North Dakota Law Review

Volume 38 | Number 1 Article 14

1962

Negligence - Acts or Omissions - Liability of Building Contractors for Injury to Third Party after Acceptance

Maurice R. Hunke

Follow this and additional works at: https://commons.und.edu/ndlr

Part of the Law Commons

Recommended Citation

Hunke, Maurice R. (1962) "Negligence - Acts or Omissions - Liability of Building Contractors for Injury to Third Party after Acceptance," *North Dakota Law Review*: Vol. 38 : No. 1 , Article 14.
Available at: https://commons.und.edu/ndlr/vol38/iss1/14

This Case Comment is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.commons@library.und.edu.

driving under alcoholic influence.[5]

These cases in which the defendant was present during the act which caused death are clearly within the scope of the misdemeanor-manslaughter rule. However, in fact situations in which the death occurs apart from the defendant's presence, but where his misdemeanor had put the force in motion, the courts are presented with a more difficult question.

The test most commonly applied in restricting the application of the rule is that of "proximate cause". The misdemeanor must, within the limits of legal causation and foreseeability, have been the "proximate cause" of the death.[6]

To illustrate the problem confronting the courts in these situations; the defendant in *Commonwealth v. Williams*,[7] driving without a driver's license and involved in a fatal accident, was acquitted because the death was not in consequence of the violation. It must be proved that there is more than mere "coincidence of time and place" between the misdemeanor and the death to sustain the charge of involuntary manslaughter.[8] In addition, there must be a clear connection between cause and effect.[9]

In at least two cases North Dakota has prosecuted on the misdemeanor-manslaughter rule.[10] In both instances convictions were upheld because the culpable negligence was proved to be the proximate cause of death.

To convict the defendant in the instant case would be to apply the misdemeanor-manslaughter rule too strictly, operating in derogation of the concept of proximate cause. The decision rendered is based on logic and should serve as a guide in future litigation involving a similar problem.

MARK J. BUTZ

NEGLIGENCE—ACTS OR OMISSIONS—LIABILITY OF BUILDING CONTRACTORS FOR INJURY TO THIRD PARTY AFTER ACCEPTANCE

5. People v. Townsend, 214 Mich. 267, 183 N.W. 177 (1921); State v. Kline, 168 Minn. 263, 209 N.W. 881 (1926); Maxon v. State, 177 Wis. 319, 187 N.W. 753 (1922).
6. Kimmel v. State, 198 Ind. 444, 154 N.E. 16 (1926); State v. Satterfield, 198 N.C. 682, 153 S.E. 155 (1930); State v. Minko, 46 N.E.2d 469, 470 (Ohio 1940), "Unlawful killing, as used in manslaughter, must be such as would naturally, logically, and proximately result from the commission of some unlawful act as defined by statute, and . . . must be one that would be reasonably anticipated by an ordinarily prudent person as likely to result in such killing."
7. Commonwealth v. Williams, 133 Pa. Super. 104, 1 A.2d 812 (1938).
8. Maxon v. State, 177 Wis. 319, 187 N.W. 753, 755 (1922).
9. Ibid.
10. State v. Tjaden, 69 N.W.2d 272 (N.D. 1955) (Bus driver collided with parked car killing occupant); State v. Gulke, 38 N.W.2d 722 (N.D. 1949) (Reckless driver killed bicycle rider).

BY GRANTEE—Defendant, a building contractor, constructed a house for purposes of sale. Two and one-half years later plaintiff was an occupant of the house as a tenant of the person who had purchased from defendant's grantee. Plaintiff brought action against the contractor to recover damages for personal injuries sustained when the roof of a small porch to the house fell upon her. In affirming a judgment for plaintiff, the Supreme Court of Oklahoma *held* that, generally, a builder's liability to third persons for negligent construction terminates upon acceptance of the property by his grantee, but the builder is liable where he has willfully created a condition which he knows to be immediately and certainly dangerous. *H. B. Leigh v. Wadsworth,* 361 P. 2d 849 (Okla. 1961).

