1967

Building Contractor's Liability after Completion and Acceptance

James Jay Brown

Building Contractor's Liability After Completion and Acceptance

*James Jay Brown**

> The person who designedly or unwittingly constructs a trap which will injure innocent passersby cannot escape liability for his wrong by asserting that he has left the premises or no longer controls the injurious engine he abandoned to trusting mankind. . . .
>
> Where a builder creates a hazard which, without the need of a prophetic telescope, proclaims potential injury to the public, he may not plead immunity from liability for resulting damage on the basis that his responsibility ceased with the insertion of the last bolt and the driving of the final nail.[1]

THIS STATEMENT SYMBOLIZES a judicial attitude which is carefully, but certainly, making the independent contractor, the builder-vendor, and the sub-contractor liable for personal injury and property damage proximately caused by their negligent construction. It is generally stated[2] that the once unanimous rule of contractor's non-liability following completion and acceptance is in retreat before the alleged majority rule[3] of liability founded on the Cardozo decision in the *MacPherson* case.[4] Whether the majority trend now or not, this expanding area is an extension of tort concepts into the hallowed jurisdiction of property law and, as such, warrants concentration best begun with a well-reasoned penetrating decision.

Such a decision is *Schipper v. Levitt & Sons, Inc.*,[5] which held that a tract home-builder must defend his actions against the prima facie case established by an injured third party. This cause of action, founded on negligent construction, alleged failure to exercise reasonable care in designing and installing the domestic hot water system so as to avoid an unreasonable risk of harm to others. It was clearly established that the defendant's acts were the proximate cause of a small child's severe scalding two years after completion of the particular house.

The importance of this case lies in the application of a tort doctrine, previously applied exclusively to negligent acts by chattel manufactur-

---

* Of the Cleveland Bar.

1 Prost v. Caldwell Store, Inc., 409 Pa. 421, 187 A. 2d 273, 276-277 (1963).

2 27 Am. Jur., Independent Contractors, § 55 (Supp. 1966). See generally 65 C. J. S., Negligence § 95b (1966).

3 Prosser, Torts, § 99 at 695 (3d ed. 1964).

4 MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916 F, 696 (1916).

5 44 N. J. 70, 207 A. 2d 314 (1965). This case is fully analyzed in a subsequent section.

ers,[6] to real property construction.[7] This extension is shattering the ancient property concepts so much the bedrock of our Common Law.

We will review that foundation and the old rules of non-liability as they concern the landowner, contractor, and third party,[8] in order to grasp the significance of this new change in jurisprudential thought. From there, we will analyze Ohio's reliance on the old and possible adoption of the new.

Historical Foundation

A. Third Party v. Landowner

The long-standing rule that during the course of construction the injured third party cannot proceed against the owner-contractee for the negligent acts of his hired independent contractor,[9] thus casting a veil of immunity over the contractee, is a mere reflection of the preferred status landowners have had since earliest times. That status constituted nearly a sanctified position in the hierarchy of legal preference. English Common Law granted preference to property ownership through an "absolute right," one of three in the law, which was so great a right that the courts refused to "authorize the least violation of it . . . even for the general good of the whole community." [10] This status has been upheld for

---

[6] 1 Frumer & Friedman, Products Liability § 5.02 [5] at 54.6 (1964).

[7] Schipper v. Levitt & Sons, Inc., *supra* n. 5, at 321. The chattel manufacturing process is comparable to the acts of a builder. He designs the system, assembles the parts, installs them, and then offers his completed package for sale to the public.

[8] The Common Law concepts have become so overlapped and calcified that only through inventive exceptions have the innocently injured received that compensation demanded under modern society's recognition of the individual's rights.

[9] Fleming, The Law of Torts, § 416 (2d ed. 1961). This general rule has gradually become a framework for a long list of liability-imposing exceptions, which, in effect, indicates the judiciary's concern for individual rights. Restatement, Torts §§ 410-415 (1934).

Comment, 30 Tenn. L. Rev. 439 (1963) has a convenient, carefully documented grouping of these exceptions. The first involves the landowner-contractee's *active negligence* in such areas as exercising reasonable care when giving orders for his contractor-employee's work, and in providing precautions against recognizable dangers. The second group concerns *non-delegable duties* such as preventing harm to adjoining property owners; a city keeping its streets in repair; an employer providing a safe working place; and a vendor keeping his premises reasonably safe for business visitors. The third covers *inherent dangers* including extra-hazardous activities (blasting, spraying insecticides) and nuisances. The last group includes liability for *collateral negligence*, which, as a jury question, concerns whether the contractor acted outside the scope of his employment thereby raising the issue of foreseeability of unreasonable risk of harm to others. Should the acts be outside of the scope of employment, the owner-contractee has a valid defense against liability.

In Woolen v. Aerojet General Corp., 57 Cal. 2d 407, 369 P. 2d 708, 20 Cal. Rptr. 12 (1962), a property owning corporation-contractee was held liable to an employee of its independent contractor for failing to take safety precautions with work which was recognizable as containing an unreasonable risk of bodily harm.

