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Negligence Liability of Artisans and Tradesmen

Jerry L. Moore

NOTE

NEGLIGENCE LIABILITY OF ARTISANS AND TRADESMEN

The purpose of this Note is to examine certain aspects of the tort liability of nonprofessional persons who engage in a trade or craft which requires skill and abilities not ordinarily possessed by the average man. Since, with such a wide range of subjects, an adequate treatment of all the problems peculiar to each trade would require volumes, it is necessary at the outset to place rather narrow limitations on the scope of this analysis. Perhaps it is best to define the outside limits in the form of two "issues" as follows. When a person engages in a certain trade or craft and holds himself out to the public as competent to perform the specialized services ordinarily identified therewith, and when he undertakes to perform those specialized services for a consideration: (1) What is the standard of skill and care demanded of him in order that he not be held liable in tort for negligent performance; and (2) Under what circumstances will he be liable for negligent performance to persons not in privity of contract?

Normally in a discussion of this type one would expect the defendants to be John Jones, village blacksmith, or Henry Smith, plumber. But the job of the artisan has been taken over to a large extent by large corporations and it is not unusual to find that the heating system in a residence was installed by the Standard Oil Company of California, or that E. I. DuPont DeNemours & Co. is being sued in tort for the negligent installation of a door handle. In spite of the names of the litigants, however, the "issues" as outlined above remain the same.

I. Standard of Care

Much has been written about the standard of care demanded of physicians, dentists, attorneys and accountants,[1] and oftentimes it would appear that a peculiar set of rules applies to professional men as a class. But this is not true unless there is included within the definition of "profession" practically any skill or trade where those engaging in it must possess a particular skill or ability.[2] The following rule was propounded at an early stage in the development of the common law: "If a smith prick my horse with a nail, etc., I shall have my action upon the case against him, without any warranty by the smith to do it well. . . For it is the duty of every artificer to exercise his art rightly and truly as he ought."[3]

1. See, *e.g.*, *Symposium on Professional Negligence*, 12 Vand. L. Rev. 535-824 (1959).
2. Restatement (Second), Torts § 299A (Tent. Draft No. 4, 1959).
3. Y. B. 46 Edw. 3, f. 19 pl. 19 (1372), as quoted in Pollock, Law of Torts 335 (15th ed. 1951).

The more elaborate American version of the same rule is:

> It is a general rule of law that, when a person holds himself out to the public in any particular employment, work, or trade, there is an implied agreement with those who may employ him that he and his employees in that trade or business possess that reasonable degree of knowledge and skill which is ordinarily possessed by others engaged in the same business or trade; and that he and they will perform the services which he may be engaged to do, diligently and faithfully, and with that skill and prudence ordinarily possessed and observed by others engaged in the same or like employment.[4]

Thus there are two elements in the standard of care. The actor must possess a certain minimum of skill and apply his skill with reasonable care.[5] The degree of skill required has been expressed in a variety of ways, but none of them seems to add to or detract from the test previously set forth to any noticeable extent. A sampling of the terminology reveals: the skill of his art,[6] ordinary skill and ability of persons engaging in this business practicing in the locality,[7] such reasonable skill as the nature of the service may require,[8] skill which one impliedly held himself out as exercising,[9] and the amount of skill which would enable one to do the work in a reasonable and proper manner.[10] The rule has been applied to a blacksmith,[11] furrier,[12] machinist,[13] oil well petrofracturer,[14] aerial seeder,[15] garageman,[16] dry cleaner,[17] hairdresser,[18] electrician,[19] general contractor,[20] restaura-

4. Pusey v. Webb, 18 Del. 490, 47 Atl. 701 (1900) (blacksmith).
5. Stevens v. Moore, 24 Tenn. App. 61, 139 S.W.2d 710 (1940) (dry cleaner).
6. "The amount of care to be used varies with the instrumentality dealt with; where it is inherently dangerous, more care is necessary in regard to it than where it is, according to common experience, a thing relatively harmless even where defectively constructed or negligently used. Therefore, what amounts to the exercise of ordinary care under all the circumstances is a question for the jury, but ordinary care, not extraordinary care is still the yardstick." Hand v. Harrison, 99 Ga. App. 429, 108 S.E.2d 814 (1959) (installing steam tables).
7. Barnett v. Roberts, 243 Mass. 233, 137 N.E. 353 (1922) (hairdresser).
8. Van Nortwick v. Holbine, 62 Neb. 147, 86 N.W. 1057 (1901) (wheat thresher).
9. Flint & Walling Mfg. Co. v. Beckett, 167 Ind. 491, 79 N.E. 503 (1906) (windmill erector).
10. Lincoln v. Gay, 164 Mass. 537, 42 N.E. 95 (1895) (dressmaker).
11. Pusey v. Webb, 18 Del. 490, 47 Atl. 701 (1900).
12. Douglass v. Hart, 103 Conn. 685, 131 Atl. 401 (1925), 44 A.L.R. 820 (1926).
13. Arkansas Machine & Boiler Works v. Moorhead, 136 Ark. 18, 205 S.W. 980 (1918), 1 A.L.R. 1652 (1919).
14. Dowell, Inc. v. Lyons, 265 F.2d 521 (6th Cir. 1959).
15. Aerial Agricultural Service of Montana v. Richard, 264 F.2d 341 (5th Cir. 1959).
16. Simms v. Sullivan, 100 Ore. 487, 198 Pac. 240 (1921), 15 A.L.R. 678.
17. Stevens v. Moore, 24 Tenn. App. 61, 139 S.W.2d 710 (1940).
18. Barnett v. Roberts, 243 Mass. 233, 137 N.E. 353 (1922); Annot., 14 A.L.R.2d 860 (1950).
19. Person v. Cauldwell-Wingate Co., 187 F.2d 832 (2d Cir. 1951), *cert. denied*, 341 U.S. 936 (1951); Annot., 3 A.L.R.2d 1448 (1949).
20. *Ibid.*

