Torts - Construction and Repair Contractors - Liability to Third Persons After Acceptance of Work by Owner

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fusals of the court, this area of the Robinson-Patman Act is seen
to be at least partially without the effective device, the shifting
of the burden of proof, that gives effect to other areas of the
act. The Commission now, in this limited area must resume,
after over two decades of rest, the unwieldy burden of gaining
"secret" information and searching for inaccessible records with
which to prosecute a defendant.

But it should be said that the area in which the burden is to
be resumed is indeed limited. It is only after the defendant
has come forward and shown affirmative elements of good faith,
as exemplified by the findings in the instant case, that the plain-
tiff need take a turn. It would be up to him then to show ele-
ments negating good faith. This is certainly a very sensible situa-
tion; otherwise, as more and more activities which per se pre-
clude good faith become known in the jurisprudence, a defendant
would be required to show affirmatively the absence of dozens,
perhaps hundreds, of activities. Such a burden would surely
be unreasonable.

The decision in the instant case, then, gives more than merely
an example of affirmative facts sufficient to come within a de-
fense; it unfolds an equitable see-saw procedure for presentation
of proof under the Robinson-Patman Act.

Philip E. Henderson

TORTS — CONSTRUCTION AND REPAIR CONTRACTORS — LIABILITY
TO THIRD PERSONS AFTER ACCEPTANCE OF WORK BY OWNER

Two recent cases reflect rapid changes in the tort liability of
construction and repair contractors to third persons. In Marine
Ins. Co. v. Strecker,1 the Louisiana Supreme Court held that a
contractor could be liable for damages to a tenant’s glassware
caused by negligence in the installation of a cabinet under a con-
tract with the building owner, even though the damage occurred
several months after the acceptance of the work by the building
owner. The California Supreme Court went even further in Dow
v. Holly Manufacturing Co.2 The court held that a general con-
tractor was liable to a third person for the negligence of his sub-
contractor, who had improperly installed a heater during the

1. 234 La. 522, 100 So.2d 493 (1957).
construction of a house. The defective heater caused the death of a subsequent purchaser of the house three years after the acceptance of the work by the former owner and after the property had been sold twice.

Construction and repair contracts were the last stronghold of the old rule that contracting parties were not liable in tort to persons with whom they had no contractual relation for negligence in the performance of a contract. For many years, the rule was applied to situations involving all types of contracts, but exceptions were developed, the most notable one being that the rule would not apply where the negligence related to inherently or imminently dangerous things. A 1916 case defined this exception so broadly that it virtually destroyed the general rule insofar as it applied to manufacturers and suppliers of chattels, and recognized in effect that a contracting party owed a duty of reasonable care to third persons in the performance of a contract. The case was followed widely in other cases involving manufacturers or suppliers of chattels and the old rule of immunity died out as to those types of contracts. However, in a somewhat modified form, the old rule survived as to construction and repair contractors. The courts continued to hold that such

