inspect it too. The situation was not one with which they were unfamiliar or about which they could do nothing. It was in Mrs Cotter's interest as well as that of the appellant that they should instruct the appellant not to use it and to provide her with alternative equipment if they were not willing to accept responsibility for its use. The judge did not make any findings about what alternative

courses of action were available had they taken this view. But he said that he had no doubt that the appellant would have notified the council if she had realised that there had been an obvious defect: para 39. As it happened, the ramp was not in an obvious state of disrepair before the accident such as to put someone on notice that there was something wrong: para 13. As I have said, that does not afford a defence given the strict nature of the obligation to maintain that regulation 5(1) imposes. But there is no doubt that the council were aware of the existence of the ramp, of its reason for being there and of the fact that the appellant was using it for the work they employed her to do. She, for her part, was using it because they knew that she had to use it to do her job and they had not told her not to use it. She had no option but to use it because they had not provided her with an alternative.

26. The Court of Appeal said that the council had no control over the ramp because they did not have the ability to maintain it. But the judge found that they had some considerable degree of control for the reasons he gave in para 40, and I see no reason for disagreeing with this finding. He was right to take a wider view of what amounted to control for this purpose. As Mr Limb QC put it, the council decided to take the benefit of the ramp as a means of enabling the appellant to do her work. It was not just being "used" by her. It was being used by her for work that the council employed her to do. And it was performing a useful practical function as far as their undertaking was concerned which they knew about and had authorised. I would hold therefore that this is the kind of situation that may reasonably be thought to be within the scope of the Regulations.

27. As for the limiting factor, I think that the best guidance as to the intended scope of the Regulations is to be found in regulation 3(3). It states that the requirements that they impose shall also apply (a) to a self-employed person, in respect of work equipment he uses at work and (b) to "a person who has control to any extent" of work equipment, a person at work who uses or supervises or manages the use of work equipment or the way in which work equipment is used at work, and to the extent of his control. The introduction of the concept of control in that extended sense in this context is instructive. The word "also" in the introductory part of regulation 3(3) indicates that the purpose of its provisions is to extend the application test set out in regulation 3(2), as Ward LJ said in *Mason v Satelcom Ltd* [2008] EWCA Civ 494, [2008] ICR 971, para 43. But the test which it applies is nevertheless a helpful indication of how regulation 3 as a whole is intended to operate. It suggests that control is indeed the underlying assumption on which the application provisions throughout this regulation are based. As Smith LJ

observed in *Couzens v T McGee & Co Ltd* [2009] EWCA Civ 95, para 29, the employer must have "a sufficient degree of control" over the work equipment in order to justify the imposition of strict liability. This was not something that needed to be stated in so many terms in the case of the self-employed person. A self-employed person who uses work equipment at work can be assumed to have control over it and the way it is used. So the absence of this word from subparagraph (a) of regulation 3(3) does not mean that the concept of control has no place in his case.

28. Conscious though I am of Neuberger LJ's warning in *PRP Architects v Reid* [2007] ICR 78, para 38, against attempts to redefine a statutory expression, I would carry the same concept into the case of the employer too. A sufficient degree of control can be assumed to be there where the work equipment is "provided for use … by an employee of his at work". The act of providing it or authorising its use is an exercise in decision-taking as to whether it should be used at all and, if so, as to the way in which it should be used. That is a situation which, not unreasonably, attracts the obligations that Parts II to IV of the Regulations set out. Applying the Regulations to cases where work equipment is provided or authorised for use but has not yet been used promotes health and safety. The best way of avoiding accidents is to ensure that work equipment is suitable for the purpose before it is used. The difficult area is that where it is found that an employee has simply "used" the work equipment at work. I agree with my noble and learned friend Lord Mance that there needs to be a nexus between the work equipment and the undertaking that the employer is carrying on. But in my opinion the concepts of authorisation and control of the employee's use of it by the employer provide that nexus. Lord Mance's reference to the use of the work equipment with the employer's consent and endorsement (see para 65) also meets the test that I have in mind.

29. The situations referred to in regulation 3(3)(b) indicate what "control" should be taken to mean in this context. They are all situations where the person has provided or authorised the work equipment for use at work. Control of its use to any extent will do, the person being liable – as the concluding words of the sub-paragraph indicate – to the extent of his control. He does not have to ensure that the maintenance log is kept up to date, for example, if this is under the control of someone else. But he does have to fulfil obligations that are under his control, such as ensuring that the equipment which he authorises for use by the person at work is suitable for the purpose for which it is to be used and that it is in good repair. Understood in this way, regulation 3(2) will serve the purposes indicated by the Equipment Directive without exposing employers to strict liability in situations where they are not in a position

to exercise control to any extent of the equipment that is used at work by the employee.

30. Lord Mance is of the opinion that the ramp cannot be said to have been incorporated and adopted as part of the council's undertaking: para 67. I understand my noble and learned friend Lord Carswell to be of the same opinion: para 53. It seems to me that this test runs into the difficulty to which my noble and learned friend Lord Neuberger of Abbotsbury draws attention in para 77. It is a different test from that set out in the legislation, and it throws up problems that the legislation itself does not give rise to. Moreover it can lead to a result which is contrary to that reached by Lord Mance and Lord Carswell. As Lord Neuberger points out in para 81, the fact that the council knew and effectively approved of the appellant's use of the ramp as a means of taking Mrs Cotter to and from her house could be said to have incorporated it into the council's undertaking, at least when it was being so used by the appellant. It all depends what one means by "undertaking". In its ordinary meaning it is a word of wide application. Article 3(2) of the Equipment Directive, which refers to "the hazards which exist in the undertaking and/or establishment, in particular at the workplace" indicates that it extends to any place where work is being carried out for the employer's purposes and to the work equipment that he proposes to use there. In *R v Associated Octel Co Ltd* [1996] 1 WLR 1543, 1547, Lord Hoffmann said that a person who is conducting his undertaking is free to decide how he will do so, and that anything which constituted running Octel's chemical plant was part of the conduct of its undertaking. In this case the council's undertaking included taking persons like Mrs Cotter to a day centre, and it was for the council to decide how this operation was to be conducted. It seems to me that the ramp was indeed part of their undertaking, as it was being used by the appellant with their consent and endorsement for the work she was doing as their employee in the place where the ramp was situated of getting Mrs Cotter in and out of her house.

