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# CASES NOTED

## THE INAPPLICABILITY OF THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE TO EMPLOYEES OF AN INDEPENDENT CONTRACTOR

An independent contractor, hired by the defendant power company, employed the plaintiff to construct and energize an electrical distribution system. The plaintiff was injured when fellow employees negligently energized a wire he was attempting to insulate. The Second District Court of Appeal reversed the decision of the trial court and found the defendant liable, though not negligent, on the basis that the activity was inherently dangerous and involved the use of electricity, a dangerous instrumentality. On certiorari to the Florida Supreme Court, *held*, reversed: a contractee, in the absence of negligence, is not liable to an employee of an independent contractor when the contract requires the performance of an inherently dangerous activity. Nor can liability to the employee be predicated upon the Florida dangerous instrumentality doctrine.\* *Florida Power & Light Co. v. Price*, 170 So.2d 293 (Fla. 1964).

Early common law shielded the employer of an independent contractor from liability for the torts committed by the contractor.<sup>1</sup> Immunity from suit ran against third parties and the contractor's employees alike. By the mid-nineteenth century, case law accorded third persons a right of action against the employer, but only if the contract called for the performance of an unlawful act,<sup>2</sup> a nondelegable duty,<sup>3</sup> "or"<sup>4</sup> an inherently

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\* It is interesting to initially note that the instant case is unique in that no other case has considered the contractee's liability under both of these legal theories.

For a general discussion of the dangerous instrumentality doctrine as it existed at early common law, see Horack, *The Dangerous Instrument Doctrine*, 26 YALE L.J. 224 (1917). For a development of the doctrine in Florida law, see Comment, *The Dangerous Instrumentality Doctrine: Unique Automobile Law In Florida*, 5 U. FLA. L. REV. 412 (1952).

1. Early juristic opinion in England viewed the employer-independent contractor relationship as necessarily preclusive of any form of vicarious liability. The inability to control the performance of the work, which was the major criteria employed in classifying any particular employment situation as one of employer-independent contractor or master, gave rise to a policy "that it would be over-harsh to make men liable not only for acts which they cannot practically control in detail, but for the acts of persons over whom they have no control at all." POLLOCK, *ESSAYS IN JURISPRUDENCE AND ETHICS* 130 (1882). Thus, during the nineteenth century the limits of vicarious liability was generally confined to the masters of servants and partners. Williams, *Liability for Independent Contractors*, *CAMB. L.J.* 180 (1956).

2. The employer's legal responsibility was first established in that class of cases wherein the employment contract was for the performance of an unlawful act. *Ellis v. Sheffield Gas Consumers Co.*, 2 El. & Bl. 767, 118 Eng. Rep. 955 (Q.B. 1853) and *Hale v. Sittingbourne & Sheerness Ry.*, 6 H. & N. 488, 158 Eng. Rep. 201 (Ex. 1861) are generally cited as the leading

dangerous activity.<sup>5</sup> Along with these exceptions, a distinction between third persons and employees of the independent contractor developed. The scope of this note is primarily limited to an examination of the inherently dangerous activity exception as it relates to independent contractor's employees.<sup>6</sup>

The majority of jurisdictions that have litigated the issue maintain that the benefit of the inherently dangerous activity exception to the employer's nonliability extends only in favor of third persons.<sup>7</sup> Most deci-

cases in this area. Jolowicz, *Liability for Independent Contractors in the English Common Law*, 9 STAN. L. REV. 690 (1957).

3. A difference of opinion exists as to the historical beginning of the nondelegable duty exception. BOHLEN, *STUDIES IN THE LAW OF TORTS* 432 (1926) traces the rule to the landmark decision of *Rylands v. Fletcher*, [1868] L.R. 3 H.L. 330, while Jolowicz, *supra* note 2, maintains that the ratio decidendi of the nondelegable duty exception was first formulated in *Pickard v. Smith*, 10 C.B. (n.s.) 470, 142 Eng. Rep. 535 (C.P. 1861).