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4. 2 Harper & James, Torts 1041 (1956).
5. Huset v. J. I. Case Threshing Mach. Co., 120 Fed. 865 (8th Cir. 1903). The case reviewed the exceptions which had at that time developed to the rule of immunity for acts of negligence where the injured party was not in privity of contract: cases of negligence imminently dangerous to life or health, or committed in the preparation or sale of an item intended to preserve, destroy or affect human life; cases of invitation by the plaintiff to the defendant to use the defective thing; and cases wherein one who sells or delivers an article which he knows to be imminently dangerous to life and limb without notice is liable to anyone that might foreseeably be injured.
6. McPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). The exception of the Huset case, which allowed recovery where the maker or seller knew the thing to be imminently dangerous and could thus clearly foresee injury to others, was refined by Justice Cardoza in McPherson to cover situations where the maker or seller should have known that the thing being made or sold was dangerous. Wherever a maker or seller could have foreseen that the thing sold created an unreasonable risk to others, it could be classed within the exception. Thus the exception was defined so as to engulf the lack of privity rule by imposing a general duty of reasonable care. See 2 Harper & James, Torts 1042 (1956).
7. See Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 633 (1946), wherein the history of the rule and its exceptions are reviewed, and the conclusion is reached that the imminently or inherently dangerous exception had grown so that its effect removed the immunity of manufacturers and suppliers of chattels, and placed them under a duty of reasonable care, to persons with whom they have no contractual relation.
8. Ford v. Sturgis, 14 F.2d 253 (D.C. Cir. 1926), is often cited as a leading case adhering to the rule that a construction contractor is not liable to third persons for negligence once the work has been accepted, unless the thing constructed
contractors were not liable to third persons for negligent work after the work had been accepted by the owner of the property. This rule also became encrusted with exceptions which allowed recovery in many situations where more basic tort principles strongly dictated that the contractor should be liable. If willful or gross negligence, fraud, nuisance, or an implied invitation could be found, or if the work was so defective or involved such a highly dangerous subject that the negligence could be considered as relating to an inherently or imminently dangerous thing, the rule of immunity to third persons did not apply. Although a surface reading of the cases indicates that continued recognition of the old rule of immunity is still the majority view, the frequency with which the exceptions have been applied in more recent years suggests that many jurisdictions which have not overtly repudiated the old rule have in reality discarded it.

The Restatement of Torts abandoned the old rule even before the language of the courts supported such a position. Several of the


9. See note 6 supra.

10. See, e.g., Murphy v. Barlow Realty Co., 206 Minn. 527, 289 N.W. 563 (1939) (contractor built a portion of building — owner had contracted to have it built in defective fashion — the court termed the contractor's action a wilful construction of a latent trap).

11. See Travis v. Rochester Bridge Co., 188 Ind. 79, 122 N.E. 1 (1919) (no fraud or concealment — no liability for defects after acceptance).


16. RESTATEMENT, TORTS § 385 (1934).
more recent decisions have taken the same position as the Re-
statement and recognized that the contractor is under a duty of
reasonable care to anyone whenever he may foresee injury even
after acceptance of the work by the owner, thus treating the con-
tractor in the same manner as manufacturers.17

A view taken by both of the instant cases is that there is no
valid reason to excuse a contractor from liability for negligent
injury to third persons occurring after acceptance of the work
by the owner. Although the question was de novo to the Louisi-
ana Supreme Court,18 California had taken this position prior
to the instant California decision.19 The significance of the Cali-
ifornia decision rests in its handling of problems in this new area
of liability. The fear of these problems was probably the cause
behind the prolonged survival of the old rule. This significance
will be more apparent after an analysis of the reasons which sup-
ported the survival of the old rule. One notion used to justify the
old rule was that acceptance and subsequent control of the de-
fective work by the owner served as an intervening or proximate
cause.20 In the cases employing this reasoning, the injured plain-

17. Hanna v. Fletcher, 231 F.2d 469 (D.C. Cir. 1956); Moran v. Pittsburgh-
Des Moines Steel Co., 166 F.2d 908 (3d Cir. 1948); McDonnell v. Wassenmiller, 74
F.2d 320 (8th Cir. 1934); McCloud v. Leavitt Corp., 79 F. Supp. 286 (E.D. Ill.
1948); Hale v. Depaoli, 33 Cal.2d 228, 201 P.2d 1, 13 A.L.R.2d 183 (1948);
Hunter v. Quality Homes, 45 Del. 100, 68 A.2d 620 (1949); Colbert v. Holland
Furnace Co., 333 Ill. 78, 164 N.E. 102, 60 A.L.R. 353 (1928); Wright v. Holland
Furnace Co., 186 Minn. 265, 243 N.W. 387 (1932); Foley v. Pittsburgh-Des
Moines Steel Co., 363 Pa. 1, 68 A.2d 517 (1949); Colton v. Foulkes, 259 Wis. 142,
47 N.W.2d 901 (1951).