Conclusion

31. In this case the ramp was not provided by the council for use by the appellant. But it was being used by her at work with their knowledge and with their approval. They would have had to have made other arrangements if they were not satisfied that it was suitable for use by her at work, but they did not do so. I would hold that there was a sufficient element of authorisation and control or, if one prefers, of consent and endorsement of her use of the ramp for the obligation that regulation

5(1) imposes to apply in this case. If incorporation and adoption of the ramp as part of the council's undertaking is the test, I would hold that it was satisfied too. For these reasons, and for those given by my noble and learned friend Baroness Hale of Richmond whose opinion I have had the advantage of reading in draft and with which I am in full agreement, I would allow the appeal and restore the order made by Judge Metcalf.

BARONESS HALE OF RICHMOND

My Lords,

32. Perhaps it all depends upon how you tell the story. I tell it like this. A wooden ramp was supplied by an NHS occupational therapy department so that a severely disabled, wheel-chair bound patient, Mrs Cotter, could get in and out of her home. It was the only way Mrs Cotter could get in and out of the house. The same ramp was used by the local social services authority when taking Mrs Cotter to and from their day centre. The department employed Mrs Smith to transport Mrs Cotter up and down the ramp. Mrs Smith was injured when the edge of the ramp gave way under her foot. No-one was negligent. The ramp was defective. The issue is whether the ramp was "work equipment" within the meaning of regulation 2(1) of the Provision and Use of Work Equipment Regulations 1998 and "provided for use or used by an employee . . . at work" within the meaning of regulation 3(2). If it is, the authority are liable under regulation 5(1) for failure to ensure that the work equipment "is maintained in an efficient state, in efficient working order and in good repair".

33. "Work equipment" means "any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not)". "Use" in relation to work equipment means "any activity involving work equipment and includes starting, stopping, programming, setting, transporting, repairing, modifying, maintaining, servicing and cleaning". The authority now concede that the ramp was "work equipment". The concession was made because, in *Spencer-Franks v Kellogg Brown and Root Ltd* [2008] UKHL 46, [2008] ICR 863, at para 21, Lord Hoffmann had indicated that "work equipment" was not to be given "an artificial and relativist" meaning; the area of the employer's responsibility was delimited by regulation 3(2). However, it is difficult to separate the two, because regulation 3(2) imposes responsibility whenever such

equipment is "provided for use or used". The critical words are derived from the combination of "for use" in regulation 2(1) and "at work" in regulations 2(1) and 3(2).

34. Wide though the wording of both regulations is, the words "for use . . . at work" do seem to me to import certain limitations. The main limitation is that the use at work be known about and authorised by the employer. The equipment could not otherwise be "for" such use, whether this means "for the purpose of" or "with a view to", use at work. Mr Patrick Limb QC, who appeared for Mrs Smith, accepted that authorisation was required. Another limitation, it seems to me, is that the actual use made of the equipment be for the purposes of the employee's employment. "At work" is not a geographical description, applying to everything used at a particular place of work and nothing outside it, for some work equipment is clearly used by employees whose work takes them outside their employers' premises. The postman's bicycle in *Stark v Post Office* [2000] ICR 1013 is a good example. Neither can "at work" be a purely temporal description, applying to everything the employee chooses to use during working hours. It has to be something specifically "for" the work which the employee is employed to do. The i-pod brought in to listen to while working would not, it seems to me, be work equipment. The employer may authorise its use but it is not used or provided for the purposes of the work which the employee does for the employer.

35. This ramp was clearly "apparatus" or an "installation" and equally clearly "for use at work". It was there for the use of people who were at work, such as the NHS staff who installed it and Mrs Smith and her colleagues, and to use for the purposes of the work which they were employed to do. The fact that it was also used by people, such as Mrs Cotter's family and friends, who were not at work makes no difference, as the use does not have to be exclusive. The use was authorised by the employer. The use was also for the purposes of Mrs Smith's employment. Indeed, it was the only way in which she could do her job.

36. So much for the words used. Are there any further limitations to be imported? The essence of the issue between my noble and learned friends, Lord Hope of Craighead and Lord Mance, is that Lord Hope would import a requirement that the employer be in control either of the equipment or of the use which the employee makes of it, whereas Lord Mance would concentrate on the control which the employer has over the equipment itself. Both draw some support from regulation 3(3). Regulation 3(3) does not apply to an employer. It extends the

obligations imposed upon employers to certain other people. Thus it provides:

> "The requirements imposed by these Regulations on an employer shall also apply –
>
> > (a) to a self-employed person, in respect of work equipment he uses at work;
> >
> > (b) . . . to a person who has control to any extent of –
> >
> > > (i) work equipment;
> > >
> > > (ii) a person at work who uses or supervises or manages the use of work equipment; or
> > >
> > > (iii) the way in which work equipment is used at work,
>
> and to the extent of his control."

37. As this is extending to such other people the same obligations which employers have, it must be contemplating that employers owe those obligations at the very least in the same situations as are there described. These include, not only control of the equipment itself, but also control of the person who uses the equipment and control of the use made of that equipment. There is nothing in regulation 3(3) to limit responsibility to those in control of the equipment; *a fortiori* there can be nothing in regulation 3(2) limiting an employer's responsibility to equipment over which they are in control. It is enough if they can tell the person who might use the equipment not to use it or how to use it.

38. The arguments have been tested against some interesting examples of defects in such things as bridges, escalators, lifts and other public infrastructure which an employee may be required to use in the course of travelling, not to or from work, but in the course of his work, for example when coming from a solicitor's office to assist counsel arguing a case before this committee. Another example discussed was a defect in the chairs upon which such people are required to sit during our hearings. Realistically, the employer has no choice in such matters and cannot simply forbid the employer to use the mode of transport or item of equipment in question. Control over the person who uses the equipment at work must import an element of choice. Regulation 3(3)

extends liability only to the extent of the control in question. So if this does colour the meaning of regulation 3(2), the employer would not be responsible for the use of equipment where there was no real choice about whether to allow the employee to use the equipment in question.