For a comprehensive analysis of contractee-owner's Ohio immunity for torts of his independent contractor during the course of employment, *see* Blattner, Employer Immunity in Independent Contractor Torts in Ohio, 9 Clev-Mar. L. Rev. 287 (1960).

[10] 2 Blackstone, Commentaries *138. See also 2 Harper & James, Torts § 27.2 at 1434 (1956), where the authors refer to the English Court's ". . . overzealous desire to safeguard the right of ownership as it was regarded under a system of landed estates . . ."; Comment, 31 Tenn. L. Rev. 485, 486 (1964).

such academic reasons as the fact of possession, which carries with it the right to exclude others,[11] and the vested right to control any activity thereon.[12]

Although the landowner has a preferred position, it has been whittled away by exceptions under the terminology of "duty," i.e., to keep one's property in repair. A public utility with a building fronting on a sidewalk was found liable for failing to have its display window adequately installed and braced, and for failing to inspect its property periodically, which were its duties to pedestrians.[13] Under a recent decision,[14] a building owner-lessor who retained control of the premises not only had a duty of repair but also the responsibility for the use of due care by his contractor during any repair. In connection therewith, he has the co-related duty to warn of inherent dangers, defects, and potentially harmful conditions existent within or around the working area.[15] The contractor must be adequately apprised of the risks and danger[16] and/or be sufficiently warned under a reasonable review of all the circumstances.[17] It is such standards of care which reduce the owner's veil of immunity if the injured party fits within the duty class.

The other "duties," breach of which may open an avenue for recovery, concern us at this point.

---

[11] Green v. Manveg Properties, Inc., 126 Cal. 2d 1, 271 P. 2d 544 (1954); Starits v. Avery, 204 Iowa 401, 213 N. W. 769 (1927).

[12] United States v. Fox, 60 F. 2d 685 (2d Cir. 1932); Wittkop v. Garner, 4 N. J. Misc. 235, 132 A. 339 (Sup. Ct. 1926).

[13] "The owner of the building abutting a public highway, which includes a public sidewalk, must exercise reasonable care not to endanger the safety of persons lawfully using the public way. While the owner or person in control of the building is not an insurer, he is bound to use reasonable care and skill in the construction and maintenance of the building, which includes the duty to inspect from time to time." Lee v. Milwaukee Gas Light Co., 20 Wis. 2d 333, 122 N. W. 2d 374, 378 (1963); *Accord*, Majestic Realty Corp. v. Brandt, 198 Wis. 527, 224 N. W. 743 (1929); where owner has the added duty of periodic inspection: Smith v. Earl D. Hanson, Inc., 9 (N. Y.) Misc. 2d 244, 170 N. Y. S. 2d 866 (1957); Feeney v. New York Waist Co., 105 Conn. 647, 136 A. 554, 50 A. L. R. 1539 (1927).

[14] Joint defendants—owner, general contractor, and roofing sub-contractor—were held liable for water damage to tenant's merchandise. Poulsen v. Charlton, 224 Cal. App. 2d 262, 36 Cal. Rptr. 347 (1964).

[15] Note, 61 Colum. L. Rev. 284 (1961). To determine the reasonableness of defendant-landowner's acts of warning his contractor and employees of the dangers, courts ask whether he surrendered or retained actual control over the premises during the construction; whether there were moderate costs involved in providing safer modes of work; whether the warning went to the single general contractor or his sub-contractors as well as employees; and whether the work itself was inherently dangerous.

For modern treatment of employer-contractee's liability under exceptions to general rule of non-liability for negligence of independent contractor see, Note, 44 N. C. L. Rev. 242 (1965).

[16] Paul v. Staten Island Edison Corp., 2 App. Div. 2d 311, 155 N. Y. S. 2d 427 (1956); Larkin v. New York Telephone Co., 220 N. Y. 27, 114 N. E. 1043 (1917); Sadler v. Lynch, 192 Va. 344, 64 S. E. 2d 664 (1951).

[17] Schwarz v. General Electric Realty Corp., 163 Ohio St. 354, 126 N. E. 2d 906 (1955); Storum v. New York Telephone Co., 270 N. Y. 103, 200 N. E. 659 (1936).

Following completion and acceptance of any work, repairs included, the law imposes a "duty of care" to trespassers,[18] licensees, and invitees. The occupier-owner owes the licensee a duty to warn of concealed dangerous conditions of which he has knowledge, but he is under no duty to inspect the premises or take special precautions for safety.[19] An invitee possesses the right to be informed about dangerous conditions the owner knows about or could have discovered with reasonable care, and the right to expect that the premises will be reasonably safe.[20] In effect, the owner must fulfill his duty of discovering unsafe conditions, keeping them repaired, or issuing a warning about their existence and taking whatever precautionary measures are necessary. To determine whether the owner has breached his duty to an invitee, the courts have devised the economic benefit test,[21] which includes, *inter alia,* the hired independent contractor,[22] and the invitation test, wherein if the person remains within the reasonable boundaries of the area over which his invitation extended, he may safely presume that the area has been arranged for his safety.[23] However, none of the foregoing makes the owner an insurer of any invitee's safety.[24]

Neither of the above tests lends itself to an easy determination of activity areas over which the landowner's duties extend.[25] An even greater uncertainty arises where the distinctions between invitee and licensee are obliterated by a decision evolving a different duty concept.