teur,[21] livery stable keeper,[22] tree expert,[23] dressmaker,[24] windmill erector,[25] plumber,[26] brick contractor,[27] wheat thresher,[28] and a drayman.[29] The standard is premised on the feeling that even though the actor "might be an ordinarily prudent man . . . if he had no experience or skill in the particular work in which he is engaged, disastrous results would be liable to follow."[30]

Although the duty arises in the first instance by contract, we are not concerned here with actions for breach of contract but with actions in tort for negligence; hence the standard of care required is a tort standard and not a contract standard.[31] Ordinarily the tort and contract standards will be the same as when the contract provides "that the work shall be performed in a good workmanlike manner"[32] or when nothing is expressed as to the standard required.[33] But "the specifications of the contract do not determine the standard of care; proof of compliance with the specifications by the defendant is not of itself a defense nor, on the other hand, would proof of their violation without more make a case for the plaintiff."[34] "Therefore, any contract provision prescribing a different standard of care from that imposed by the rule of the common law is not relevant to the issue of actionable negligence and should be stricken on motion."[35]

Persons falling within this group are not insurers of the public, nor are they bound to use the safest methods or tools available in rendering their services.[36] It will generally suffice if they comply with the

21. Louis Pizitz Dry Goods Co. v. Waldrop, 237 Ala. 208, 186 So. 151 (1939).
22. Deming v. Johnson, 80 Conn. 553, 69 Atl. 347 (1908).
23. Porter v. Davey Tree Expert Co., 34 Ga. App. 355, 129 S.E. 557 (1925).
24. Lincoln v. Gay, 164 Mass. 537, 42 N.E. 95 (1895).
25. Flint & Walling Mfg. Co. v. Beckett, 167 Ind. 491, 79 N.E. 503 (1906).
26. Stafford v. Gowing, 236 Iowa 171, 18 N.W.2d 156 (1945); Annot., 18 A.L.R.2d 1326 (1951).
27. Daegling v. Gilmore, 49 Ill. 248 (1868).
28. Van Nortwick v. Holbine, 62 Neb. 147, 86 N.W. 1057 (1901).
29. Spokane Truck & Dray Co. v. Hoefer, 2 Wash. St. 45, 25 Pac. 1072 (1891).
30. 25 Pac. at 1073.
31. Lewis v. LaNier, 84 Colo. 376, 270 Pac. 656 (1928) (road contractor); Hand v. Harrison, 99 Ga. App. 429, 108 S.E.2d 814 (1959) (installing steam table); Pinnix v. Toomey, 242 N.C. 358, 87 S.E.2d 893 (1955); 34 N.C.L. Rev. 253 (plumber); Boyd, Higgens & Goforth, Inc. v. Mahone, 142 Va. 690, 128 S.E. 259 (1925) (road contractor).
32. Green v. Hanson, 103 Cal. App. 430, 284 Pac. 1082 (1930) (raising level of building).
33. Van Nortwick v. Holbine, 62 Neb. 147, 86 N.W. 1057 (1901) (thresher).
34. Welter v. M. & M. Woodworking Co., 338 P.2d 651, 655 (Ore. 1959) (logging road).
35. Pinnix v. Toomey, 242 N.C. 358, 87 S.E.2d 893, 898 (1955).
36. "[T]he law required at his hands only the exercise of reasonable means and efforts to furnish good and well-constructed machinery, of good material, adapted to the work in hand, combining the greatest safety with practical use. He was not an insurer of plaintiff's property, and was not, as stated in the instruction, bound to come with safe machinery, so that, by the exercise of ordinary care, absolute security would be afforded." Holman v. Boston Land & Security Co., 20 Colo. 7, 36 Pac. 797, 799 (1894) (thresher). *But see* Mayer