Until recently, a firmly established tenet of American case law was that a building contractor would not be liable to third persons with whom he had no contractual relations for injuries caused by negligent construction after the structure had been accepted by the contractor's grantee.[1] This rule of nonliability has its origin in dicta of an 1842 English case, *Winterbottom v. Wright.*[2] Therein Lord Abinger stated: "There is no privity of contract between these parties . . . Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue."[3] Reasons offered in later decisions favoring the rule of nonliability are that the contractor ceases to have control over the structure once completed,[4] the plaintiff has not relied upon defendant's contract,[5] and the consequences of holding the opposite doctrine would be too far reaching.[6] It has been said that the negligence of the owner in maintaining the building, and not that of the builder in constructing it, is the true proximate

1. Ford v. Sturgis, 14 F.2d 253 (App. D.C. 1926); Erie & Western Transp. Co. v. City of Chicago, 178 Fed. 42 (7th Cir. 1910); Daugherty v. Herzog, 145 Ind. 255, 44 N.E. 457 (1896); Sarnicandro v. Lake Developers, Inc., 55 N.J. 475, 151 A.2d 48 (1959); Curtain v. Somerset, 140 Pa. 70, 21 Atl. 244 (1891); *cf.* Larrabee v. Des Moines Tent & Awning Co., 189 Iowa 319, 178 N.W. 373 (1920); Cunningham v. T. A. Gillespie Co., 241 Mass. 280, 135 N.E. 105 (1922).

2. 10 M.&W. 109, 152 Eng. 402 (1842). At 405, Baron Alderson said; "The only safe rule is to confine the right to recover to those who entered into the contract; if we go one step beyond that, there is no reason we should not go fifty."

3. Winterbottom v. Wright, 10 M.&W. 109, 152 Eng. Rep. 402, 405 (1842).

4. Cunningham v. T. A. Gillespie Co., 241 Mass. 280, 135 N.E. 105, 106 (1922).

5. Larrabee v. Des Moines Tent & Awning Co., 189 Iowa 319, 178 N.W. 373, 374 (1920).

6. Curtain v. Somerset, 140 Pa. 70, 21 Atl. 244, 245 (1891) "It is safer and wiser to confine such liabilities to parties immediately concerned."

cause of the third person's injury.[7] Another reason is the public policy argument to the effect that if such a broad duty were imposed on contractors, few would engage in the occupation.[8] Passage of time as an intervening cause has not generally, of itself, been sufficient to avoid liability.[9]

The rule of nonliability was applied equally stringently in cases involving injuries resulting from defectively manufactured chattels[10] until the landmark case of *MacPherson v. Buick Motor Co.*[11] In an historic opinion Justice Cardozo determined the manufacturer to be liable "if the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made . . ."[12] As to personal property, the *MacPherson* doctrine is now all but universal law in the United States[13] and has "caused the exception to swallow the asserted general rule of nonliability, leaving nothing upon which that rule could operate."[14]

In the past decade several cases have flatly rejected the old rule of nonliability in the absence of privity of contract.[15] The most significant of those cases is *Inman v. Binghamton Housing Authority.*[16] Seeing no logical basis for the distinction between the laws governing chattels and real structures, the court concluded that "the 'principle inherent' in the *MacPherson* doctrine applies to determine the liability of architects or builders for their handiwork . . ."[17] This extension of *MacPherson* to real property is favored by the Restatement of Torts[18] and authoritative text writers.[19]