---

[18] Prosser, Torts § 76 at 432 (2d ed. 1955).

[19] 2 Harper & James, Torts, § 27.1 at 1431 (1956). See generally, Prosser, Torts § 60 at 385 (3d ed. 1964).

[20] Prosser, Torts § 78 (2d ed. 1955).

[21] Restatement, Torts § 332 comment b (1934); 2 Harper & James, Torts § 27.12 (1956).

[22] Wohlfron v. Brooklyn Edison Co., 238 App. Div. 463, 265 N. Y. S. 18 (1933), *aff'd.* 263 N. Y. 547, 189 N. E. 691 (1933); *Contra,* where a contractor knowingly accepts employment to repair a defective structure, Kowalsky v. Conreco, 264 N. Y. 125, 190 N. E. 260 (1954).

For general discussion of landowner's liability for construction and repairs, see: Koerner, Owner-Contractorship Liability in Building Construction and Repair Cases, 5 N. Y. L. Forum 73 (1959).

During the course of any construction work, where its nature requires the owner to exercise supervision over his contractor, the owner becomes vicariously liable for injurious acts by the contractor's employees toward pedestrians, visitors, or tenants. Tipaldi v. Riverside Memorial Chapel, 273 App. Div. 414, 78 N. Y. S. 2d 12 (1948), *aff'd.* 298 N. Y. 686, 82 N. E. 2d 585 (1948). Such liability is more nearly strict where the nature of the work involves a nondelegable duty (e.g. explosives on premises; elevator maintenance), Koerner, *supra* n. 22 at 76.

[23] Comment, 31 Tenn. L. Rev. 485 (1964).

[24] Koehler v. Grace Line, Inc., 285 App. Div., 154, 136 N. Y. S. 2d 87 (1954). See also, Busler v. Cut Rate Super Market, 47 Tenn. App. 1, 334 S. W. 2d 337 (1960); Management Services v. Hellman, 40 Tenn. App. 127, 142, 289 S. W. 2d 711 (1955). Merely being injured on the property does not constitute prima facie evidence that the owner has breached his duty of care. 4 Shearman & Redfield, Negligence § 779 (1941).

[25] For an example, see the discussion concerning social guest in Prosser, Torts § 61 at 394-401 (3d ed. 1964).

Such an example involved elevator repairs, where an independent contractor, not the owner, was charged with breach of duty on the basis of foreseeability of harm to those third persons who would be considered elevator users,[26] regardless of other status.

Obviously, there are no vested rights in the injured third person when proceeding against the landowner. So many exceptions and subdistinctions have been evolved that each case becomes a major test or case of first impression, if no precedent exception can be located. Often, however, an exception must be twisted to fit the plaintiff's search for recompense; in turn, creating more confusion in an already confusing area. It is the thesis of this article that such injustice should be eliminated by adoption of the new trend of liability.

B. Third Party v. Contractor-Vendor

The previous analysis of the landowner's immunity applies in full where the owner is also the contractor and seller, such as a tract homebuilder. He is saved harmless from any liability, whether from dangerous conditions existing at the sale or arising thereafter,[27] from the moment the deed is transferred.[28] This means that neither the vendee nor a third party has any grounds[29] upon which to bring a cause of action for injury or damage from those dangerous conditions. One reason for this immunity is that from the moment of transfer the contractor-vendor, lacking possession or control, is unable to make corrections or repairs of such conditions.[30]

---

[26] McIntyre v. Monarch Elevator Co., 230 N. C. 539, 54 S. E. 2d 45 (1949), where a patient fell through an open elevator door while defendant contractor was doing repair work.

[27] Restatement, Torts § 352 (1934) as to dangerous conditions existing at the time the grantee-vendee took possession; § 351 as to those coming into existence after possession is taken.

[28] Palmore v. Morris, Tasker & Co., 182 Pa. 82, 37 A. 995 (1897).

[29] Unless the vendee carefully inspects the premises and rejects specifically those conditions he finds to be unsatisfactory, he is divested of that right at the instant of transfer. Kordig v. Grovedale Oleander Homes, Inc., 18 Ill. App. 2d 48, 151 N. E. 2d 70 (1958); McIntosh v. Goodwin, 40 Tenn. App. 505, 292 S. W. 2d 242 (1954); Combow v. Ground Investment Co., 358 Mo. 934, 218 S. W. 2d 539 (1949).