4. Technically the use of a disjunctive in so far as it connotes a conceptual dichotomy is not wholly born out by authority. For instance, "[t]he California cases make this relationship [nondelegable duties and inherently dangerous activities] highly important since there appears to be no case in which liability has been imposed on the basis of inherent danger exception. The courts have often used the term 'inherent danger,' but always in connection with a primary basis for liability." Note, *Liability For the Torts of Independent Contractors In California*, 44 CALIF. L. REV. 762, 764 n.19 (1956).

An awareness that a hard and fast distinction between these two exceptions can not in every instance be made is also revealed in HARPER & JAMES, *TORTS* § 26.11 n.51 (1956) wherein Harper states that the inherently dangerous exception can be rationalized in terms of nondelegable duty. For a treatment which separates these two bases for liability, see PROSSER, *TORTS*, ch. 13, § 70 (3d ed. 1964).

Nor are judicial decisions unresponsive to the overlapping of these categories. In *International Harvester Co. v. Sertain*, 32 Tenn. App. 425, 452, 222 S.W.2d 854, 866 (1948), the court, classifying electricity as inherently dangerous, states: "Where . . . in the natural course of things mischievous consequences must be expected to arise, unless means are adopted by which such consequences may be prevented, then the owner is under the non-delegable duty to see that appropriate preventative measures are adopted."

5. *Bower v. Peate*, 1 Q.B.D. 321 (1876) is frequently cited as the leading case which first established the inherently dangerous activity exception. *Eaton v. Weir*, 125 So.2d 115 (Fla. 2d Dist. 1960); *Silveus v. Grossman*, 307 Pa. 272, 161 Atl. 362 (1932); *Harper, The Basis of the Immunity of An Employer of an Independent Contractor*, 10 IND. L.J. 494 (1934); MORRIS, *STUDIES IN THE LAW OF TORTS* (1952); Note, 51 CALIF. L. REV. 245 (1963); *cf.* Annot. 23 A.L.R. 1084, 1085 (1923).

6. An interesting aspect of the noted topic lies in a failure of other commentators to succinctly state a trend in the law. But the fact is that no such trend appears to be perceptible. For example, it was not until 1962 that the Restatement on Torts, *infra* note 11, unequivocally excluded employees from the rules stated in §§ 413, 416 and 427 which otherwise would be applicable to the instant case. In that year, however, California in *Wollen v. Aerojet Gen. Corp.*, 20 Cal. App. 12, 369 P.2d 708 (1962), allowed a legal representative of an employee to recover from the contractee for the death of the employee. Although the Restatement is not mentioned in the instant decision, Florida now apparently subscribes to that position. A good criticism of the California decision can be found in Note 51 CALIF. L. REV. 245 (1963).

7. See *Corban v. Skelly Oil Co.*, 256 F.2d 775 (5th Cir. 1958) (applying Arkansas law); *Hurst v. Gulf Oil Corp.*, 251 F.2d 836 (5th Cir. 1958) (applying Texas law); *Sword v. Gulf Oil Corp.*, 251 F.2d 829 (5th Cir. 1958); *Cagle v. McQueen*, 200 F.2d 186 (5th Cir. 1952) (applying Texas law); *Union Tank & Supply Co. v. Kelly*, 167 F.2d 811 (5th Cir. 1948) (*dicta*); *Terry v. Green*, 164 F. Supp. 184 (E.D. Ark. 1958); *Burke v. Ireland*, 26 App. Div. 487, 50 N.Y. Supp. 369 (1898); *Cleveland Elec. Illuminating Co. v. O'Connor*, 50 Ohio App. 30, 197 N.E. 428 (1935); *Silveus v. Grossman*, 307 Pa. 272, 161 Atl. 362 (1932); *Hader v.*

sions while devoid of policy considerations<sup>8</sup> reflect an unwillingness of judges to include the contractor's employees within the exception on the ground that as between the contractee and the employee, the latter is better equipped to perform the work.<sup>9</sup>

The rationalizations formulated in support of the majority position

Coplay, 410 Pa. 139, 189 A.2d 271 (1963); *Perez v. Hernandez*, 317 S.W.2d 81 (Tex. App. 1958); *Nance Exploration Co. v. Texas*, 305 S.W.2d 621 (Tex. App. 1957); *Texas Elec. Serv. Co. v. Holt*, 249 S.W.2d 662 (Tex. App. 1952); *Humble Oil & Ref. Co. v. Bell*, 180 S.W.2d 970 (Tex. App. 1943). See generally *RESTATEMENT (Second), TORTS*, ch. 15 (Tent. Draft No. 7, 1962) wherein the Institute unequivocally excludes employees of the contractor. The reason for doing so is stated in note 11 *infra*.