accepted customs and procedures adopted by others engaged in substantially the same trade or business in the community.[37] Evidence of accepted customs is frequently introduced by either the plaintiff or the defendant by way of expert testimony.[38] In *Stafford v. Gowing*,[39] testimony of a plumber had the double-barrelled effect of establishing negligence on the part of the defendant and the lack of contributory negligence on the part of the plaintiff. Plaintiff went to defendant's plumbing shop to procure a piece of soil pipe. In cutting the pipe to the desired length the defendant caused it to chip and a splinter struck plaintiff in the eye, seriously impairing his vision. The defendant contended that he had used the customary method in cutting the pipe and that plaintiff should have known that soil pipe would splinter. Another plumber testified that no reputable plumber would employ the method used by defendant in cutting pipe, and further testified that he did not know that soil pipe would splinter until he became a plumber. The plaintiff recovered. Evidence of custom was used defensively in *Rawls v. Ziegler*,[40] where the court held:

> The evidence as to the standard practice in the community of placing five-yard bodies on two-ton chassis is, without more, sufficient to discharge Cecil & Bruce from legal liability to plaintiffs for assembling a five-yard body on a two-ton chassis in accordance with their directions from Luby.[41]

In the thoroughly entertaining case of *Vann v. Ionta*,[42] the plaintiff became tickled while seated in a barber's chair and during the excitement he grabbed the barber's razor cutting his hand in the process. The court, in holding that the barber had shown no "unusual propensity for fooling around with customers"[43] discussed the customs of the barbering trade from the days of the prophet Ezekiel down to the twentieth century.

> So that, while admitting the talking, Jimmie tenders the proposition that barbering and talking go hand in hand, and that although the conversation evokes laughter, there can be no negligence based on that fact alone....
>
> Common observation furnishes proof that the barber is truly a philosophic person, of amiable and tractable disposition, ready to be accomodating, and always dispensing vocal wares with varying degrees of

v. Thompson-Hutchison Bldg. Co., 104 Ala. 611, 16 So. 620, 624 (1894), where the court said: "It is next contended by the defendant that it was impossible to erect a scaffold or safeguards. . . . We do not think this any excuse. The defendants were under no compulsion to erect the building." (building contractor).

37. See generally MORRIS, STUDIES IN THE LAW OF TORTS 214 (1952).
38. *Id.* at 1.
39. 236 Iowa 171, 18 N.W.2d 156 (1945).
40. 107 So. 2d 601 (Fla. 1958).
41. *Id.* at 605.
42. 157 Misc. 461, 284 N.Y. Supp. 278 (Mun. Ct. 1935).
43. 284 N.Y. Supp. at 286.

> humor and intelligence, while the razor follows the facial contours and, maybe the course of least resistance, depending upon when it was last sharpened. That barbers talk cannot be disputed. Some talk more, some less, some humorously, some not, but talk they do. It is traditional and hereditary with them."[44]

To support a recovery on the ground of negligence in failing to comply with an alleged business custom, it is often held that the custom must be general and well established, so as to raise a presumption that the defendant knew it, or that he had actual knowledge of it.[45] Or, as is sometimes stated, the custom must be "certain, reasonable, distinct, uncontradicted, continued and so notorious as to be probably known to all parties to be controlled by it."[46] It is error to admit evidence of an extraordinarily safe practice followed in an isolated case.[47]

There may be circumstances, of course, under which a reasonably prudent man should depart from trade custom.[48] An obvious example of such a situation was presented in *Alston v. Stewart*.[49] There the defendant, a stone contractor, received permission from the brick contractor to use his scaffold but was told that the scaffold should be braced before using it for such heavy work. Defendant used the scaffold as it was, and the scaffold collapsed injuring the plaintiff. The court held that it was proper to exclude plaintiff's proffered evidence that it was a custom of the building trade for the stone to "go over" the bricklayer's scaffold. There may also be circumstances where the custom should not be followed in any event because the members of the trade have not set their standards high enough. As the court pointed out in *McCollum v. O'Neil*:[50]

> The fact that there was evidence that closing the valves before disconnecting a radiator constituted standard plumbing practice, where the disconnection was to be temporary is immaterial since the standard is "not what men ordinarily do under like circumstances, but what reasonably prudent and careful men, having regard for the rights and safety of others, do under like circumstances."[51]

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44. *Id.* at 280, 282.
45. Boyd v. Graham, 5 Mo. App. 403 (1878) (plumber).
46. Jemison v. Pfeifer, 397 Pa. 81, 152 A.2d 697 (1959) (razing building).
47. In Johannsen v. Peter P. Woboril, Inc., 260 Wis. 341, 51 N.W.2d 53, 55 (1952), where a painting contractor was charged with negligence, the court held that: "The admission of plaintiff's evidence of the practice and regulations under which Bucyrus-Erie Company handled inflammable liquids was error. It appears that the Company required it to be transported and kept in one-gallon red cans with self-closing tops. The operations of Woboril, Inc. and of Bucyrus-Erie Company differ so greatly that we consider their respective use of inflammables is not to be judged by the same standard, at least on the present record, in determining whether the method was as safe as the nature of Woboril's work would reasonably permit."
48. RESTATEMENT (SECOND), TORTS § 295A (Tent. Draft No. 4, 1959).
49. 2 Monag. 51 (Pa. 1889).
50. 128 Mont. 584, 281 P.2d 493 (1955).
51. 281 P.2d at 496.