This rule of waiver of defects not objected to at the time of acceptance applies whether vendee purchases a tract-home or has it built to specifications. Guschl v. Schmidt, 266 Wis. 410, 63 N. W. 2d 759 (1954).

Where a vendee takes possession of a newly-completed house and continues to live in it for two years prior to personal injury from a patently defective basement stairway, all rights of recovery against the builder-vendor were lost when acceptance and possession were completed, even though the vendee made one verbal objection to said defect two weeks after the deed transfer. Sarnicandro v. Lake Developers, Inc., 55 N. J. Super. 475, 151 A. 2d 48 (1959).

[30] Copfer v. Golden, 135 Cal. App. 2d 623, 288 P. 2d 90 (1955); McQuillan v. Clark Thread Co., 12 N. J. Misc. 409, 172 A. 370 (1934).

C. Third Party v. Hired Contractor

The controlling reason for immunity, which covers this and the above sub-section, is that where there is no contractual relation flowing between the third party and the negligent contractor, no breach can occur, and therefore no right of action can arise.[31] Contractual privity was the reason for a 1964 Virginia decision,[32] which discharged plaintiff-motorist's petition against a negligent sewer contractor but permitted it against the municipality-contractee. In addition to citing the city for failing in its affirmative duty of maintaining the public thoroughfares, the court relied on *McCrorey v. Thomas*[33] which had said:

> [T]he independent contractor is not liable for an injury to person or to property of one not a party to the contract, occurring after the independent contractor has completed the work and turned it over to the owner or employer, and the same has been accepted by him, though the injury resulted from the contractor's failure to properly perform his contract.[34]

Although an unsuccessful attempt was made to hold the sewer contractor liable under one of the many exceptions[35] to the general rule of non-liability after completion and acceptance, it is within this area that we find the modern concern for social welfare and the attempts to cast the liability where it justly belongs. Only certain exceptions will be mentioned as a means of illustrating the pains taken to get out of the Common Law straitjacket.

The vendor-contractor is liable for his failure to disclose a known dangerous condition or failure to realize that the vendee did not know or probably would not discover the condition or its potentiality for harm.[36]

---

[31] Prosser, Torts § 85 (2d ed. 1955).

[32] City of Richmond v. Branch, 205 Va. 424, 137 S. E. 2d 882 (1964) where motorist became stuck in a deep depression where the sewer contractor had recently completed and refilled his excavation work for the city.

[33] 109 Va. 373, 379, 63 S. E. 1011, 1013 (1909).

[34] City of Richmond v. Branch, *supra* n. 32 at 885. A clear statement of the old rule prior to Hanna v. Fletcher: Ford v. Sturgis, 56 App. D. C. 361, 14 F. 2d 253, 52 A.L.R. 619 (1926), *certified question dismissed per curiam*, 266 U. S. 584, 45 Sup. Ct. 124, which held that (1) after a building is completed and accepted, the liability of the builder-contractor for accidents caused by defective construction ceased and attached to the owner-contractee, whether the damage was the result of the owner's or builder's negligence; (2) such a conclusion was a decree of sound public policy designed to prevent endless litigation; (3) that generally it was the negligence of the owner in maintaining the building, and not of the builder in constructing it, which was the proximate cause of the injury to the third party.

[35] The court referred to the inherent or imminent danger exception but held that the factual situation failed to qualify as such. City of Richmond v. Branch, *supra* n. 32 at 886. For list of exceptions see 27 Am. Jur., Independent Contractors, Sec. 56.

[36] "A vendor of land, who conceals or fails to disclose to his vendee any condition whether natural or artificial involving unreasonable risk to persons upon the land, is subject to liability for bodily harm caused thereby to the vendee and others upon the land with the consent of the vendee or his sub-vendee, after the vendee has taken possession, if

(Continued on next page)

> Generally, the liability of a grantor of real property for the dangerous or defective condition of the premises ceases upon the transfer of possession and control, regardless of whether the person injured is the transferee, or some third person to whom a duty of care is owed. . . . The rule is subject to the qualification that, if the grantor knows of a latent defect or danger on the premises, and misleads the transferee into believing the premises are safe, or fails to disclose the defect when he has reason to believe that it will not be discovered by him, he may nevertheless be liable for any injury resulting therefrom.[37]

This exception has grown in importance with each case because it creates an affirmative duty of disclosure; one which shatters the veil of immunity, to the benefit of society.

Another exception states that a hired contractor is not liable when he follows the plans and specifications furnished by his employer-contractee where they are not so obviously defective or dangerous that no reasonable man would follow them.[38] The law presumes that the contractee has assumed responsibility for them, and any resultant injury proximately caused by defects in those plans is the contractee's liability.

(Continued from preceding page)

(a) the vendee does not know of the condition or the risk involved therein, and

(b) the vendor knows of the condition and the risk involved therein and has reason to believe that the vendee will not discover the condition or realize the risk."