8. The failure of American courts to invoke considerations of policy parallels the development of this area of tort law in English jurisprudence. Since *POLLOCK, ESSAYS IN JURISPRUDENCE AND ETHICS* (1882), very little has been written on the policy question. However, "[o]ne of the most disturbing features of the law of tort in recent years is the way in which the courts have extended, seemingly without any reference to considerations of policy, the liability for independent contractors." Williams, *Liability For Independent Contractors*, *CAMB. L.J.* 180 1956.

9. In *Hammond v. City of El Dorado Springs*, 362 Mo. 530, 242 S.W.2d 479 (1951), the court reasoned that because the employee's injury stemmed from a condition he was correcting under a contract to repair the contractee could not be held liable. The same court thirty-nine years earlier in a dissenting opinion distinguished between the contractor and his employee in the following manner:

This reasoning [the majority position] does not involve, as has been suggested, the liability of the owner to the independent contractor himself. The latter plies his particular trade for livelihood. This implies a representation on his part that he is possessed of the requisite skill and competency. When he solicits employment in his own calling, he cannot ask the employer, who knows nothing of his special craft, to indemnify him against his own lack of qualification for his own trade, or against his own negligence.

*Salmon v. Kansas City*, 241 Mo. 14, 68, 145 S.W. 16, 33 (1912) (dissenting opinion). But in *Mallory v. Louisiana Pure Ice & Supply Co.*, 320 Mo. 95, 6 S.W.2d 617 (1928), a negro laborer was allowed to recover from the independent contractor's employer.

Seemingly applying the *Salmon* rationale to an employee, a New York appellate court in denying recovery stated in dicta: "In fact, I should be inclined to think they [the employees] were all well able to judge the character and competency of their co-servants as the owner was, and at all times the determination whether to continue in the service or leave it rested solely upon them." *Burke v. Ireland*, 26 App. Div. 487, 493, 50 N.Y. Supp. 369, 372-373 (1898).

The jurisdiction of Pennsylvania does not recognize the inherently dangerous activity rule even as to third persons on the broad ground that "[w]ork not ordinarily hazardous is, when done by the unskillful and careless, much more dangerous than is work ordinarily classified as 'dangerous' when done by the skillful and careful." *Silveus v. Grossman*, 307 Pa. 272, 277, 161 Atl. 362, 364 (1932).

Similarly, the courts of Ohio, in denying recovery, have stressed the fact that the employee was accustomed to working in the dangerous situation and knew of the dangerous conditions entailed in the work. *Schwarz v. General Elec. Realty Corp.*, 163 Ohio St. 354, 126 N.E.2d 906 (1955); *Wellman v. East Ohio Gas Co.*, 160 Ohio St. 103, 113 N.E.2d 629 (1953); *Cleveland Elec. Illuminating Co. v. O'Connor*, 50 Ohio App. 30, 197 N.E. 428 (1935). *But see King v. Morrison Motor Freight Lines*, 111 Ohio App. 172, 171 N.E.2d 173 (1959) wherein the employee prevailed on the ground that his employer was unaware of the hazard involved due to the misrepresentation of the contractee.