39. Here the authority clearly were in a position to decide whether or not to allow Mrs Smith to use this ramp. They inspected it in order to satisfy themselves that manoeuvring Mrs Cotter up and down the ramp would comply with the Manual Handling Operations Regulations 1992. That, I agree, does not make them liable under a completely different set of Regulations. But it does indicate that they had a real choice whether or not to let Mrs Smith use the ramp. Indeed, Mr Preston, for the authority, argued that if there were to be liability in a case such as this, local authorities would have to stop relying on other people's ramps and supply their own. There could be no clearer indication that this authority were very much in control of Mrs Smith and her use of the ramp, and that they had an obvious alternative open to them. Thus they would in my view fall squarely within the wording of regulation 3(3) if they were not Mrs Smith's employers and I see no reason why they should not also fall squarely within regulation 3(2) as they are her employers.

40. As to the policy considerations, discussed by my noble and learned friend Lord Neuberger, they are impossible for us to assess. On the one hand, the employer is being held liable for defects in equipment which he has no right to control. On the other hand, an employee has suffered injury, not only in the course of her work, but in the course of doing that which she was required by her employer to do. It has long been an accepted policy of our law that employers might have to compensate their employees for injuries suffered in such circumstances, irrespective of whether there was anything which the employer could have done to prevent it. This was not an invariable rule, but depended upon the wording of the particular legislation involved. Some obligations were expressed in terms of what was reasonably practicable; others contained no such limitation. Employers are required to insure against their liability, so any broader policy considerations come down to choosing which party is the better placed to effect and to bear the cost of such insurance. There can be only one answer to that question in a case such as this, which leaves us to speculate upon whether imposing liability in cases such as Mrs Smith's would add so appreciably to employers' liability insurance premiums as to put businesses or public services at risk. We are in no position to make judgments about such matters.

41. In any event, in this case, the authority could have done something to prevent it. They could have supplied their own portable ramp for Mrs Smith to use; they could, with Mr and Mrs Cotter's consent, have replaced the ramp supplied by the NHS; they could have declined to offer Mrs Cotter their services unless the ramp were replaced. The real objection is not that they had no choice, but that they were not negligent because the ramp was not obviously defective. But negligence is not the test under these or many other of the regulations dealing with health and safety at work, nor was it under much of the legislation which they replaced. Long ago, our law took the view that, as between the non-negligent employer who benefited from the employee's labour and the non-negligent employee who suffered illness or injury at work, the law might often (though not invariably) favour the employee.

42. For that reason, I am not persuaded that the European Directives are of much help in construing these regulations. Clearly, the regulations were meant to do at the very least what the Directives required United Kingdom law to do. But they were made, not under the *vires* of section 2(2) of the European Communities Act 1972, but under the *vires* of the Health and Safety at Work etc Act 1974. It is unlikely in the extreme that when the regulations were made there was any intention to adopt a different approach to the construction of legislation imposing liability upon employers than there had been under the previous law. Unlike other regulations in the same field, these regulations do not contain limitations based upon reasonable practicability or even assessment of risk

43. I am further fortified in this view by the approach of Lord Rodger of Earlsferry, with whom Lord Mance and Lord Neuberger expressly agreed on this point, in the *Spencer-Franks* case at para 51, albeit in the context of the definition of "work equipment": "The machinery and apparatus etc of an undertaking are there to perform a useful, practical function in relation to the purposes of that undertaking". This ramp was not only performing a useful, practical function in relation to the purposes of this employer's undertaking, it was absolutely essential to it. Without it, the authority could not have provided Mrs Cotter with the services which it was their business to provide for her. Lord Rodger had already made the point (at para 42) that the equipment did not have to be provided by the employer.

44. My Lords, for these reasons and in agreement with my noble and learned friend Lord Hope, I would allow this appeal.

LORD CARSWELL

My Lords,

45. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Hope of Craighead, Lord Mance and Lord Neuberger of Abbotsbury. I agree with very much of what each has stated, though favouring, for reasons which I shall give, the eventual conclusion reached by Lord Mance and Lord Neuberger. I am conscious of the difficulties which may be created for those who have to administer the law by too great a proliferation of opinions, but I feel bound to express as succinctly as possible the path of reasoning which has brought me to my own conclusion.

46. Lord Hope has fully set out the facts and issues in the appeal, together with the material provisions of the Provision and Use of Work Equipment Regulations 1998 ("PUWER 1998"), and I gratefully adopt these without requiring to repeat them.

47. Once one starts to consider the scope of the regulations it becomes apparent that one has to consider whether there is some limit on the types of equipment and work situation to which they extend and, if so, how and where it is to be drawn. Examples were posed in the written cases and in the course of argument before the House, some of which have been mentioned in your Lordships' opinions. These may be very easily multiplied, but the type of problem before the House will typically arise where an employee is working away from his employer's home base. If he is injured, in what circumstances will the employer be liable under the regulations? It is desirable that the House should define the boundaries of liability in a way which is readily comprehensible by all those who have to operate the Regulations, a range of persons extending well beyond practising lawyers familiar with personal injuries litigation.

48. One possible, though extreme, solution would be to conclude that the employee is entitled to recover if he is injured in any circumstances when he is within the course of his employment. Such a very wide approach, which echoes that of the old statutory scheme of workmen's compensation, would give an injured employee a ready means of obtaining compensation without having to search for a defendant who will be liable. It also has to be borne in mind that an employer can seek

contribution from other parties who would if sued be liable. It would, however, be capable of generating much uncertainty about its extent, as witness the myriad of cases which fell to be decided under that legislation. It would involve a considerable departure from the principle of imposing liability upon those most responsible for the safety of workers. The enhancement of their safety and health and the prevention of accidents is one of the major aims of the Equipment Directive and the Regulations, and that wide approach would not accord with the emphasis on the employer's responsibility which appears in the Directives. Waller LJ recognised this imperative in the Court of Appeal, when he stated (para 31):

> "Strict liability should not flow out of a position in which there was no right and no responsibility to do that thing or insist on the doing of that thing for which strict liability is being imposed."