Restatement, Torts § 353 (1934). *Accord,* Sarnicandro v. Lake Developers, Inc., 55 N. J. Super. 475, 151 A. 2d 48, 52 (1959). See also 2 Harper & James, Law of Torts § 27.18 at 1520 (1956); Prosser, Torts § 62 at 409 (3d ed. 1964).

The first case to adopt the position which finally became Restatement, Torts § 353 above was Kilmer v. White, 254 N. Y. 64, 171 N. E. 908 (1930).

In McCabe v. Cohen, 294 N. Y. 522, 63 N. E. 2d 88 (1945), a vendor was held liable for concealing the known condition of a rusted-out fire escape. This decision approved and followed Pharm v. Lituchy, 283 N. Y. 130, 27 N. E. 2d 811 (1940).

[37] U. S. v. Inmon, 205 F. 2d 681, 684 (5th Cir. 1953).

[38] Leininger v. Stearns-Roger Manufacturing Co., 17 Utah 2d 37, 404 P. 2d 33 (1965). See also Person v. Cauldwell-Wingate Co., 187 F. 2d 832 (2d Cir. 1951), *cert. den.* 341 U. S. 936, 71 Sup. Ct. 855 (1951); Trustees of the First Baptist Church of Corinth v. McElroy, 223 Miss. 327, 78 So. 2d 138 (1955); Tipton v. Clower, 67 N. M. 388, 356 P. 2d 46, 49 (1960), which restated the plans and specifications exception plus an additional one which makes the owner liable if he discovers the danger or it is obvious to him. This court went on to state that the application of these exceptions had to be tempered with consideration of the status of the injured third party, whether invitee or licensee. Campbell v. Barnett, 351 F. 2d 342 (10th Cir. 1965), approved and followed the second exception in the Tipton decision.

The Leininger case held the defendant exhaust fan manufacturer not liable for an explosion within the device while an employee of the mining company was dismantling it. Four years preceding this mishap, the company had hired the defendant to install an exhaust system in compliance with the company's plans. Because of the company's strict direction and control over the project, no issue of reliance upon a warranty was involved. However, after the evidence disclosed the fact that the company experienced similar explosions in the years following completion, part of the court's rationale for its decision was based upon the rule of superseding liability where an owner-employer discovers the dangerous defect. Such a discovery relieves the contractor-manufacturer of any liability; Prosser, Torts § 85 at 519 (2d ed. 1955).

In an action against a paving contractor and municipal contractee,[39] by a pedestrian who tripped over a large projection in a recently black-topped street, only the contractee was subject to liability. This decision was grounded upon the facts (1) that where the contractee furnished the plans and/or materials, and the injury was a result of faults in either, then the contractor is immune from liability and (2) that nothing in the case raised issues of inherent defect necessary for application of the *MacPherson* Doctrine.[40]

In a 1966 New Jersey decision,[41] a public housing authority and its contractor-grantor were compelled to undergo trial for liability where a negligently repaired sidewalk, which existed in that condition at the moment of deed conveyance, was the proximate cause of an injurious fall five days thereafter by a pedestrian and baby. This was a nuisance,[42] another exception to the general rule,[43] which prevented liability from shifting with the conveyance.[44] The authoritative source material for this case[45] reflects the state's progressiveness in treating injuries which previously had been irremediable.

New Trend of Liability Through the MacPherson Doctrine

Hot scalding water at 210° emanating from a bathroom sink faucet was the cause of a minor's injuries which required 74 days of hospital care plus two skin grafts. For the cost of a $10.00 mixing valve, the builder-vendor-grantor could have regulated the domestic water level at 140° while leaving an adequate supply at 210° for the under-floor radiant heating system. Apparently the builder was aware of the possible risk to others, for he equipped his 400 tract homes with common spigot mixing-type fixtures plus a homeowner's manual which advised the buyer that since his water was hotter than usual, it would be advisable to first

---

[39] Johnson v. City of San Leandro, 179 Cal. App. 2d 794, 4 Cal. Rptr. 404 (1960). *Accord,* Barnthouse v. California Steel Buildings Co., 29 Cal. Rptr. 835 (1963).

[40] Johnson v. City, *supra* n. 39 at 406. The court in this case construed Dow v. Holly Manufacturing Co., 49 Cal. 2d 720, 321 P. 2d 736 (1958), in a very strict sense and refused to extend its theory to this set of facts.

[41] Cavanaugh v. Pappas, 91 N. J. Super. 597, 222 A. 2d 34 (1966).

[42] Sarnicandro v. Lake Developers, Inc., 55 N. J. Super. 475, 151 A. 2d 48 (1959). To avoid liability, the grantor must abate the nuisance prior to conveyance. Pirozzi v. Acme Holding Co. of Paterson, 5 N. J. 178, 188, 74 A. 2d 297, 302 (1950).

[43] McQuillan v. Clark Thread Co., 12 N. J. Misc. 409, 172 A. 370 (1934).

[44] Cavanaugh v. Pappas, *supra* n. 41 at 38. *Accord*, Restatement, Torts (Second) § 373 (1965); Prosser, Torts § 62 at 409-410 (3d ed. 1964).