Since we are dealing with cases involving a failure to perform skillfully, it naturally follows that the expert witness will frequently play an important role.[52] He may not only testify as to whether the defendant followed an accepted trade custom, but he may express an opinion as to whether the net result of the defendant's labor was to create a potentially dangerous condition,[53] and whether the condition so created was the cause of the injury.[54] But where the dangerous condition would be obvious to an unskilled person, the plaintiff need not introduce expert testimony in order to prove his case.[55]

Oftentimes there is no direct evidence of negligence to be had and the plaintiff must rely on a combination of circumstantial evidence and expert testimony or invoke the doctrine of *res ipsa loquitur*.[56] The doctrine has been rather freely applied to cases involving barbers and beauticians[57] and to cases involving other trades[58] if the injury occurs prior to the time that the defendant relinquishes control of the instrumentality.[59] Even when the defendant is not in actual possession but still has "management"[60] of the instrumentality, there is little difficulty in applying the doctrine. But when the work has been completed and turned over to the contractee the so-called requirement of "exclusive control"[61] is still a problem,[62] though not as much so as in former times. The more modern approach is that the doctrine may apply even though the defendant has relinquished control if the plaintiff can show that the mechanism has not been tam-

52. See generally MORRIS, STUDIES IN THE LAW OF TORTS 1 (1952).
53. Louisville & N. R.R. v. Deering, 188 Ky. 708, 223 S.W. 1095 (1920) (defective scaffold); Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949) (defective steel tank).
54. "Expert opinion as to the cause of an accident is always admissible where the facts depend upon circumstances rather than direct evidence." 68 A.2d at 525. See also Spoelter v. Four-Wheel Brake Service Co., 99 Cal. App. 2d 690, 222 P.2d 307 (1950) (garageman).
55. "The question as to whether or not the construction was defective was not of such a character that only persons of skill and experience were capable of forming a correct judgment about it. There was no complicated machinery and no question of science or skill. The facts with reference to the nailing of the cleat, and the cleat itself, were before the jury, and they were competent to form an opinion as to whether any defects existed." Colbert v. Holland Furnace Co., 331 Ill. 78, 164 N.E. 162 (1928), 60 A.L.R. 353 (1929) (installing furnace).
56. See generally PROSSER, TORTS § 42 (2d ed. 1955).
57. Annot., 14 A.L.R.2d 860, 877 (1950).
58. Annots., 18 A.L.R. 2d 1326, 1330 (1951) (oil burning heating appliances), 3 A.L.R.2d 1448 (1949) (electrical appliances).
59. John Rooff & Sons v. Winterbottom, 249 Iowa 122, 86 N.W.2d 131 (1957) (sparks from acetylene torch set fire to plaintiff's building while defendant was erecting a roof).
60. Central Arizona Light & Power Co. v. Bell, 49 Ariz. 99, 64 P.2d 1249 (1937) (gas appliance), Michener v. Hutton, 203 Cal. 604, 265 Pac. 238 (1928), 59 A.L.R. 480 (1929) (vent pipe).
61. PROSSER, TORTS 204-08 (2d ed. 1955).
62. See, *e.g.*, Wagner v. Associated Shower Door Co., 99 So. 2d 619 (Fla. 1958) (glass door).

pered with since it left the defendant's possession.[63]

A fairly recent development with respect to the standard of skill and care required of a skilled craftsman is the tendency to establish certain standard procedures by statute or administrative order;[64] and as the coverage of these statutes and regulations becomes more comprehensive day by day, they play an increasingly important role in negligence cases.[65] As is true of tort cases generally, the plaintiff, in order to found his charge of negligence on the violation of a safety order or statute, must show that he is a member of the class of persons whom the legislature intended to protect.[66] Violation of a safety order may be only evidence of negligence,[67] or it may be negligence *per se*,[68] and presumably compliance with a safety order would be evidence of ordinary care.[69] Such compliance would not preclude a finding of negligence, however, where a reasonable man would take additional precautions.[70]

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63. Plunkett v. United Electric Service, 214 La. 145, 36 So. 2d 704 (1948), 3 A.L.R.2d 1437 (1949) (central heating unit).