I accordingly consider that such an approach would not be the right solution.

49. Your Lordships are all in agreement that the extent of the Regulations must have some limit, but the issue which we have all found difficult is to determine where the boundaries lie. Attempts were made in earlier cases to fix a limit by restricting the ambit of the phrase "work equipment", but the House held in *Spencer-Franks v Kellogg Brown and Root Ltd* [2008] UKHL 46, [2008] ICR 863 that the limitation accepted in that case by the Second Division of the Court of Session, following the decision of the Court of Appeal in *Hammond v Commissioner of Police of the Metropolis* [2004] EWCA Civ 830, [2004] ICR 1467, could not be supported and that the breadth of the definition should not be restricted unnecessarily. It was conceded in the present case that the ramp was work equipment, and although there might have been room for debate about that conclusion I am not minded to refuse to accept the concession.

50. The other approach, which has found favour with your Lordships, is by the avenue of restricting the breadth of application of Regulation 3(2), which provides:

> "The requirements imposed by these Regulations on an employer in respect of work equipment shall apply to such equipment provided for use or used by an employee of his at work."

The phrase "provided for use" does not give rise to much difficulty, but the words "used . . . at work" are capable on their face of extending to a great breadth of situations, including the examples to which I referred in paragraph 47 above.

51. In the Court of Appeal Waller LJ sought (para 31) some criterion for determining that the employer had a sufficient right over, or the beginnings of a responsibility for, the construction or maintenance of the ramp in question so as to make it proper to impose liability for breach of statutory duty. He had previously referred, apparently with approval, to Pill LJ's emphasis in *PRP Architects v Reid* [2006] EWCA Civ 1119, [2007] ICR 78 on the employer's control over the work equipment and concluded (para 35):

> "There must, in my view, at the very least be factors from which can be spelt out some right … to carry out maintenance before it is right to impose strict liability for failure."

Richards LJ placed particular emphasis on the concept of control, which was also the basis on which Rimer LJ decided the case.

52. In your Lordships' House Lord Hope, with whose opinion my noble and learned friend Baroness Hale of Richmond is in agreement, has also adopted the test of control. Lord Neuberger has favoured the same criterion, although it took him to a different conclusion on liability. Lord Mance, on the other hand, sought some specific nexus between the work equipment and the employer's undertaking. He took as the test (para 65)

> "whether the work equipment has been provided or used in circumstances in which it was as between the employer and employee incorporated into and adopted as part of the employer's business or other undertaking, whether as a

> result of being provided by the employer for use in it or as a result of being provided by anyone else and being used by the employee in it with the employer's consent and endorsement."

Lord Neuberger has characterised Lord Mance's approach as focusing more on the control which the employer has over the equipment itself, whereas Lord Hope concentrates more on the control which the employer has over the employee's use of the equipment (para 83).

53. My own opinion has swung around to a large extent since I commenced consideration of the issues in this appeal, but I have come to the firm conclusion that I am in agreement with the approach espoused by Lord Mance. As Lord Hoffmann said in *Spencer-Franks*, at para 26, the Regulations should be interpreted to accord with the principle stated in the Work Equipment Directive. Articles 3 and 4 of the Directive refer throughout to work equipment made available or provided to workers in "the undertaking and/or establishment". The subsequent provisions, which provide for inspection of work equipment, specific risks, ergonomics and occupational health and informing and training of workers, are all posited upon this basic definition of relevant work equipment. The Regulations have not followed the same wording, though they were intended to implement the requirements of the Directive, but instead adopted in Regulation 3(2) the phrase whose meaning is critical to the determination of this appeal, "provided for use or used . . . at work". Whatever was in the draftsman's mind when he fashioned this phrase, it obviously has to be limited in some manner in order to limit the ambit of possible liability. In my view that is best done by resort to the concept of the undertaking and/or establishment. This would exclude an employer's liability for defects in such things as the chair in the committee room in the House of Lords or the escalator in the Westminster Underground station. It might or might not extend to the lift in *PRP Architects v Reid* [2007] ICR 78, as to which I would reserve my opinion. It could include the door closer in *Spencer-Franks*, which was within the purview of the employer's concern for his employees when carrying out work on the oil rig and so can be regarded as being within his undertaking or establishment. Similarly, I think that defective scaffolding on a building site on which the employer is a subcontractor would ordinarily come within the ambit of liability. It would depend on the facts, as so often in such cases, whether a defective tool belonging to the main contractor which is borrowed by a subcontractor's employee comes within the definition of work equipment used by the employee at work. If liability attaches in such a case, the employer may of course have recourse against the owners of the tool, and one should not

overlook the relevance of compulsory employer's liability insurance in considering the policy of the legislation.

54. When one applies this principle to the facts of the present case, I am in agreement with Lord Mance and Lord Neuberger that liability for the condition of the ramp should not attach to the respondent employer. The respondent council did not supply or repair the ramp. It had inspected it at an earlier stage, but, as Lord Mance states (para 70), it was merely being careful of its employees' safety and such care should not give rise to liability which is not otherwise covered by its statutory duty. I cannot conclude that the ramp came within the respondent's undertaking or establishment, any more than the much-discussed chair or escalator.

55. I would therefore dismiss the appeal.

LORD MANCE

My Lords,

56. I have had the benefit of reading in draft the speech of my noble and learned friend, Lord Hope of Craighead. I gratefully adopt his account of the facts and of the terms of the Provision and Use of Work Equipment Regulations 1998.

57. The present appeal turns primarily on the scope of the definitions in regulation 2 and on the terms of regulation 3, set out by Lord Hope. It is accepted, and I am prepared to proceed on the basis, that the ramp was in an abstract sense work equipment, in that it could be contemplated that it would from time to time be used by persons including those at work, who might include a taxi-driver or a council employee like the appellant sent to the house to pick up the owner, Mrs Cotter, in her wheel-chair.