18. However, it had been squarely considered by the Orleans Court of Appeal
in Schott v. Ingargolia, 180 So. 462 (La. App. 1938). A building contractor was
held not liable to a third party injured by the fall of the building after its accept-
ance on the theory that the contractor owed no duty to third persons injured after
acceptance of the work. The case was criticized in Note, 1 LOUISIANA LAW RE-
VIEW 233 (1938), on the grounds that the old rule adopted by the Schott case was
no longer justified and that the tendency was to abandon it. Perhaps it might be
said that the Supreme Court faced the question squarely for the first time in Ken-
drick v. Mason Co., 234 La. 271, 99 So.2d 108 (1958), which was relied upon in
contractor was held responsible for the destruction of a house which resulted from
underground gas line cuts negligently made by the contractor. The damage occurred
after acceptance of the work by the city, but the court rejected this fact as a de-
fense, holding that the language of La. CIVIL CODE arts. 2315, 2316 (1870) called
for responsibility for every act of negligence by which another is injured. However,
earlier language in the opinion indicated that the court felt that the great danger
of cut and leaking gas lines was sufficient to cause the case to fall within the
inherently dangerous exception to the old rule of liability.


20. "[T]he negligence of the owner in maintaining the defective building, and
not that of the builder in constructing it, is the true proximate cause of the third
person's injury." Ford v. Sturgis, 14 F.2d 253, 254 (D.C. Cir. 1926) (defective
theater roof collapsed). See also, e.g., Bogoratt v. Pratt & Whitney Aircraft Co.,
114 Conn. 126, 157 Atl. 860 (1932); Miner, Read & Garrette v. McNamara, 51
Conn. 690, 72 Atl. 138 (1909); Healy v. Heidel, 210 Ill. App. 387 (1918); Schott
tiff would not have been injured without the contractor's negligence. The proximate or intervening causation reasoning was therefore only another means of expressing the old rule that there was no duty extending to third persons injured after acceptance, and not a reason in support of that rule. The better approach is to not relieve the maker of a thing from the consequences of his negligence merely because another person was also negligent in that he failed to discover and correct the danger created by the maker of the thing. Another reason for the old rule's existence may have been a reluctance to deal with problems of determining the contractor's liability where injury was possibly caused by defects in designs or specifications furnished by another. Perhaps more so than manufacturers, the construction or repair contractor often works under plans furnished by another. In addition to factual problems of determining whether a particular defect was caused by fault in the plans or by fault in the actual work, there arises a problem, when the protection of the old rule is removed, of defining the contractor's duty to refrain from following faulty plans. The difficulty of reliable proof, especially as to questions of causation, is apt to be more acute in suits against contractors because the injuries may occur long after the work is accepted by the owner. Also, manifold


21. See note 20 supra. The facts of those cases clearly fit within the "but for" rule of causation in fact. Therefore, the intervening and proximate cause rationalizations merely limited the scope of the contractor's duty, so that it did not extend to third persons after acceptance of the work by the owner. See PROSSER, TORTS § 44 (2d ed. 1955).

22. See RESTATEMENT, TORTS §§ 385, 396 (1934).

23. See Ford v. Sturgis, 14 F.2d 253 (D.C. Cir. 1926). There the court avoided the necessity of disentangling the contractor's negligence from that of the architect by applying the old rule of non-liability in sustaining the contractor's demurrer.

