Diagram 4E

Before the Contracts (Rights of Third Parties) Act 1999, third parties had many ways of circumventing the privity rule and suing the promisor. These avenues were **not closed off** by the 1999 Act, although there will be less need to appeal to them because the Act creates a **wide ranging exception** to the privity rule, thereby allowing a third party beneficiary under a contract made by 2 other parties to sue for that benefit.
The common law actions may be wider in some circumstances, and so still useful. We will work through 9 so-called 'exceptions' to the privity rule under the common law. Most of these are not true exceptions because they operate by treating the third party as a 'first' party (whether in contract, tort or trust) with a direct right to sue.

Diagram 4E.1 illustrates the **Agency** device**:** An agent is someone who acts on behalf of his principal.

1. Where *A* makes a contract with *B*;
2. But B is the agent of C, C is *not* a third party. C is, in fact, a contract party in her own right.
3. So, C can sue for the benefit from A whether A knows that B is acting as C's agent or, controversially, even if A *doesn't* know.

Diagram 4E.2 deals with the **collateral contract** device**:** An apparent third party can also enforce the benefit of a promise if there is a collateral contract between her and the promisor.

1. For example, in *Shanklin Pier Ltd v Detel Products Ltd*, Detel (the manufacturer) told Shanklin (the customer) that its paint was suitable for painting Shanklin's pier and would last for 7 - 10 years.
2. Shanklin had a contract with its contractor to paint its pier.
3. Shanklin instructed its contractor to buy Detel's paint, expecting to benefit from the durability of the paint. In this contract, Shanklin is the third party beneficiary.
4. When the contractor used it to paint Shanklin's pier, the paint turned out to be less durable than stated. The court allowed Shanklin to sue Detel by finding a collateral

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contract between them: Shanklin gave consideration for Detel's promise on the paint's durability by getting its contractor to buy the paint from Detel.

Diagram 4E.3 The contract parties can benefit a third party by **exempting the third parties from liability.** This can be made enforceable by a combination of the previous two devices - of agency and collateral contract.

1. In the typical situation, there is a contract between a cargo owner or shipper and the cargo carrier which includes a term exempting the cargo carrier from liability.
2. The question is whether the stevedore, who works for the cargo carrier, but is not a party to the contract containing the exemption clause
3. can benefit from the exemption clause when, typically, the stevedore's negligence causes loss to the cargo owner. The answer 'yes' was arrived at in a rather convoluted way. What is required is known as a *Himalaya clause* (after the name of the ship in the case *Adler v Dixon*). Accordingly, the cargo carrier not only makes the main contract of carriage with the Cargo owner, but also
4. makes a **collateral contract** with the cargo owner as the stevedore's ***agent***. In this collateral contract, the *Owner* exempts the *Stevedore* from liability in exchange for *Stevedore*'s *consideration* of performing or promising to perform services in relation to the cargo which the *Stevedore* already owes the carrier under their contract.
5. The upshot is that, when sued by the owner for negligence, the stevedore can enforce the benefit of the exemption clause in the carriage contract to which he is not a party. The stevedore is entitled to this protection under a collateral contract made on his behalf by the carrier; the stevedore gave consideration for the owner's promise to exempt him from liability by performing his pre-existing contractual duty to the carrier.

   Section 1(6) of the Contracts (Rights of Third Parties) Act 1999 Act cuts through this complex reasoning and now straightforwardly allows qualifying third parties to rely on any exclusion or limitation clauses.

Next, we move on to circumventions of the privity rule via **the tort of negligence. Diagrams 4E.4 looks at whether a contract can** confer on the third party, the benefit of a negligence action **against a contract party.**

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1. Where A makes a contract with B
2. to perform for the benefit of C
3. *A's* breach of his contract with *B* might also amount to a breach of *A's* duty of care owed to C, entitling C to sue *A* in negligence**.**
4. C's claim is relatively straightforward where the loss involves physical injury or property damage. However, courts are far more reluctant to impose liability where the loss is *purely economic* and this is reflected in the very narrow scope of the **promisor's duty of care** in such cases.

Diagram 4E.5 represents the controversial decision allowing a third party claim for **pure economic loss** in *Junior Books* v *Veitchi*.

1. Here, Junior Books employed a main contractor (MC) to build a factory
2. The main contractor subcontracted the flooring to Veitchi
3. Junior Books is a third party beneficiary to this subcontract.
4. When the floor was laid defectively, JB was allowed a direct claim against Veitchi.
5. And this, despite the contractual chain which meant that –
    - JB could have sued the main contractor, and
    - The main contractor could sue Veitchi for the defective floor

The case is now regarded as anomalous and inconsistent with the general rule that a party only assumes contractual liability to his *immediate* contractual partner and is not liable in tort to remoter parties further removed in the contractual chain.

Diagram 4E.6 represents the more widely accepted case of ***White v Jones***. This also allowed a negligence action for pure economic loss and had the same effect as the enforcement of a contract by a third party.

1. A solicitor made a contract to prepare a will
2. This will was to benefit the testator's daughters
3. When the solicitor's negligence deprived each daughter of a £9,000 bequest, the House of Lords allowed them to claim against the solicitor as a matter of practical justice and to avoid the legal 'black hole'.

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4. Since the estate had suffered no loss it could only claim nominal damages, and so the solicitor would 'get away with it' unless he was made liable to the beneficiary daughters in tort.

The decision only applies to **wills**. With **gifts** made during a donor's lifetime, the donor can always choose whether to put right the solicitor's negligence.

We saw in Diagram 4E.3 that a contract can confer the benefit of an exemption clause on a third party via the **contractual** devices of agency and collateral contract. **Diagram 4E.7** shows how the same result can be achieved via **tort** reasoning.

1. In *Norwich CC v Harvey, Norwich CC* engaged a contractor to extend a swimming pool and agreed to maintain adequate insurance cover and exempt the contractor from liability for loss or damage by fire.
2. This same exemption was agreed when the contractor subcontracted the roofing work to Harvey. The negligence of Harvey's employee caused extensive fire damage to the property and Norwich CC brought a negligence claim against Harvey.
3. The claim failed. Although there was no contract between Norwich CC and Harvey, Harvey could still rely on the clear basis that all the parties proceeded in respect of fire damage. To achieve this The Court of Appeal simply negated any **duty of care** that Harvey would otherwise have owed to Norwich CC in respect of the fire damage.
4. In this way, Harvey obtained the benefit of the exemption clause in the main contract between other parties.

Diagram 4E.8 shows how a third party can have a direct action against the promisor if the court construes the promisee as holding ***his*** contractual right to sue the promisor on *trust* for the third party. This device is called the **trust of a contractual right** or the trust of a promise. The third party, as the beneficiary of the trust, acquires *a **property*** right enforceable against the promisor. For example,

1. If B promises to transfer a benefit to A
2. in exchange for A paying a sum to C
3. *C* can sue *A* for the sum if the trust device can be invoked making B the trustee

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4. and C the beneficiary. However, the courts are reluctant to invoke this device without clear evidence of the parties' intention to create a trust.

Diagram 4E.9 represents the device of **Assignment**

1. if *A* makes an enforceable promise to *B* to pay *B* a sum of money,
2. *B* can **assign** the benefit of that promise to *C*. B can do that subject only to a few limits such as:
    - that the contract forbids such assignment;
    - that contractual performance involves personal skill or
    - that C (the assignee) has no genuine or commercial interest in taking the assignment.
3. Assignment *allows C* to enforce the promise against *A. C* is the assignee and he takes the benefit 'subject to equities'; so that C's claim is subject to all the promisor's defences against B, the promisee/assignor.

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