58. It seems to me immaterial to the outcome of this appeal whether this is all that is required to satisfy the definition of work equipment in regulation 2(1) or whether the purposive phrase "for use" in that regulation itself refers to use in a more contextual and less abstract

sense. This is because Mr Limb QC acknowledged, when opening the appeal, that the regulations involve on any view a second relevant question. That is whether, in respect of the respondent council as the appellant's employer, it was relevant work equipment, in particular for the purposes of regulation 3(2), which imposes strict responsibilities on an employer for "work equipment . . . provided for use or used by an employee of his at work".

59. The one matter that is clear is that an entirely literal approach to the words "or used" in regulation 3(2) cannot be correct. On an entirely literal approach, an employer would be strictly liable for a defect in an employee's private drill which the employee, after leaving the work equipment supplied to him on the underground, had decided against company instructions to use because he wanted to finish work early rather than return to the company premises to obtain a spare set. Or a solicitors' firm would be strictly liable to its clerk who was required to attend a House of Lords hearing for injury caused by a defect in the Westminster Underground Station lift or the House of Lords Committee Room chair used by the clerk. The time is however long-since past when legislation, especially legislation implementing this country's European obligations, is given an entirely literal, as opposed to a purposive, effect.

60. The starting point is that the Regulations must be construed on the basis, stated in the recital to the Regulations, that they were intended to give effect to the proposals submitted by the Health and Safety Commission ("HSC") which were in turn "guided by the need to implement the European Directive", viz the Work Equipment Directive 89/655/EEC, itself made pursuant to the Framework Directive 89/391/EEC: see per Lord Hoffmann (at paras. 3 and 26), Lord Rodger of Earlsferry (at para. 32) and myself (at paras. 79-82, 88 and 91) in *Spencer-Franks v. Kellogg Brown and Root Ltd.* [2008] UKHL 46, [2008] ICR 863.

61. The Directive sets minimum standards, but the HSC went on to make clear that the domestic intention was that, "while ensuring the levels of safety are maintained ….. we do not go beyond the Directive unless there are good grounds for doing so". The only relevant area in which the HSC in its Explanatory Note identified an intention to go beyond the Directive concerned the responsibilities imposed under regulation 3(3) to (5) on persons having control of work equipment, other than employers. See *Spencer-Franks* para. 81.

62. The change in formulation between Article 3(1) of the Directive (imposing responsibility for "work equipment made available to workers in the undertaking and/or establishment") and regulation 3(2) (imposing responsibility for work "equipment provided for use or used by an employee of his at work") was not signalled in the HSC's Explanatory Note as being of any significance. I share Lord Hoffmann's view (in paras. 22 to 26 in *Spencer-Franks*) that no major extension of the scope of responsibility can thereby have been intended, and that the regulations should in this respect be "interpreted to accord with the principle stated in the Directive". He suggested, and I would agree, that the words "or used" may have been "inserted to cover a situation in which, with the employer's consent, the employee uses some work equipment which one would ordinarily expect to have been provided by the employer: say, his own saw or screwdriver".

63. In *Spencer-Franks* both Lord Neuberger (at para 97) and I (at paras. 86-88) expressed sympathy with Lord Rodger's suggestion (at paras. 50-53) that whether an item performed a useful, practical function within and in relation to the purposes of the business could assist to define the scope of application of the regulations. Ultimately, the question is a composite one, with both abstract and specific aspects. The definition in regulation 2(1) may be seen, as Lord Hoffmann evidently saw it, as involving an issue entirely divorced from the issue arising under regulation 3(2) which is whether the equipment was work equipment in relation to the particular employer's undertaking. Or the words "or use", with the purposive aspect to which Lord Hoffmann also referred (para. 10), may be seen as a precursor to the, in this case critical, enquiry whether the equipment was work equipment in relation to the particular employer's undertaking. What matters is that some specific nexus (beyond the mere fact of use) is required between the equipment and the employer's undertaking, before the employer comes under the strict responsibilities imposed by the regulations.

64. There are in my opinion other clear pointers towards the need for such a nexus and the character that it might have. Regulation 4(2) speaks of an employer as "selecting work equipment", a phrase which I see as general (particularly against its background in article 3(2) of the Directive) although it can and should no doubt be interpreted broadly. Regulations 4, 5 and 6 impose obligations which employers can only sensibly have been intended to perform or be responsible for in respect of equipment within the direct sphere of their undertaking or control. I note inter alia the obligation on every employer under regulation 5(2) to "ensure that where any machinery has a maintenance log, the log is kept up to date", the obligation under regulation 6(1) to "ensure that, where

the safety of work equipment depends on the installation conditions" it is inspected after installation and before being put into service, etc., and the obligation under regulation 6(4) to "ensure that no work equipment - (a) leaves his undertaking; or (b) if obtained from the undertaking of another person, is used in his undertaking, unless it is accompanied by physical evidence that the last inspection required to be carried out under this regulation has been carried out".

65. How then is the nexus to be defined? Since regulation 3(2) is dealing with situations where there is a direct employment relationship, I would myself take as the test whether the work equipment has been provided or used in circumstances in which it was as between the employer and employee incorporated into and adopted as part of the employer's business or other undertaking, whether as a result of being provided by the employer for use in it or as a result of being provided by anyone else and being used by the employee in it with the employer's consent and endorsement.

66. Lord Hope suggests a test of control. If that means control in the limited sense of making the employer liable under regulation 3(2) only to the extent of his control, it is difficult to see why regulation 3(2) is there at all. Yet regulation 3(2) is on its face the primary regulation. If, on the other hand, it means that any aspect of control (whether of the work equipment, or of a person using, supervising or managing the use of work equipment, or of the way in which work equipment is used) suffices to make an employer liable for any breach of the regulations, that goes too far. A solicitor's firm has control of its clerk or of his or her use of work equipment, but that this cannot be sufficient to make it liable for the defective Westminster Underground Station escalator or House of Lords Committee Room chair. It is for that reason that I would adopt and apply under regulation 3(2) a test based on Lord Rodger's reasoning, which requires the work equipment to be incorporated into and adopted as part of the employers' undertaking. If control is any sort of guide to the scope of regulation 3(2), then it can in my view only be in the sense of control over the work equipment.