24. Some cases have faced this problem and defined the contractor's duty in general terms. If the plans are so defective that the ordinary prudent builder would have known that, if followed, they would create a danger, there arises a duty to refrain from following the plans. It is submitted that this general rule is still not susceptible of easy application. Roth v. Great Atlantic & Pacific Tea Co., 108 F. Supp. 390 (E.D.N.Y. 1952); Inman v. Binghamton Housing Authority, 152 N.Y.S.2d 79, 1 App. Div. 559 (1956) (contractor liable for following apparently defective plans for porch); Ryan v. Feeney & Sheehan Bldg. Co., 239 N.Y. 43, 145 N.E. 321 (1924) (defects in design of canopy not apparent — contractor not liable).

questions may arise as to the extent of the contractor's liability for defects in sub-contractors' work or in materials furnished by suppliers.\textsuperscript{26} The problem of defining which class of defendants would be subject to the new rule of liability may have been another reason behind the prolonged retention of the old rule of immunity. Thus, if contractors were to be held liable for their negligence in construction or repair work after they had relinquished control of the property, the courts would ultimately have to face problems of determining whether other classes of persons who engage in construction or repair work, such as landlords, occupiers of land, and vendors, should be subject to the duty of the contractor.\textsuperscript{27}

It is submitted that the difficulties which would attend the litigation that might result from removing the old rule of immunity offers an explanation for the prolonged survival of the old rule as to contractors.\textsuperscript{28} The modern trend of abandoning the old rule, as reflected by the instant cases, suggests a willingness to cope with the practical and theoretical complexities of a new area of liability wherein an unusual division and overlapping of

\textsuperscript{26} In one of the instant cases, the primary negligence was that of the subcontractor in installing a heater, but the principal contractor was held liable largely on the basis of his overall supervision and control of the project. An analogy was drawn to manufacturers, and also since the principal contractor had held out the entire house as his product, he was liable for defects in parts or work supplied by another. Dow v. Holly Mfg. Co., 49 Cal.2d 720, 321, P.2d 736 (1958). Questions might arise as to when the contractor will have held the construction out as his own product, thus conferring automatic liability upon him for his subcontractor's negligence and to what extent the contractor should inspect the work or materials supplied by others.

\textsuperscript{27} In Hale v. Depaoli, 33 Cal.2d 228, 201 P.2d 1, 13 A.L.R.2d 183 (1948), the defendant was the owner of the building at the time of the injury to the plaintiff, but was the building contractor at the time it was constructed. The court refused to hold him liable as a lessee, but held him liable as a contractor. In Dow v. Holly Mfg. Co., 49 Cal.2d 720, 321 P.2d 736 (1958), the court drew by analogy upon the law which would hold occupiers of land liable for dangerous conditions on the premises in order to hold the contractor liable. No cases were found which were directly confronted by the questions raised in the text. They are presented as illustrative of questions which may face the courts.

\textsuperscript{28} The fear of an inability to cope with the litigation that might result if the contractor's liability is not limited to the other contracting party is evident in many of the opinions supporting the old rule of immunity to third parties. E.g., "if a contractor, who erects a house owes a duty to the whole world, it is difficult to measure the extent of his responsibility. . . . It is safer and wiser to confine such liabilities to the parties concerned." Curtain v. Somerset, 140 Pa. 70, 21 Atl. 244 (1891). Quoting from Winterbottom v. Wright, 10 Mees. & W. 109, 115 (1842), the court in Ford v. Sturgis, 14 F.2d 253, 255 (D.C. Cir. 1926) indicated its fear of the consequences of departing from the old rule "unless we confine the operation of such contracts as this to the parties who entered them, said Lord Abinger, the most absurd consequences, to which no limit can be seen, will ensue; and Baron Alderson remarked, if we hold that the plaintiff can sue in such case, there is no point at which such actions will stop. The only safe rule is to confine the right to recover to those who enter into the contract; for if we go one step beyond that, there is no reason why we should not go fifty."
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responsibility and causation are apt to occur. In the Dow case, the California court demonstrated that some of the problems can be effectively handled by analogy to the law as to suppliers of chattels and owners of immovables. The California court noted that manufacturers are under a duty to exercise a reasonable inspection to discover defects in parts supplied by subcontractors, that a vendor who holds out a product as his own is treated as though he were the manufacturer for negligence in the making of a chattel, and that landowners cannot escape liability where a dangerous condition is caused by having an independent contractor construct a building. The court concluded that general contractors should be similarly responsible for the negligence of subcontractors.