[45] Prosser, *op. cit. supra* n. 44, and Restatement, *op. cit. supra* n. 44, wherein is stated that:

> "(1) A vendor of land who has created or negligently permitted to remain on the land a structure or other artificial condition which involves an unreasonable risk of harm to others outside of the land, because of its plan, construction, location, disrepair, or otherwise, is subject to liability to such persons for physical harm caused by the condition after his vendee has taken possession of the land."

turn on the cold. However, nothing in this manual apprised the reader of the inherent danger from the extremely high temperature. Whether this manual was read by guests of the vendee or subsequent vendees was never open to serious debate.

In a 6-0 decision, the New Jersey Supreme Court found that the plaintiff had established a prima facie case of negligence against the builder-vendor for proximately causing injury to a third person.[46] However, the case was remanded for trial on factual issues regarding installation.

> The plaintiffs urge that the *MacPherson* principle, imposing liability for negligence, should be applied to a builder vendor such as Levitt. We consider their point to be well taken for it is clear to us that the impelling policy considerations which led to *MacPherson* and its implications are equally applicable here.[47]

---

[46] Schipper v. Levitt & Sons, Inc., 44 N. J. 70, 207 A. 2d 314 (1965).

[47] *Id.* at 321. The MacPherson Doctrine imposed liability on the manufacturer of a chattel which, if negligently built, would be foreseeably dangerous to the immediate vendee and others not in privity of contract, MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050, LRA 1916 F, 696 (Ct. App. 1916).

> "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. . . . If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully." *Id.*, 217 N. Y. at 389, 111 N. E. at 1053.

Although nearly all states have adopted the MacPherson Doctrine when concerned with manufactured chattels, it was never applied to acts of builder-contractors or to structures on real property. Comment, 23 Brooklyn L. Rev. 160 (1956); Comment, 4 St. Louis U. L. J. 344 (1957).

This can be attributed to the Common Law reliance upon *Caveat Emptor* plus the rationale that each party to a contract involving real property enters it with firm bargaining power so that their contract specifically safeguards the rights and identifies the obligations, one to the other. Also, the longer period of life of the completed structure may have had an important limiting effect upon creating liability before this period. Note, 1963 Wis. L. Rev. 343 (1963). See generally, 1 Frumer & Friedman, Products Liability § 5.03 [1] & [2] (1960).

It was only recently extended to cover real property construction in Inman v. Binghamton Housing Authority, 3 N. Y. 2d 137, 164 N. Y. S. 2d 699, 704 (1957), *reversing on other grounds*, 1 App. Div. 2d 599, 152 N. Y. S. 2d 79, 82 (1956),

> ". . . we conclude that the 'principle inherent' in the MacPherson doctrine applies to determine the liability of architects or builders for their handiwork. . . ."

Id., 164 N. Y. S. 2d at 704. (This court reasoned that there was no logical basis for distinguishing between liability for chattels or real property structures. That to do so was a mere mechanical contrivance for withholding liability.)

By the time of this decision, the 1934 Restatement of Torts had been advocating such a development. See Restatement, Torts §§ 385, 395 (1934).

Of course, Inman v. Binghamton Housing Authority, was an important step for New York State. At about the same time, MacPherson was extended in the Federal Court for the District of Columbia:

> "The bridge described in the MacPherson case between the manufacturer of an article and its third party user, not in privity of contract with the manufacturer, is the same as that between a landlord's contractor or repairman and the tenant of the premises repaired; for in each case negligent conduct often may be expected to result in injury to one reasonably foreseen as a probable

(Continued on next page)

> In fulfillment of the deliberate design of its system for distributing hot water for domestic use, Levitt assembled the ingredients, including the heating unit from York [Mfgr.], and directed their installation. In this respect it was not unlike the manufacturers of automobiles, airplanes, etc., whose products embody parts supplied by others. When their marketed products are defective and cause injury to either immediate or remote users, such manufacturers may be held accountable under ordinary negligence principles. . . .[48]

Unmistakably, this is the clearest factual analogy of the building contractor's acts to the manufacturing process. The defendant had acted in all capacities, *i.e.,* architect, engineer, designer, builder-contractor and vendor. The analogy is, in actuality, more than what we find in the outright examples seen in manufacturer-to-wholesaler transactions.

It must be clearly understood at this point that the application of the *MacPherson* Doctrine can be made only to cases of *completed* construction, wherein defective performance and a duty relation are involved. It cannot be applied to construction in progress.[49]

The New Jersey court went into analysis of the necessity in plaintiff's cause of action of pleading the existence of a latent defect.[50] Such a defect is the sole basis for recovery;[51] without it, only patent defects remain for which there is no right of recovery against the contractor. Whether the latent defect element will retain its importance is yet to be seen, for in the area of manufacturer's liability it has been subject to severe criticism.[52] Further analysis included the foreseeability concept,

---

(Continued from preceding page)

user. Here the tenants were to use the steps, not the landlord, as in MacPherson, the ultimate purchaser was to use the car, not the dealer." Hanna v. Fletcher, 97 App. D. C. 310, 231 F. 2d 469, 474, 58 A. L. R. 2d 847 (D. C. C. 1956), *cert. den.* 351 U. S. 989, 76 Sup. Ct. 1051 (1956).