67. On the facts of this case, I do not consider that it can properly be said that the ramp was either incorporated into and adopted as part of the council's undertaking, or indeed under their control. In my view, the judge was too kind when he said that the council had "control" of the ramp. They did not provide it. They did not own or possess it. They did not have any responsibility or indeed any right without more to repair it. It was no more than part of the environment, like the Westminster

Underground Station escalator or the House of Lords chair, which any employee must face, when performing his or her functions at work away from any premises or place occupied by his employer.

68. In saying this, I do not find it is necessary in this case to express any view on the correctness or otherwise on its own particular facts of the decision in *PRP Architects v. Reid* [2007] ICR 78. Further, if control has any role as a guide, I do not regard regulation 3(3)(b) as pointing to an interpretation of regulation 3(2), or to the application of a concept of "control" (if relevant by implied extension to that regulation), covering this case. Regulation 3(3) extends the responsibilities imposed by the regulations to any person (other than an employer) who has "control to any extent" of (i) work equipment, (ii) a person at work using, supervising or managing the use of such equipment or (iii) the way in which it is used at work. But it only does so "to the extent of such control". The breach here alleged to have caused the appellant's injury was a defect in the work equipment, not in the way the appellant did, or was trained to do, her work or in the way she used the ramp. Accordingly, it is no use pointing to the council's undoubted control over the appellant's movements or activities.

69. The Regulations are not on any view an all-embracing protection which renders superfluous, at places with which an employer has no connection except that his or her employee has while working to visit them, the Occupiers' Liability Acts or ordinary common law duties of care or such other duties as may in this case have been owed by the National Health Service as suppliers of the ramp. Courts should be careful not to impose on employers responsibilities which go far beyond those at which the Directive and Regulations can in my opinion have been intended to impose. The judge's (over) generous interpretation of the concept of control would, if accepted, add both unjustified stringency and undesirable uncertainty into this area.

70. It is of course true that the council inspected Mrs Cotter's home and prepared Personal Handling Plans – Transport dated 14 November 2001 and 9 February 2004, in each case identifying the means of access as the French windows where the ramp stood, though not referring expressly to it. In making such inspections, the council observed nothing amiss with the ramp, because any defect was latent. What that shows is that the council was careful, not that it controlled the ramp or incorporated it into its undertaking, or should be strictly responsible for any defect in it. The ramp was someone else's equipment on someone else's premises visited by its employees while at work. "I am monarch

of all I survey" is not to be taken literally as opposed to literarily. In carrying out the inspection, the council was simply fulfilling its duty under regulation 3(1) of The Management of Health and Safety at Work Regulations 1999 (SI 1999/3242) to "make a suitable and sufficient assessment of - (a) the risks to the health and safety of his employees to which they are exposed whilst they are at work". Performance of that duty cannot have the Catch 22 consequence of making the council strictly liable for latent defects in equipment which they did not provide, which was not part of its undertaking and which it had no obligation to provide or repair.

71. Likewise, it is true that, if the defect in the ramp had been observable on careful inspection, which it was not, the council could have refused to send its employees to collect Mrs Cotter, or might itself even have procured and made available another ramp (e.g., a permanent ramp or, if feasible, a portable ramp to accompany its employees on visits to Mrs Cotter). Neither possibility shows any form of control of the actual ramp which caused Mrs Smith's injury. As to the former, no employer would or should allow its employee to be exposed to unsafe conditions anywhere, if it knew of them.

72. As to the latter, whether this would or might have happened is on the material before the House speculation, especially when the council did not supply the actual ramp which caused the injury. Although not the subject of any submissions or indeed reference in this case at, so far as appears, any level, it may well be that the council would, as her local authority if so requested by or on behalf of Mrs Cotter, have been obliged to decide whether the ramp needed repair or replacement and to undertake this if and as found necessary: see Disabled Persons (Services, Consultation and Representation) Act 1986, s.4 and Chronically Sick and Disabled Persons Act 1970, s.2. There has never been any suggestion that any such request was made or that any potential duties under these statutes have any relevance in this case. Had there been such a request and had the council then repaired or replaced the ramp, it could then for the future very plausibly have been argued that it had provided and adopted the new or repaired ramp as work equipment in its undertaking; certainly it would have done so if it supplied its own ramp for its own employees to bring with them and use on each occasion they came to take Mrs Cotter to the Day Centre. But responsibility under regulation 3(2) depends upon the actual position and the scope of the actual undertaking (or on Lord Hope's formulation upon actual control), not on a hypothetical scenario that never arose.

73. For these reasons, I would myself dismiss this appeal. Since preparing this speech, I have had the benefit of reading in draft the speech of my noble and learned friend, Lord Neuberger of Abbotsbury. I agree with his analysis of the difference between Lord Hope's and my own views and with the reasons that he gives for agreeing that the appeal should be dismissed.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

74. The issue on this appeal is whether a wooden ramp, placed outside the front door of Mrs Gina Cotter's house by the National Health Service ten years earlier, constituted "work equipment" "provided for use or used . . . at work", within regulation 3(2) of the Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306), by Mrs Jean Smith, when, in the course of her employment with Northamptonshire County Council as a driver and carer, she was pushing Mrs Cotter in her wheelchair from her home to a minibus in which Mrs Cotter was to be conveyed to a Council day centre.

75. The centrally relevant provisions of the Regulations and the more detailed facts and procedural history of this case are set out in the opinion of my noble and learned friend Lord Hope of Craighead, which I have had the benefit of reading in draft.

76. The problem in the present case arises from the fact that the ramp was neither on premises owned, managed, or occupied by the Council nor was its condition (save if the 1998 Regulations otherwise require) the responsibility of the Council. It cannot be doubted that, if the injury in question had been suffered by Mrs Smith when pushing Mrs Cotter in her wheelchair on a ramp outside the front door of the day centre, then the ramp would have been "work equipment" "provided for use or used . . . at work". Similarly, if, when accompanying Mrs Cotter, Mrs Smith had suffered the injury as a result of a faulty lift in the day centre. On the other hand, it seems to me that Mrs Smith could not have relied on the Regulations if she suffered injury as a result of a faulty lift or escalator at a railway station, even if she was accompanying Mrs Cotter, and hence was "at work" at the time. However, the fact that equipment is not on premises owned, managed, or occupied by the employer is

plainly not determinative of the issue: if Mrs Cotter's wheelchair had been provided by the Council and, as a result of a defect, it injured Mrs Smith, she would have had a claim for breach of the Regulations.