64. See generally MORRIS, STUDIES IN THE LAW OF TORTS 141-213 (1952). Safety statutes and orders frequently encounter constitutional obstacles. See, *e.g.*, Hillman v. Northern Wasco County People's District, 323 P.2d 664 (Ore. 1958), where a statute providing that the National Electric Code as approved by the American Standards Association should be the electrical code of Oregon was declared unconstitutional on the ground that it was unlawful delegation of legislative power. And see Electrical Contractor's Ass'n v. McLaughlin, 153 F. Supp. 653 (D.D.C. 1957), where an order of the Board of Commissioners which would require any electrical installation over a certain capacity to be approved by a professional electrical engineer was struck down as being arbitrary and unreasonable and having no relation to public health and safety.

65. RESTATEMENT (SECOND) TORTS § 286 (Tent. Draft No. 4, 1959).

66. In Sumner v. Lambert, 96 Ohio App. 53, 121 N.E.2d 189 (1953), the court held that evidence as to the specific safety requirements relating to construction work adopted by the Industrial Commission of Ohio were inadmissible because the requirements related only to employers and their employees. But in Porter v. Montgomery Ward & Co., 48 Cal. 2d 846, 313 P.2d 854 (1957), the court held that safety orders and provisions of the Labor Code were intended to protect the public generally and not merely employees.

67. In Webb v. Standard Oil Co. of California, 308 P.2d 350 (Cal. App. 1957), *aff'd*, 49 Cal. 2d 509, 319 P.2d 621 (1957), the defendant's agent improperly installed bottled propane gas tanks in the plaintiff's house. The court held that it was proper to admit in evidence the Liquified Petroleum Gases Safety Order. In an earlier case in the same jurisdiction the court held that it was proper to instruct the jury that violation of the safety orders would constitute evidence as a *matter of law*. Atherley v. McDonald, Young & Nelson, Inc., 142 Cal. App. 2d 575, 298 P.2d 700 (1956).

68. Lutz Industries v. Dixie Home Stores, 242 N.C. 332, 88 S.E.2d 333 (1955). In another case decided the same day in the same jurisdiction the court admitted relevant provisions of a building code into evidence but failed to state that a violation of the code would constitute negligence *per se*. Pinnix v. Toomey, 242 N.C. 358, 87 S.E.2d 893 (1955) 34 N.C.L. Rev. 253.

69. Such a rule has been applied to public utilities where the National Electrical Code has been brought into evidence; Isbell v. Union Light Heat and Power Co., 162 F. Supp. 471 (E.D. Ky. 1958); Daniel v. Oklahoma Gas & Elec. Co., 329 P.2d 1060 (Okla. 1958); and there is no apparent reason why the same rule would not apply to private persons.

70. RESTATEMENT (SECOND), TORTS § 288c (Tent. Draft No. 4, 1959).

A craftsman is generally held to be free from negligence if he performs his work according to the plans of an architect or engineer[71] unless a craftsman of "ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury."[72] But in determining whether the craftsman was justified in following the architect's plans, at least one court has applied two tests: whether a reasonably competent contractor would have noticed the defect; and whether this particular contractor by reason of his possessing some special skill or knowledge should have noticed the defect.[73]

As has been pointed out, a person who engages in a particular line of work must possess such skill as is usually possessed by persons in that field. In a recent English case[74] a plaintiff sought to apply this doctrine to a "do it yourself" carpenter. The defendant had repaired the door handle in his own home, and the plaintiff, an invitee, was injured when the handle came loose from the door. The plaintiff contended that since the defendant had seen fit to engage in carpenter work he should be held to the same standards as a professional carpenter, and the plaintiff introduced evidence tending to show that a professional carpenter would have used larger screws than had been used by the defendant. But the court refused to go that far. It said:

> [W]e think the standard of care and skill demanded of the defendant in order to discharge his duty of care to the plaintiff in the fixing of the new handle in the present case must be the degree of care and skill to be expected of a reasonably competent carpenter doing the work in question. This does not mean that the degree of care and skill required is to be measured by reference to the contractual obligations as to the quality of his work assumed by a professional carpenter working for reward, which would, in our view, set the standard too high. The question is simply

71. Person v. Cauldwell-Wingate Co., 187 F.2d 832 (2d Cir. 1951), *cert. denied*, 341 U.S. 936 (1951) (electrical contractor); Rawls v. Ziegler, 107 So. 2d 601 (Fla. 1958) (mounting body on truck); Daegling v. Gilmore, 49 Ill. 248 (1868) (brick contractor); Inman v. Binghamton Housing Authority, 1 App. Div. 2d 559, 152 N.Y.S.2d 79 (1956), *rev'd on other grounds*, 3 N.Y.2d 137, 143 N.E.2d 895 (1957) (building contractor) Ryan v. Feeney & Sheehan Bldg. Corp., 239 N.Y. 43, 145 N.E. 321 (1924) (building contractor). *Contra*, Blendinger v. Souders, 2 Monag. 48 (Pa. 1889) (building contractor).