Reasoning of similar import exists in English law. "Parker J. in *Bloomstein v. Railway Executive* ([1952] 2 All E.R. 418) held that the rule was that the occupier's duty of care to invitees may be performed by delegating to an apparently competent contractor if the occupier has to rely upon the contractor's technical knowledge; but this does not apply if no special knowledge is involved." Williams, *Liability For Independent Contractors*, *CAMB. L.J.* 180, 181 (1956).

are diffused, and generally no unanimity is ascertainable with respect to the reasoning employed. Major reliance is placed upon the fact that the employer owes no special duty to the plaintiff by virtue of the fact that the activity engaged in is inherently dangerous or that if the nature of the work does create a special duty, it may nevertheless be delegated by contract to the independent contractor.<sup>10</sup> The Restatement of Torts excludes employees as a class entitled to the benefit of the exception on the ground that in almost all jurisdictions workmen's compensation acts afford the plaintiff sufficient protection.<sup>11</sup> Actions brought under the Federal Tort Claims Act fail since the negligence complained of is not that of a governmental employee.<sup>12</sup> One decision implied that as a matter of law, employees as a class are contributorily negligent when engaging in inher-

10. One who employs an independent contractor to do work which the employer should recognize as necessarily creating, during its progress, conditions containing an unreasonable risk of bodily harm to others unless special precautions are taken, is subject to liability for bodily harm caused to them by the absence of such precautions, if the employer

(a) fails to provide in the contract that the contractor shall take such precautions, or

(b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

RESTATEMENT (Second), TORTS, § 413, at 1118-1119 (1934).

11. One reason why such responsibility has not developed has been that the workmen's recovery is now, with relatively few exceptions, regulated by workmen's compensation acts, the theory of which is that the insurance out of which the compensation is to be paid is to be carried by the workmen's own employer, and of course premiums are to be calculated on that basis. While workmen's compensation acts not infrequently provide for third-party liability, it has not been regarded as necessary to impose such liability upon one who hires the contractor, since it is to be expected that the cost of the workmen's compensation insurance will be included by the contractor in his contract price for the work, and so will in any case ultimately be borne by the defendant who hires him.

RESTATEMENT (Second), TORTS, Special Note, ch. 15 (Tent. Draft No. 7, 1962). See *Corban v. Skelly Oil Co.*, 256 F.2d 775 (5th Cir. 1958) for an interesting approach to the problem. The court in dictum suggested that if the activity is inherently dangerous then the employee would be the servant of the contractee and as such would be limited to his workmen's compensation benefits. *Corban v. Skelly Oil Co.*, *supra* at 781. See however *Kennerly v. Shell Oil Co.*, 13 Ill. 2d 431, 150 N.E.2d 134 (1958) for a result contrary to the Restatement rationale. The case can be distinguished, however, on the ground that a nondelegable duty imposed by statute was involved.

12. The Federal Tort Claims Act imposes liability upon the federal government for ". . . civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (1958).

*Hopson v. United States*, 136 F. Supp. 804 (W.D. Ark. 1956) established that "liability under the Act cannot be predicted upon the alleged negligence of an independent contractor or its employees, when said contractor and employees are not employees of the United States." *Id.* at 815. However, if a local statute imposes a nondelegable duty on the government a recovery may be had. *Grogan v. United States*, 225 F. Supp. 821 (W.D. Ky. 1963) (discussing *Schmid v. United States*, 273 F.2d 172 (7th Cir. 1959)). *But see Stratton v. United States*, 213 F. Supp. 556 (E.D. Tenn. 1962) wherein it was unequivocally held that "liability under this Act cannot arise by virtue of ownership by the United States of 'an inherently dangerous commodity' or property, or of engaging in an 'extra-hazardous' activity. *Id.* at 560. It is to be noted that in the latter case strict liability was contended.

ently dangerous work.<sup>13</sup> Other rationales have stressed the following two factors: the lack of the contractee's control over the performance of the work which is inherent in the relationship;<sup>14</sup> and, the anticipation that the application of the exception in favor of employees would lead to business stagnation.<sup>15</sup>

Four minority jurisdictions permit employees to recover under the inherently dangerous activity exception.<sup>16</sup> These forums generally stress the presence of ultimate benefit to the employer, which will accrue from the performance of the work,<sup>17</sup> the fact that the employer knows that laborers must be employed by the contractor to assist in performing the work,<sup>18</sup> and the "law's policy as to the liability for risks broadly incidental

13. "This doctrine of inherent danger inures to the benefit of third persons who have been injured without negligence on their part. It does not inure to one actively participating in the performance of the work." *Cleveland Elec. Illuminating Co. v. O'Connor*, 50 Ohio App. 30, 34, 197 N.E. 428, 429-430 (1935).