77. The problem thrown up by the present case is therefore to identify the extent to which the Regulations apply to equipment which is not within what my noble and learned friend Lord Mance calls "the direct sphere of [the employer's] undertaking or control" in paragraph 64 of his opinion, which I have had the benefit of reading in draft. In this connection, prescriptive reformulations of the legislative test can be dangerous. This is partly because recasting the legislative test can lead to error, as it runs the inherent risk of unintentionally inventing a different test from that set out in the legislation. In addition, any reformulation can lead to problems not thrown up by the statutory wording, in which case it makes matters worse rather than better.

78. Nonetheless, there are undoubtedly legislative provisions which, either because they are so obscure or because they must be given some sort of limitation which is not expressed, may well benefit from judicial exegesis, in order to decide whether, and if so how, they apply in the particular case, and also to assist in their application in future occasions. The expression "provided for use or used . . . at work" in regulation 3(2) is such a provision. Nonetheless, particularly in relation to legislation such as the 1998 Regulations, which can apply in such multifarious circumstances, any judicial observations can normally be no more than helpful guidance, which at best can be of value in the great majority of cases.

79. It is not unknown, however, for judges to despair of being able to provide any such guidance, even where it would be of considerable value if they could. For instance, in *Armstrong, Whitworth & Co Ltd v Redford* [1920] AC 757, 780, Lord Wrenbury said, in relation to somewhat similar legislation, the Workmen's Compensation Act 1906, "I have long since abandoned the hope of deciding any case upon the words 'out of and in the course of' upon grounds satisfactory to myself or convincing to others".

80. In this case, however, your Lordships consider, rightly in my respectful view, that judicial assistance can be given when it comes to considering the ambit of the words used in regulation 3(2). As to that, however, there are two differently expressed opinions. Lord Hope's view is that the 1998 Regulations apply if the employee's use of the

equipment for the purpose of her work is known to (or *a fortiori* is authorised by) the employer, the employer can inspect and assess the equipment, and the employer could reasonably instruct the employee not to use it. Lord Mance considers that the Regulations apply to equipment which is incorporated into and adopted as part of the employer's undertaking, and which is provided to the employee either by the employer or by someone else with the employer's consent.

81. I refer to these two formulations as "differently expressed", because I suspect that they will normally yield the same answer. Further, while I would expect that, whichever formulation is adopted will help clarify the law in this field significantly, neither is without its difficulties. In this case, for instance, each formulation could be invoked to support the opposite result which it is said to justify. On Lord Hope's test, it might be said that the Council could not reasonably be expected to assess the ramp any more than a lift escalator or train at a railway station: in each case they could only effect a cursory inspection; it might also be said that there could not reasonably have been an alternative route for Mrs Smith to use when pushing Mrs Cotter from her home in her wheelchair. On Lord Mance's test, the Council knew and effectively approved of Mrs Smith's use of the ramp as the means of taking Mrs Cotter to and from her house, and, to that extent, it might be said that the ramp was incorporated into the Council's undertaking, at least when it was being so used by Mrs Smith.

82. It is, of course, very easy to make such points, and they serve only to underline the substantial difficulties facing those who have to draft, and those who have to interpret, legislation such as the 1998 Regulations, when it comes to delineating their precise limits and scope. The Regulations are intended to impose absolute liability on an employer in a very wide, but not infinitely wide, range of factual circumstances, many of which it is impossible to envisage in abstract, and which are any way so multifarious that it is impossible to spell out even all those that can be foreseen. Having said all that, there is undoubtedly a difference between the two approaches, as the difference in outcome in this case suggests. In many ways, the difference seems to me to come down to the nature of the control which the employer has to have.

83. Lord Hope's approach appears to me to concentrate on the control which the employer has over the employee's use of the equipment, although the degree to which he can inspect the equipment is also relevant. Lord Mance seems to me to focus more on the control

which the employer has over the equipment itself, although his knowledge and approval of the employee's use is relevant. When referring to control in what follows, I shall use it in the sense of control over the equipment.

84. With considerable hesitation, and rather contrary to my initial impression, I have come to the conclusion that I agree with Lord Mance. So far as the definitions in regulation 2(1) and the actual words of regulation 3(2) are concerned, they do not appear to me to advance either view as against the other, save that the very fact that no express limitations are included could be said to support Lord Hope's wider interpretation. However, on any view, some degree of limitation is to be implied, so one has to look elsewhere for guidance as to what it should be. When one does so, there are a number of factors which seem to me to have some force.

85. First, subject at any rate to regulation 3(3)(b), some of the other provisions of the 1998 Regulations are more consistent with Lord Mance's view. Thus, regulation 5(1) requires an employer to "ensure" that work equipment is appropriately "maintained", and regulation 5(2) obliges an employer to "ensure" that the "maintenance log" of any machinery "is kept up to date". Regulation 6(1)(a) requires an employer to ensure that, "where the safety of work equipment depends on … installation", "it is inspected … before being put into service …". It would be unrealistic, at least in my view, to contend that an employer would be in breach of such provisions in relation to equipment which he does not control and has not installed. I believe that regulation 7, which requires an employer to limit and train those who use "work equipment [whose use] is likely to involve a specific risk", similarly envisages that the use of such equipment will be in the control of the employer. Otherwise, it is hard to see how he could comply with it.

86. It is true that employees normally may not be concerned about these regulations, given that claims based on breach of regulation 3(2) are not fault-based. But that is not the point: regulations 5, 6 and 7 can properly be referred to in order to identify what the draftsman of the 1998 Regulations had in mind when referring to work equipment and its use. It is also true that, if work equipment includes equipment not in the control of the employer, it may be possible to imply a term that those regulations only apply to the extent that it is legally possible for the employer to comply, but I am very doubtful whether such a reading would be permissible or appropriate.