72. Ryan v. Feeney & Sheehan Bldg. Corp., 239 N.Y. 43, 145 N.E. 321 (1924).

73. In Person v. Cauldwell-Wingate Co., 187 F.2d 832, 836 (2d Cir. 1951), both the electrical contractor and the general contractor had been joined as defendants. As to the electrical contractor the court held: "The standard of responsibility for the ordinary contractor is that usually possessed by persons in his place; and it should be proved like any other such fact. The subcontractor at bar was prima facie of this class; it was only a contractor, although an electrical contractor; and it was charged with only so much competence to pass on plans as such contractors ordinarily have." But as to the general contractor the court held: "Having employed such a specialist [an electrical engineer] the law of New York imposed upon it a duty measured by the skill of that specialist; it had removed itself from the class of 'ordinary contractors.' It was correct, therefore, to charge the jury that, if an electrical engineer would have thought the rigging of Pole No. 1422 'obviously' or 'patently' improper, the contractor was liable."

74. Wells v. Cooper, [1958] 2 Q.B. 265.

> what steps would a reasonably competent carpenter wishing to fix a handle such as this securely to a door such as this have taken with a view to achieving that object.[75]

II. Liability to Third Parties

Throughout the early history of the common law, the courts could see no basis for allowing a party to maintain an action for breach of a duty created by contract unless the complaining party could establish privity.[76] But just as the law of property had its *Tulk v. Moxhay*[77] and contract law had its *Lawrence v. Fox*,[78] the law of torts has had its *MacPherson v. Buick Motor Co.*[79] Prior to *MacPherson* the almost universally accepted general rule was that a manufacturer or repairer of chattels, or a person creating or repairing structures on land would not be liable to a third person not in privity of contract for negligent manufacture, construction or repair.[80] Some exceptions to this rule had developed where the instrumentality was of such a nature that negligence by the maker would inevitably place human life in danger,[81] and an occasional case allowed recovery where the instrumentality was not a thing of "imminent danger."[82] But with these few exceptions the general rule would not permit recovery in the absence of privity.

In *MacPherson,* Chief Judge Cardozo[83] established the rule that a manufacturer would be liable to third persons "if the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made . . . ."[84] As to manufacturers some courts have interpreted the *MacPherson* case as having "caused the exception to swallow up the asserted general rule of non-liability, leaving nothing upon which that rule could operate."[85]

Although *MacPherson* involved a manufacturer, the case has been

75. [1958] 2 Q.B. at 271. As to the standard of care required of a lessor who voluntarily undertakes to make repairs for his lessee see Restatement, Torts § 362 (1934). But *cf.* Bartlett v. Taylor, 351 Mo. 1060, 174 S.W.2d 844 (1943).

76. See generally Prosser, Torts §§ 84, 85 (2d ed. 1955).

77. 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848).

78. 20 N.Y. 268 (1859).

79. 217 N.Y. 382, 111 N.E. 1050 (1916).

80. See, e.g., Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

81. See Devlin v. Smith, 89 N.Y. 470, 42 Am. Rep. 311 (1882) (negligent construction of scaffold); Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852) (false label on poison).

82. See, *e.g.*, Fish v. Kirlin-Gray Elec. Co., 18 S.D. 122, 99 N.W. 1092 (1904) (arc light installed in church).

83. For a discussion of Judge Cardozo's influence in this area of tort law, see Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 Harv. L. Rev. 372, 376-79 (1939).

84. 111 N.E. at 1052.

85. Carter v. Yardley Co., 319 Mass. 92, 64 N.E.2d 693, 700 (1946), 164 A.L.R. 559.

extended to cover repairers of chattels and persons erecting or repairing structures on the land. But as of this writing there has been a more liberal application to the former category than to the latter.

A. Liability of Negligent Repairers of Chattels

One of the earlier cases to apply the *MacPherson* doctrine to repairers of chattels was *Kalinowski v. Truck Equipment Company*.[86] There the court was able to bridge the gap between the manufacturer and the repairer with comparative ease, because the truck had been almost completely rebuilt. And in a later case involving the law of Kansas, a federal court seemed to lean on the same "slender reed" by holding an aircraft company liable either as a manufacturer or as a repairer.[87] But most courts no longer take this approach.

Most of the decided cases deal with repairers of automobiles, and the tendency is in the direction of the rule set forth in *Zierer v. Daniels*[88] to the effect that one who contracts to repair an automobile and negligently performs[89] is liable in tort to third persons for resulting bodily harm or property damage[90] unless the owner knew of the defect[91] or by the exercise of reasonable care should have discovered the defect before the accident.[92] The present *Restatement* rule is somewhat more conservative in that it would limit recovery to bodily injury.[93]

B. Liability of Negligent Builders and Repairers of Structures on Land

The orthodox general rule as to independent contractors is that they are "not liable to a third person receiving injury or damage as a result of the negligent construction of the work, after the completion and

86. 237 App. Div. 472, 261 N.Y. Supp. 657 (1933), *aff'd per curiam*, 270 N.Y. 532, 200 N.E. 304 (1936).