14. "The very phrase 'independent contractor' implies that the contractor is independent in the manner of doing the work contracted for." *Hader v. Coplay Cement Mfg. Co.*, 410 Pa. 139, 151, 189 A.2d 271, 277 (1963). See also Blattner, *Employer Immunity in Independent—Contractor Torts in Ohio*, 9 CLEV.-MAR. L. REV. 287 (1960); Note, *Liability for the Torts of Independent Contractors in California*, 44 CALIF. L. REV. 762, 763 (1956).

15. *Silveus v. Grossman*, 307 Pa. 272, 277, 161 Atl. 362, 364 (1932).

16. *California*: *Woolen v. Aerojet Gen. Corp.*, 57 Cal. App. 2d 407, 369 P.2d 708 (Sup. Ct. 1962). *Missouri*: *Mallory v. Louisiana Pure Ice & Supply Co.*, 320 Mo. 95, 6 S.W.2d 617 (1928). *North Carolina*: *Watson v. Black Mountain Ry.*, 164 N.C. 176, 80 S.E. 175 (1913); *Greer v. Callahan Constr. Co.*, 190 N.C. 632, 130 S.E. 739 (1925). *New Jersey*: *Marion v. Public Serv. Elec. & Gas Co.*, 72 N.J. Super. 146, 178 A.2d 57 (1962) (citing *Bergquist v. Penterman*, 46 N.J. Super. 74, 134 A.2d 20 (App. Div. 1957)).

Dictum in several decisions indicate that other jurisdictions may follow the minority position. *Looker v. Gulf Coast Fair*, 203 Ala. 42, 81 So. 832 (1919) (implication); *Chicago Economic Fuel Gas Co. v. Myers*, 168 Ill. 139, 48 N.E. 66 (1897); *Looney v. Prest-O-Lite Co.*, 65 Ind. App. 617, 117 N.E. 678 (1917); *Laffery v. United States Gypsum Co.*, 92 Kan. 475, 141 Pac. 241 (1914); *Peck v. Woomack*, 65 Nev. 184, 192 P.2d 874 (1948); *Stevens v. United Gas & Elec. Co.*, 73 N.H. 159, 60 Atl. 848 (1905); *Oklahoma City v. Caple*, 187 Okl. 600, 105 P.2d 209 (1940) (implication); *International Harvester Co. v. Sartain*, 32 Tenn. App. 425, 222 S.W.2d 854 (1948) (but the decision is distinguishable on the ground that the employee was not the servant of the negligent contractor and therefore was a third person); *Davis Bakery, Inc. v. Dozier*, 139 Va. 628, 124 S.E. 411 (Ct. App. 1924).

17. *Greer v. Callahan Constr. Co.*, *supra* note 17, at 742 (cited in *Price v. Florida Power & Light Co.*, 159 So.2d 654 (Fla. 2d Dist. 1963)). The language of the court in the *Greer* case suggests that the employee would be allowed a recovery where a third person would not. In this respect the following quote is unique:

The rule exempting an owner or contractor from liability for the negligence of an independent contractor to a stranger or third person does not necessarily exempt such owner or contractor from liability to the servant or employee of the independent contractor who is injured while engaged in work for the ultimate benefit of such owner or contractor. There is a relationship between the owner or contractor and the servant or employee of the independent contractor which may impose upon the former duties which the law does not impose upon him with respect to strangers or third persons. *Ibid.*

See 57 C.J.S. *Master and Servant* § 600 at 353 (1948) for a list of cases supporting the proposition that the liability of the employer to the independent contractor's employees is not as extensive as his liability to third persons.