In this case, an injured tenant stated a good cause of action for negligent repair and maintenance of stair railings against the owner-landlord and his repair contractor.

48 Schipper v. Levitt & Sons, Inc., *supra* n. 46 at 321.

49 Dixon v. Simpson, 74 Nev. 358, 332 P. 2d 656 (1959).

50 Schipper v. Levitt & Sons, Inc., *supra* n. 46 at 332.

51 Failure to allege and prove the existence of a latent defect or danger is fatal to plaintiff's cause of action. Inman v. Binghamton Housing Authority, *supra* n. 47 at 704; *Accord:*

> ". . . in cases dealing with a manufacturer's liability for injury to remote users, the stress has always been upon the duty of guarding against *hidden* defects and of giving notice of *concealed* dangers. . . . In point of fact, several of the cases actually declare that a duty is owed, a liability imposed, *only if* the defect or danger be not 'known' or 'potent' or discoverable 'by a reasonable inspection.'" Campo v. Scofield, 301 N. Y. 468, 472-473, 95 N. E. 2d 802, 804 (1950).

Plaintiff failed to state a cause of action against a storm door contractor when he did not allege the existence of a latent defect. Eilenberg v. O & M Storm Window Co., 17 (N. Y.) Misc. 2d 799, 187 N. Y. S. 2d 922 (Sup. Ct. 1959).

52 2 Harper & James, Torts § 28.5, 1542, 1545 (1956). One writer has noted the decline of reliance on the patent-latent distinction and a greater emphasis toward basing liability upon acts which create any unreasonable danger. Noel, Manufacturer's Negligence of Design or Directions for Use of a Product, 71 Yale L. J. 816, 837-838 (1962).

which received a new application in *Hanna v. Fletcher*,[53] when the court remarked:

> [I]f (defendant's) repair was so negligently performed as to cause the railing to become insecure, there arose a probably dangerous physical condition. The railing was essential to the safe use by the tenants of the steps over the area way. Use of the steps would be reasonably certain to place life and limb in peril unless the railing was secure. The consequence to the tenants of negligence in repair could be foreseen.[54]

This federal decision impliedly rejected the privity of contract concept.[55]

Although individually the above concepts could control, the New Jersey court found that, regardless of privity, and whether the defect/danger was latent or patent, it was foreseeable that serious danger was involved in defendant's home construction. It noted that "[T]he obviousness of a danger does not necessarily preclude a jury finding of unreasonable risk and negligence. . . ." [56] The court distinguished the normal dangers incident to modern living, such as work in and around stoves, ovens, electrical appliances, stairways, second-story windows and porches without railings. Such things cannot be the safety responsibility of any contractor; his acts of construction could not change the normal dangers incident to their use. By distinct contrast, the court mentioned the special danger beyond what the reasonable person would expect to find within normal living hazards. The facts presented a

> special and concealed danger far beyond any danger incident to contact with normally hot water; certainly no one, whether he be adult or child, would have suspected from its appearance that the water drawn . . . would be at the dangerously high temperature of 190-210 degrees.[57]

Note the phraseology of "special and concealed danger far beyond" the normally expected danger, unusually hot water from a common source. It cannot be maintained that this danger could not have been discovered by a reasonable man; it must therefore be a patent danger, certain to be known by anyone living in the home for any period of time. However, this was a latent danger when we assume what the reasonable user would assume, *i.e.*, that the domestic water source was safe for its obviously intended use.

---

[53] 97 App. D. C. 310, 231 F. 2d 469, 58 A. L. R. 847 (D. C. C. 1956), *cert. den.* 351 U. S. 989, 76 Sup. Ct. 1051 (1956).

[54] *Id.* 231 F. 2d at 474.

[55] *Id.* at 473, relying on MacPherson v. Buick Motor Co., 217 N. Y. 382, 390, 111 N. E. 1050, 1053 (Ct. App. 1916), which discarded and put aside the notion that duty of care in safety matters arose solely from contract.

[56] Schipper v. Levitt & Sons, Inc., 44 N. J. 70, 207 A. 2d 314, 323 (1965).

[57] *Id.* at 324.

Thus, the defendant building contractor's acts of installing a mix-type water fixture and issuing a veiled warning in its homeowner's guide were not sufficient to overcome the foreseeability of danger to the primary vendee, his family, guests, and others.