Apparently the courts are drawing by analogy upon other more well-developed areas of law in entering this new arena of complexities in order to serve better a cornerstone principle of tort law: A person should be obliged to exercise reasonable care whenever it is foreseeable that failure to exercise such care would injure anyone. The transfer of control or ownership of a thing by a contractor when the owner accepts the work is no longer viewed as a valid reason for frustrating the operation of this principle. Although evidence of the principle permeates other branches of the law, under traditional concepts of law other

29. The principle was first clearly expressed by Brett, M.R. (later Lord Esher) in Heaven v. Pender, 11 Q.B.D. 503, 509 (1883): "Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." The statement by Brett was regarded as too broad by the other members of the court who did not concur in it, and later rejected by Brett himself. As one writer pointed out, there are many persons toward whom a danger may be recognized, but to whom no reasonable care was owed. PROSSER, TORTS 168 (2d ed. 1955). However, it is submitted that the growth of the law has been in the direction of effectuating Brett's statement by removing the legal barriers to the imposition of a duty of reasonable care in cases where injury is foreseeable. Changes in the law as to manufacturers and suppliers of chattels, and building or repair contractors illustrate this point.

30. Illustrations of this point can be found in Louisiana sales and contract law where the principle of foreseeability of injury seems to be evidenced. Thus, under civilian principles of contract, damages are restricted to those which were foreseeable at the time of making the contract. LA. CIVIL CODE arts. 1934, 1943 (1870). The liability of a vendor for damages resulting from vices or defects in the thing sold depends upon whether the seller knew of the vice or defect, which, if it is submitted, bears upon the question of whether the seller should have foreseen injury to the buyer. Id. art. 2545. Although the Civil Code does not expressly provide that a vendor is liable for defects in the thing sold to subsequent vendees, the Louisiana Supreme Court has extended the warranty against such defects to protect not only the immediate vendee, but subsequent vendees also. This was accomplished by analogy to the warranty against eviction. The principle of foreseeability of injury was thus served, since the immediate vendor should be able to
classes of persons still enjoy a degree of immunity from the consequences of their negligence by virtue of their having transferred control or ownership of property subsequent to their peril-creating activity. Thus, under the common law, a lessor is ordinarily not responsible for defective premises,\(^{31}\) and a vendor may, with impunity to third persons who may foreseeably be injured by a defective structure, sell an obviously dilapidated and dangerous building.\(^{32}\) The greater recognition being given to the principle that a person should be obliged to exercise reasonable care wherever injury to another is foreseeable suggests that these and other immunities which are likewise related to the transfer of control or ownership may be weakened or removed.

Fred W. Ellis

**TORTS — DUTY TO CONTROL THE CONDUCT OF OTHERS**

Defendant construction company had just completed work on a section of an Alaskan highway, and traffic was being permitted in one lane. The company, through its supervisors, knew of the resentment which its employees held for the highway users, but in spite of this knowledge the supervisors supplied a group of off-duty employees with liquor and allowed them to have a job completion celebration adjacent to the highway. Plaintiffs entered the usable lane of the highway, which was adjacent to property occupied by the defendant construction company. There three of the company's off-duty employees attacked the plaintiffs, who brought suit against these off-duty employees, the company's supervisors, and the construction company. The federal district court gave judgment for the plaintiffs against the construction company and the off-duty employees, but exonerated the supervisors after the jury found them not negligent. On appeal by the construction company, the United States Court of

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32. See PROSSER, TORTS § 80 (2d ed. 1955). However, where the danger is very great to persons outside of the premises, the nuisance theory has been employed as an exception to the general rule that a vendor is not responsible to a vendee or to third persons for defects or dangers in real property which he has sold.