18. *Salmon v. Kansas City*, 241 Mo. 14, 145 S.W. 16 (1912) (dissenting opinion). *Cf. Simonton v. Perry*, 62 S.W. 1090 (Tex. Civ. App. 1901).

to the enterprise of the employer."<sup>19</sup> One court reasoned that, since recovery is accorded to third persons not in contractual privity with the employer, the servant of the independent contractor likewise not in privity should also be entitled to remedial rights.<sup>20</sup>

An analysis of the cases reveals that the characterization of any particular fact pattern as an inherently dangerous activity is a difficult matter. Furthermore, judicial authorities are not in agreement as to the test to be applied.<sup>21</sup> For instance, blasting with dynamite,<sup>22</sup> excavating a wall of a building,<sup>23</sup> and erecting a building<sup>24</sup> or structure<sup>25</sup> have been classified as inherently dangerous. On the other hand, drilling of pattern shot holes,<sup>26</sup> trucking of a 35,000 pound printing press,<sup>27</sup> testing by compressed air,<sup>28</sup> laying a "cold" wire by experienced linemen,<sup>29</sup> among other activities,<sup>30</sup> have not been so classified. While some of the apparent inconsisten-

19. *Marion v. Public Serv. Elec. & Gas Co.*, 72 N.J. Super. 146, 154, 178 A.2d 57, 61 (1962) wherein the question is posed: "Is the risk fairly allocable to the enterprise?" However, on other grounds the employee was denied recovery.

20. *Mallory v. Louisiana Pure Ice & Supply Co.*, 320 Mo. 95, 6 S.W.2d 617 (1928). *But see* *Simonton v. Perry*, 62 S.W. 1090 (Tex. Civ. App. 1901) wherein the court observed: "we . . . find the question to arise only between the employer and persons sustaining no relation of privity, contractual or otherwise, with the employer or contractor." *Id.* at 1091.

21. The following are the cases and key phrases mentioned by the courts: *Price v. Florida Power & Light Co.*, 159 So.2d 654 (Fla. 2d Dist. 1963) (whether danger inheres in the performance of the work); *Looney v. Prest-O-Lite Co.*, 65 Ind. App. 617, 117 N.E. 678 (1917) (dicta: where the contract requires the performance of work intrinsically or necessarily dangerous however skillfully performed); *Mallory v. Louisiana Pure Ice & Supply Co.*, 320 Mo. 95, 6 S.W.2d 617 (1928) (where the work is of a character from which danger is likely to arise unless precautionary measures are adopted); *Peck v. Woomack*, 65 Nev. 184, 192 P.2d 874 (1948) (when the contract is for work which, because of its nature or requirements, is inherently dangerous); *Marion v. Public Serv. Elec. & Gas Co.*, 72 N.J. Super. 146, 178 A.2d 57 (1962) (a danger created by the work regardless of reasonable care on the part of the contractor responsible for such an undertaking); *Kaw Boiler Works v. Frymyer*, 100 Okl. 81, 227 Pac. 453 (1924) (injuries resulting from the doing of the work, which are the natural and probable consequences of the usual methods of performing such work).

Harper, noting that the concept is an illusive one, was of the opinion that although the activity need not be extra-hazardous it is not sufficient that the situation is merely dangerous enough so that reasonable care will require the taking of precautions. HARPER & JAMES, TORTS, § 26.11, n.51 (1956). Prosser states the criterion to be a "high degree of risk in relation to the particular surroundings, or some rather specific risk or set of risks to those in the vicinity, recognizable in advance as calling for definite precautions." PROSSER, TORTS, ch. 13, § 70 (3d ed. 1964).

22. *Greer v. Callahan Constr. Co.*, 190 N.C. 632, 130 S.E. 739 (1925) (classifying dynamite as a "dangerous instrumentality"); *Watson v. Black Mountain Ry.*, 164 N.C. 176, 80 S.E. 175 (1913).

23. *Mallory v. Louisiana Pure Ice & Supply Co.*, 320 Mo. 95, 6 S.W.2d 617 (1928).

24. *Stevens v. United Gas & Elec. Co.*, 73 N.H. 159, 60 Atl. 848 (1905).