87. Vrooman v. Beech Aircraft Corp., 183 F.2d 479 (10th Cir. 1950).

88. 40 N.J. Super. 130, 122 A.2d 377 (1956). See also Moody v. Martin Motor Co., 76 Ga. App. 456, 46 S.E.2d 197 (1948); Central & Southern Truck Lines v. Westfall G.M.C. Truck, Inc., 317 S.W.2d 841 (Mo. App. 1958).

89. In the *Zierer* case the complaint charged the defendant with misfeasance "and perhaps also with nonfeasance," but the court treats the case as essentially one of misfeasance. As to the difference in attitude of the courts toward misfeasance and nonfeasance, see generally PROSSER, TORTS § 81 (2d ed. 1955). And *compare* Bock v. Truck & Tractor Co., 18 Wash. 2d 458, 139 P.2d 706 (1943) *with* Hanson v. Blackwell Motor Co., 143 Wash. 547, 255 Pac. 939 (1927).

90. The *MacPherson* doctrine, taken literally would restrict recovery to personal injuries (see note 82 *supra* and corresponding quotation in text), and most of the decided cases deal with personal injuries only. But property damages were allowed in the *Zierer* case and in the *Central & Southern Truck Lines* case.

91. If the garageman expressly warns the owner that the vehicle is not safe, then the garageman is not liable. Jewell v. Dell, 284 S.W.2d 92 (Ky. 1955).

92. Where the repairman conceals the defects he is liable. Burkett v. Globe Indemnity Co., 182 Miss. 423, 181 So. 316 (1938).

93. RESTATEMENT, TORTS § 404 (1934).

acceptance thereof by the contractee or owner."[94] Although the general rule was not followed in all the jurisdictions,[95] it represented the overwhelming weight of authority, and it was applied in dramatic fashion in *Ford v. Sturgis*,[96] referred to by Dean Prosser as the "worst of the common law horrors."[97] The court in refusing to hold a contractor liable when a roof caved in killing several persons, said:

> The reason sometimes given for this conclusion is that otherwise there would be no end to suits. It is elsewhere given as a better ground that the 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.[98]

The *Ford* case was expressly overruled in *Hanna v. Fletcher*,[99] where an iron contractor was held liable to a third person when a negligently repaired iron railing collapsed. And of the several cases cited in the *Ford* case in support of the orthodox rule, only one retains its original vitality.[100]

As a prelude to the confusion that is with us today, the *Hanna* case received contrary interpretations as to the exact breadth of its holding. One writer interpreted it to mean that "an independent contractor who negligently repairs a structure, making it a thing of inherent danger, is liable to third parties not in privity of contract. . . ."[101] But another stated that "the *Hanna* case in effect omits the imminently dangerous limitation and allows plaintiff to recover if he can show only negligence and proximate causation."[102]

As of today there are at least four separate and distinct doctrines as to third party liability in this area. They may be summarized as follows:

(1) Orthodox rule—no liability to third parties after completion and acceptance by the owner.[103]

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94. Clyde v. Sumerel, 104 S.E.2d 392, 393 (S.C. 1958). A formal acceptance of the work is not required.
95. See, *e.g.*, Brown v. Smith, 121 Minn. 165, 141 N.W. 2 (1913) (plumber).
96. 14 F.2d 253 (D.C. Cir. 1926).
97. SMITH & PROSSER, CASES ON TORTS 922 (2d ed. 1957).
98. 14 F.2d at 254.
99. 231 F.2d 469 (D.C. Cir. 1956), *cert. denied*, 351 U.S. 989 (1956), 18 NACCA L.J. 273.
100. None of the cases cited in *Ford* have been expressly overruled, but they have been distinguished, explained and questioned until they could no longer be considered authority for the hard and fast rule of nonliability to third parties. Only Thornton v. Dow, 60 Wash. 622, 111 Pac. 899 (1910) remains unscathed, but it could be seriously questioned whether that case ever stood for the orthodox rule since the defendant, a contractor, had followed the plans of an architect.
101. 44 GEO. L.J. 534 (1956).
102. Comment, 14 WASH. & LEE L. REV. 155, 164 (1957).
103. E. I. DuPont DeNemours & Co. v. Kessinger, 259 F.2d 411 (5th Cir. 1958); Clyde v. Sumeral, 104 S.E.2d 392 (S.C. 1958); Thornton v. Dow, 60 Wash. 622, 111 Pac. 899 (1910).