---

7. Ford v. Sturgis, 14 F.2d 253 (App. D.C. 1926).
8. **Id.** at 254; Galbraith v. Illinois Steel Co., 133 Fed. 485 (7th Cir. 1904).
9. Hanna v. Fletcher, 231 F.2d 469 (App. D.C. 1956) (Passage of seven years from time of structural repair to time of injury); Hale v. Depaoli, 33 Cal. 2d 228, 201 P.2d 1 (1948) (eighteen years).
10. Lebourdais v. Vitrified Wheel Co., 194 Mass. 341, 80 N.E. 482 (1907); Burkett v. Studebaker Bros. Mfg. Co., 126 Tenn. 467, 150 S.W. 421 (1912); Hasbrouck v. Armour & Co., 139 Wis. 357, 121 N.W. 157 (1909).
11. 217 N.Y. 382, 111 N.E. 1050 (1916).
12. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, 1053 (1916).
13. See PROSSER, TORTS § 84 (2d ed. 1955). See generally **id.** §§ 84-85.
14. Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693, 700 (1946). Massachusetts was one of the last states to accept the MacPherson case.
15. Hanna v. Fletcher, 231 F.2d 469 (D.C. Cir.), **cert. denied,** 351 U.S. 989 (1956); Moran v. Pittsburg-Des Moines Steel Co., 166 F.2d 908 (3rd Cir. 1948), **cert. denied,** 334 U.S. 846 (1948); Hale v. Depaoli, 33 Cal. 2d 288, 201 P.2d 1 (1948); Hunter v. Quality Homes, Inc., 68 A.2d 620 (Del. 1949); Russel v. Whitcomb, 100 N.H. 171, 121 A.2d 781 (1956); Inman v. Binghamton Housing Authority, 3 N.Y.2d 137, 143 N.E.2d 895 (1957).
16. 3 N.Y.S.2d 137, 143 N.E.2d 895 (1957).
17. Inman v. Binghamton Housing Authority, 3 N.Y.S.2d 137, 143 N.E.2d 895, 899 (1957).
18. Restatement, Torts § 385 (1934) "One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others ... for bodily harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor under the same rules as those . . . determining the liabili-

It is submitted that the true test should be simply the fact of the contractor's negligence as a cause of the injury; certainly, a requirement of privity should not be the *sine qua non* of a successful suit where it can be shown that the plaintiff's harm has resulted directly from the defendant's negligent construction. The instant case is representative of those cases which still nominally adhere to the old rule but circumvent that rule by superficially applying an exception theoretically similar to the *MacPherson* doctrine.

MAURICE R. HUNKE

TAXATION—INTERNAL REVENUE—TRANSFERS MADE IN CONTEMPLATION OF DEATH—Within three years preceding his death, decedent transferred residential property and cash to four of his six children to enable each of them to purchase a home. The court felt that the important and moving cause behind the transfers to his children was the decedent's desire to meet their present needs. The United States District Court, *held* that the transfers to the children were not made in contemplation of death. *In re Boyd,* 192 F. Supp. 242 (E.D. Ky. 1961).

Gifts apparently made as a substitute for testamentary dispositions are held to be made in contemplation of death.[1]

The legal definition of a transfer made in contemplation of death is set out in *The United States Code*[2] as follows: "If the decedent within a period of three years ending with the date of his death transferred an interest in property . . . such transfer shall, unless shown to the contrary, be deemed to have been made in contemplation of death . . ." When the transferror dies within three years from the time of such transfer, the burden of proving that such transfer was not made in contemplation of death is then upon the taxpayer.[3] The reasoning employed by the courts is that the thought of death is the impelling cause of the transfer[4] and is not limited to it being imminent.[5]

---

ty of one who as manufacturer or independent contractor makes a chattel for the use of others."
19. 2 HARPER AND JAMES, TORTS § 28.10 (1956); PROSSER, TORTS § 85 (2d. ed. 1955).

1. In re Wadsworth's Estate, 92 Mont. 135, 11 P.2d 788 (1932).
2. 26 U.S.C. §2035(b) (I.R.C. 1954).
3. McGrew's v. Commissioner, 135 F.2d 158 (6th Cir. 1943).
4. Greer v. Glenn, 64 F. Supp. 1002, (E.D. Ky. 1946). In re Mann's Estate, 219 Iowa 597, 258 N.W. 904 (1935).
5. In re Adam's Estate, 39 Cal. 2d 309, 246 P.2d 625 (1952).