25. *Peck v. Woomack*, 65 Nev. 184, 192 P.2d 874 (1948).

26. *Salmon v. Kansas City*, 241 Mo. 14, 145 S.W. 16 (1912).

27. *Nini v. Culberg*, 7 Cal. App. 146 (1st Dist. 1960).

28. *Breece v. J. F. Chapman & Son, Inc.*, 302 F.2d 581 (3d Cir. 1962).

29. *Texas Elec. Serv. Co. v. Holt*, 249 S.W.2d 662 (Tex. App. 1952).

30. *Union Tank & Supply Co. v. Kelly*, 167 F.2d 811 (5th Cir. 1948) (unloading, in the night, a box car of heavy steel sheets); *Terry v. A. P. Green Fire Brick Co.*, 164 F. Supp.

cies can be explained in terms of collateral negligence,<sup>31</sup> most decisions appear to turn on an arbitrary decision of the court as to the characterization of the activity in question.<sup>32</sup>

By its decision in the instant case, the Florida Supreme Court has adopted the majority position. In this respect the writer concurs. Issue, however, is taken with the lack of clarity evidenced in the court's analysis. Although the question presented was one of first impression, the court clouds this fact by referring to an early Florida Supreme Court decision of questionable application.<sup>33</sup> Furthermore, although the "dangerous instrumentality" cases relied upon<sup>34</sup> seemingly lead inevitably to the conclu-

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184 (E.D. Ark. 1958) (backing a dump truck up an earthen ramp); *Bedford v. Bechtel Corp.*, 172 Cal. App. 2d 401, 342 P.2d 495 (1959) (erecting oil storage tanks); *Gadsden v. Craft & Co.*, 173 N.C. 418, 92 S.E. 174 (1917) (constructing a reenforced concrete bridge); *Hess v. Bernheimer & Swartz*, Pilsener Brewing Co., 219 N.Y. 415, 114 N.E. 808 (Ct. App. 1916) (varnishing beer vats); *Kuhn v. P. J. Carlin Constr. Co.*, 154 Misc. 892, 278 N.Y. Supp. 635 (Sup. Ct. 1935) (transporting workmen by steamship); *Visconsi v. Staufert*, 45 Ohio App. 112, 186 N.E. 829 (1933) (constructing a dwelling); *Humble Oil & Refining Co. v. Bell*, 180 S.W.2d 970 (Tex. App. 1957) (digging a sluch pit by blasting); *Perez v. Hernandez*, 317 S.W.2d 81 (Tex. App. 1958) (inflating tires).

31. For a general discussion of this doctrine see PROSSER, *TORTS*, § 70, at 488 (3d ed. 1964).

32. For example, compare the facts existing in *Texas Elec. Serv. Co. v. Holt*, *supra* note 7, with those of the instant case. In the Texas case the workman was to install fuses on a newly strung electrical wire. The contracting parties originally contemplated that all work upon the line was to be performed while the line was free from electricity. The line was subsequently energized and notice of that fact was given to the workman's foreman. While attempting to install the fuses in compliance with orders given by his master, the workman was electrocuted. Similarly, in the instant case the "plan of construction was to make the new wires safe before energizing." *Price v. Florida Power & Light Co.*, 159 So.2d 654, 657 (Fla. 2d Dist. 1963). Note also that the Second District Court of Appeal held that as a matter of law the power company was not negligent in failing to de-energize the line upon which the plaintiff was working. Insofar as both cases involved work which, as originally planned, was not dangerous, the results reached are incongruous.

33. The Florida Supreme Court quoted from *Gulf Refining Co. v. Wilkinson*, 94 Fla. 664, 114 So. 503 (1927) wherein it previously relied upon the following rule stated in 25 C.J. 197: "By the weight of authority it seems that a principal is not liable for the negligence of an independent contractor, although the work to be done is intrinsically dangerous, so long as no negligence can be imputed to him in employing such contractor . . ." Significantly, the action in the *Gulf* case was brought by a third person against the alleged employer of an independent contractor for the negligence of an employee of the contractor. Thus the case and authority relied upon stands for the proposition that an employer of an independent contractor cannot be held liable to a third person for the negligence of a servant of the contractor when the work engaged in is inherently dangerous. The Second District Court of Appeal recognized this distinction.