87. However, regulation 3(3)(b) provides that the requirements "imposed by these Regulations on an employer shall also apply" "to the extent of his control" to a person who has "control to any extent of" (i) work equipment, (ii) a "person at work who uses or supervises or manages the use" of such equipment, or (iii) the way such equipment is used. This supports the notion that control is an important feature; further, as I understand the provision, it extends liability in some cases where an employer is already liable under regulation 3(2) or a self-employed person is already liable under regulation 3(3)(a). However, I do not see it assisting Mrs Smith in the present case. The only sense in which the Council had control was in its ability to instruct Mrs Smith not to use the ramp, but that would mean that the lift, escalator, or train at the railway station would be work equipment "provided for use or used . . . at work".

88. If anything, I consider that regulation 3(3)(b) supports the more limited meaning proposed by Lord Mance. It identifies what sort of control the 1998 Regulations had in mind, namely over the equipment itself, over the supervision and management of its use, and as to how it is used. The Council had no control over the ramp: what was done with it and to it was not a matter for the Council at all. The Council had no involvement in the way it was used or the management or supervision of its use. The only thing the Council could do was to forbid Mrs Smith from using it, unless that is within regulation 3(3)(b)(iii). However, that does not seem to me to accord with the natural meaning of paragraph (iii), especially if one contrasts its wording with regulation 4(1) and (2).

89. Secondly, I consider that Lord Mance's conclusion deals more satisfactorily with the case of an injury caused to an employee, when travelling for work, by equipment such as a defective lift, escalator, or train at a railway station. Such equipment is simply out of the scope of the 1998 Regulations, on his approach, because it is not in the control of the employer. It is more difficult, in my view, to justify the exclusion of such items on Lord Hope's approach, as it will not always be easy to say when and exactly why it would be appropriate to exclude, or appropriate to include, equipment not in the control of the employer from the ambit of the 1998 Regulations.

90. Thirdly, it is worth considering an employee who is working at a third party's premises – e.g. an accountant employed by a firm carrying out an audit at the offices of the company concerned. If she is injured by a defective piece of equipment (such as Rimer LJ's example of an unsafe coffee machine at [2008] EWCA Civ 181, [2008] ICR 826,

paragraph 40), liability to the accountant under the 1998 Regulations would, as I see it, lie with the Company, even though it did not employ her – see the *obiter* observations of Lord Hoffmann and Lord Rodger of Earlsferry in *Spencer-Franks v Kellogg Brown and Root Ltd* [2008] UKHL 46, [2008] ICR 863, paragraphs 26 and 44 respectively. It would not only be inherently a little surprising if the firm could be responsible; it would also be surprising if both the company and the firm were liable. Such a conclusion is consistent with the notion that an employer is not responsible under the 1998 Regulations if the equipment is not under his control, but under the control of someone else. Yet it is a little difficult to see why, on Lord Hope's approach, the employer would not be liable in such a case.

91. Fourthly, it seems to me that there is one judicial observation from a very high source, albeit *obiter*, which seems to me more consistent with the more limited scope given to the 1998 Regulations by Lord Mance. In *Spencer-Franks* [2008] ICR 863, paragraphs 23 and 26, Lord Hoffmann indicated that, at least in his opinion, where an employee of a motor repair company was injured by a defective car belonging to a customer, if anyone was liable under the Regulations, it would be the customer, rather than the employer. It is fair to say that the other members of your Lordships House who decided that case left the point open. However, such a conclusion is easily reconcilable with Lord Mance's formulation, but perhaps a little more difficult in the case of Lord Hope's.

92. Fifthly, there is the provenance of the 1998 Regulations. The recital states that they are intended to give effect to proposals made by the Health and Safety Executive ("HSE"), which were in turn expressed to be "guided by the need to implement" EU Directive 89/655/EEC ("the Directive"), as explained more fully in *Spencer-Franks* [2008] ICR 863, paras 79-81. As is made clear in that case at [2008] ICR 863, paragraph 82, the Directive focusses on equipment "selected" by the employer and "made available to workers in the undertaking", which suggests a more limited scope than Lord Hope's formulation would involve. It is true that the HSE's proposals were in one specific respect intended to go further than the Directive required - hence regulations 3(3) to (5) – but nothing said by the HSE suggested any other intention to go further. I would therefore adopt the approach of Lord Hoffmann in *Spencer-Franks* [2008] ICR 863, paragraph 26 to an issue in that case, namely that the "1998 Regulations should in my opinion be interpreted to accord with the principle stated in the Directive".

93. Sixthly, there are the broader, policy, considerations. I consider that these point both ways in this case, and are therefore of no real assistance. There is much to be said in favour of the view that an employer should be liable for any injury suffered by an employee in the course of his employment, unless it was suffered as a result of unreasonable or unauthorised behaviour. However, whether legislation should so provide is a matter of policy for the legislature, which would be in a position to assess, for instance, its feasibility and cost and employment consequences. The 1998 Regulations have a less ambitious aim, being limited to work equipment. There are arguments for construing such regulations widely, as already mentioned. But there is also an argument for not landing employers with liabilities for equipment which they do not control. The fact that the liability imposed on an employer by the Regulations is irrespective of fault cuts both ways in this connection. On the one hand, if an employer can be liable for injury despite having been entirely careful, it can be said to render it less surprising that he should also be liable for injury caused by equipment he does not control. On the other hand, if liability is strict, that is a reason for giving the regulations which impose it the narrower of two alternative meanings.

94. Finally, I am unimpressed by the argument that the Council ought to be liable in this case because they actually inspected the ramp. If that fact could support any claim against the Council, it would be one based upon negligence, which, as it happens, cannot, on the facts, be made out. More generally, I would be reluctant to invoke the fact that the Council behaved responsibly in connection with the ramp as a reason for concluding that they were liable for an injury caused thereby. Of course, as already implied, if the inspection had revealed a defect which subsequently injured Mrs Smith, there would presumably be a good claim in negligence, but that would not be because the Council had inspected: it would be because the Council failed act appropriately as a result of discovering the defect.

95. For these reasons, I consider that the Court of Appeal reached the right conclusion and I would therefore dismiss this appeal.