(2) Orthodox rule subject to three exceptions:
   (a) Where the instrumentality is dangerous in its normal or nondefective state, *e.g.*, explosives and poisons.
   (b) Where the instrumentality is to be used for particular purposes requiring security for protection of life, such as a scaffold.
   (c) When the contractor deceitfully conceals the defect.[104]

(3) Orthodox rule subject to exception where the instrumentality is likely to place life and limb in danger if negligently made. (The *MacPherson* approach).[105]

(4) The orthodox rule is no longer a part of the law. The contractor should be held to a general standard of reasonable care for the protection of third parties.[106] (The Prosser approach).[107]

In some of the jurisdictions the law in this regard is still in a state of flux. The courts have indicated that they will follow a liberal doctrine but have not yet spelled it out.[108]

In view of the tremendous impact of *MacPherson* upon the common law of torts, and the persuasive influence of Dean Prosser,[109] it seems safe to join in the prediction by the editors of the *American Law Reports:* "As the modern view gains more and more support among the leading jurisdictions it seems to predict that the general rejection of the old privity of contract rule as to building contractors

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104. Watts v. Bacon & Van Buskirk Glass Co., 20 Ill. App. 2d 164, 155 N.E.2d 333 (1959). See also Price v. Johnston Cotton Co. of Wendall, 226 N.C. 758, 40 S.E.2d 344 (1946); Hartford v. Coolidge-Locher Co., 314 S.W.2d 445 (Tex. Civ. App. 1958), 37 TEX. L. REV. 354.

105. Hanna v. Fletcher, 231 F.2d 469 (D.C. Cir. 1956); Del Guadio v. Ingerson, 142 Conn. 564, 115 A.2d 665 (1955); Flavin v. Kay, 108 So. 2d 462 (Fla. 1959); Hand v. Harrison, 99 Ga. App. 429, 108 S.E.2d 814 (1959); Holland Furnace Co. v. Nauracaj, 105 Ind. App. 574, 14 N.E.2d 339 (1938); Kendrick v. Mason, 234 La. 271, 99 So. 2d 108 (1958); Inman v. Binghamton Housing Authority, 1 App. Div. 559, 152 N.Y.S.2d 79 (1956), 10 VAND. L. REV. 156, 55 MICH. L. REV. 603, *rev'd*, 3 N.Y.2d 137, 143 N.E.2d 895 (1956) (reversed on ground that complaint failed to allege any "latent defect" or "concealed danger"); Roush v. Johnson, 139 W.Va. 607, 80 S.E.2d 857 (1954); RESTATEMENT, TORTS § 385 (1934).

106. Tomchik v. Julian, 340 P.2d 72 (Cal. App. 1959); Russell v. Arthur Whitcomb, Inc., 100 N.H. 171, 121 A.2d 781 (1956) (included property damage).

107. PROSSER, TORTS § 85 (2d ed. 1955).

108. See, *e.g.*, Benton Harbor Malleable Industries v. Pearson Construction Co., 348 Mich. 371, 83 N.W.2d 429 (1956). *Compare* Miller v. Davis & Averill, Inc., 137 N.J.L. 671, 61 A.2d 253 (1948) *with* Zierer v. Daniels, 40 N.J. Super. 130, 122 A.2d 377 (1956) (holding that third parties may recover against negligent repairers of chattels).

109. In Russell v. Arthur Whitcomb, Inc., 100 N.H. 171, 121 A.2d 781 (1956), the court quoted from Dean Prosser's text and then unequivocably made the quotation the law of the state.

is merely a matter of time."[110] And this general rejection would apply equally to electricians, plumbers, carpenters, painters and all other skilled trades.

III. Conclusion

The more recent cases in this area of tort law emphasize the modern trend toward liberality and the concern for the safety and security of the general public as opposed to the encouragement of private enterprise. A specialization grows, as men gather into groups ostensibly to raise their standards as well as their pay, as legislators prescribe examinations as conditions precedent to licensing,[111] the jacks-of-all-trades, the neophytes, and the untutored are placed more and more in jeopardy. And as the doctrine of privity crumbles the risks become greater and the circumference of liability larger.

Any adverse criticism of this trend would certainly run counter to modern legal theory; but a considered reappraisal of the present course toward universal recovery might be in order. Granted the widow of a man who is killed when a roof falls on him should be entitled to recover from the negligent builder. But how much more protection does the public need? May there not be a difference between a mortal or crippling injury to the person and mere damage to property? It would seem justifiable to draw the line of third-party liability between the personal injury cases and the property damage cases, so as to afford a reasonable degree of protection to the public and still leave some room for the encouragement of private enterprise.

Jerry L. Moore

110. Annot., 58 A.L.R.2d 865, 872 (1958).

111. A recent Tennessee statute which would have required watchmakers to pass such an examination on the subject as the state board of examiners might prescribe was declared unconstitutional in Livesay v. Tennessee Bd. of Examiners, 322 S.W.2d 209 (Tenn. 1959). The court could not imagine how such requirements would have any real tendency to promote the public morals, health or safety.