It should be noted that the *Gulf* decision was decided in 1927—a date when few, if any, cases concerning the right of an employee to recover from the contractee under the inherently dangerous activity exception had been litigated. Subsequent to that date the majority of cases cited in notes 7 and 17 were decided. The court in the instant case should have examined these decisions.

34. In refusing to engraft the dangerous instrumentality doctrine onto an independent contractual relationship the court analogized to the facts and holdings appearing in *Fry v. Robinson Printers, Inc.*, 155 So.2d 645 (Fla. 2d Dist. 1963) and *Petitte v. Welch*, 167 So.2d 20 (Fla. 3d Dist. 1964).



sion adopted by the court,<sup>35</sup> other Florida cases not mentioned by the court could support a contrary result.<sup>36</sup>

Lack of clarity in approach to the legal theories presented is also evident. By analogizing the factual pattern presented to selected Florida "dangerous instrumentality" cases,<sup>37</sup> the court interrelated the "inherently dangerous activity" rule and the "dangerous instrumentality doctrine." One wonders whether the court perceived an a fortiori relationship between the two doctrines. Such co-mingling in analysis is certain to result in future confusion in an already confused area of the law. As these areas are in their infancy—separation of thought should be pursued.

BRUCE ALEXANDER

## SEARCH—INCIDENT TO TRAFFIC ARREST

Police officers possessed information that the defendant's driver's license had been revoked. They pursued and stopped him intending merely to write a traffic ticket. Upon learning it was his fourth offense, the officers "frisked" and searched the defendant pursuant to a directive

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35. For instance, the *Fry* case, *supra* note 35 involved the question of an automobile owner's liability to an employee of a service station negligently injured by a fellow employee with whom the automobile was entrusted. Quoting from that decision, the court adopted the following reasoning as it relates to the particular facts in the instant case:

Indeed, we find nothing in the decisions applying the 'dangerous instrumentality doctrine' to justify a holding that . . . he is liable *solely by reason of ownership* for the negligent operation thereof by one employee resulting in injury to another employee of the service station, both being engaged in performing duties in connection with servicing or repairing the automobile at the time of injury. (Emphasis of the court.)

Florida Power & Light Co. v. Price, 170 So.2d 293, 296 (1964).

36. Inasmuch as Florida courts have suggested that liability predicated upon the dangerous instrumentality doctrine exists irrespective of "the particular legal relationship which exists between the possessor and the owner," authority existed for a contra holding. *Martin v. Lloyd Motor Co.*, 119 So.2d 413, 415 (Fla. 1st Dist. 1960). See also *Frankel v. Fleming*, 69 So.2d 887 (Fla. 1954).

Indeed, the lower appellate court in the instant case stated:

The courts of Florida have made it clear that it is not possible for an owner of a dangerous instrumentality to insulate himself from liability by the device of an independent contractor relationship, since, as a matter of law, such responsibility of control cannot be delegated. . . .

Florida Power & Light Co., 159 So.2d 654, 659 (Fla. 2d Dist. 1963).

37. *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920), is the leading Florida case which classified the automobile as a dangerous instrumentality. See the following cases for further applications of the doctrine: *Barth v. City of Miami*, 146 Fla. 542 1 So.2d 574 (1941) (a motor truck); *Shattuck v. Mullen*, 115 So.2d 597 (Fla. 2d Dist. 1959) (an airplane); *Skinner v. Ochiltree*, 148 Fla. 705, 5 So.2d 605 (1942) (firearms).

The ratio decidendi of the cases reveals that the hallmark of any dangerous instrumentality lies in a determination of whether the particular instrumentality is so dangerous in operation as to warrant the imposition of vicarious liability upon the party who entrusts the instrument to another.

It should be noted that the court in the instant decision did not expressly classify electricity as a dangerous instrumentality. However, that finding is implicit in both the appellate court decision and the supreme court opinion.