An important concept, not analyzed at this point, involved the immediacy of the danger arising from the negligent construction. In *Leigh v. Wadsworth*,[58] which involved the collapse of a back-porch roof more than two years after construction, the court defined "immediate" to mean:

> where the defect created by a contractor is the immediate and proximate cause of the injury—immediate and proximate because there is no intervening cause that may have brought about or directly contributed to the injury. . . .[59]

It is not an instant or sudden event. These issues of the immediacy and certainty of danger must be submitted for consideration by the jury.[60]

In certain jurisdictions, contractor liability for negligence is being controlled by a general liability statute.[61] An example is California Civil Code Section 1714:

> Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.

Existence of such a general statute has not precluded jury consideration of the prima facie case alleging negligence.[62] Such codification of duty principles reflects modern awareness of the individual's socio-legal obligations in our complex society. The enacting states are the pioneers in what will hopefully become a uniformly adopted law.

Regardless of statutes, precedent or liberal interpretation of the liability trend, the plaintiff's burden of pleading is the establishment of a prima facie case, proving that the structure was inherently defective when finished and sold, that in such condition it was unreasonably dangerous, and that the defect proximately caused the injury.

> The plaintiff must prove the contractor's negligence and that such negligence is a proximate cause of his injury; furthermore, he

---

[58] 361 P. 2d 849 (Okla. 1961).

[59] *Id.* at 854.

[60] Stewart v. Cox, 55 Cal. 2d 857, 362 P. 2d 345, 13 Cal. Rptr. 521 (1961); Schlender v. Andy Jensen Co., 380 P. 2d 523 (Okla. 1963); Strandholm v. General Construction Co., 235 Ore. 145, 382 P. 2d 843 (1963). See also, Thompson v. Burke Engineering Sales Co., 252 Iowa 146, 106 N. W. 2d 351, 84 A. L. R. 2d 689 (1960).

[61] Stout v. Madden & Williams, 208 Ore. 294, 300 P. 2d 461 (1956); Marine Insurance Co. v. Strecker, 234 La. 522, 100 So. 2d 493 (1958); Day v. National-U. S. Radiator Corp., 117 So. 2d 104 (La. 1960).

[62] Sabella v. Wisler, 23 Cal. Rptr. 277 (Ct. App. 1962), vacated and remanded, 59 Cal. 2d 21, 377 P. 2d 889, 27 Cal. Rptr. 689 (Sup. Ct. 1963), concerning inadequate land-fill and subsidence.

> must prove that he is within the class protected, that is, one as to whom the consequences of negligence may be foreseen.[63]

He must link the foreseeable injury or damage unequivocally to the defendant's construction.[64] Where there is little or no actual evidence to support some of the elements, the plaintiff may apply the Res Ipsa Loquitor Doctrine.[65] Neither is plaintiff's case foreclosed by the defense's proof of knowledge of the dangerous condition.[66] In the *Schipper* case,[67] evidence was introduced that the injured child's parents were aware of the super-hot water. This did not destroy their cause of action because, although

> they may not have fully appreciated the extraordinary nature of the risk . . . any omissions or contributory fault on their part would not preclude a finding that Levitt had been negligent and was to be held responsible to others who foreseeably might be injured as a result of its negligence. On the issue of negligence there was clearly enough evidence to go to the jury.[68]

Having reviewed the component elements of this liability-imposing trend, it is time to concentrate on how the most recent cases have treated such matters. *De Tillo v. Carlyn Construction, Inc.,*[69] involved a homeowner who experienced cracked walls and ceilings, buckled wall panels, and floors separated from wall studs as the structure settled and his back-yard sank within a short time after completion. The evidence established that a sewer pipe had burst precipitating an unusual escape of water which caused underground erosion and, finally, settling. Plaintiff

---

[63] Whorton v. T. A. Loving & Co., 344 F. 2d 739, 746 (4th Cir. 1965).

[64] ". . . The contractor . . . may escape liability under substantive tort law if, for instance, there is no proof of his negligence, no establishment of the fact that the injury or damage was foreseeable or that danger from defective construction would be probable, or no proof that the injury was proximately caused by the contractor's conduct." Marine Insurance Co. v. Strecker, *supra* n. 61 at 496, wherein the court remanded for trial a cause of action for property damage occasioned by an inadequately installed wall cabinet brace bracket.

[65] Thompson v. Burke Engineering Sales Co., 252 Iowa 146, 106 N. W. 2d 351, 84 A. L. R. 2d 689 (1960). *Accord,* Lee v. Milwaukee Gas Light Co., 20 Wis. 2d 333, 122 N. W. 2d 374, 378 (1963):

> "The direct evidence of negligence does not prevent necessarily the application of the doctrine of *res ipsa loquitur.* Specific elements of negligence not reaching the point of a *prima facie* case which is overcome by other evidence may be supported by the application of the doctrine."

[66] Strakos v. Gehring, 360 S. W. 2d 787 (Tex. 1962).

[67] Schipper v. Levitt & Sons, Inc., *supra* n. 56 at 324.

[68] *Ibid; Accord,*

> "Today, however, the negligence principle has been widely accepted in product liability cases; and the bottom does not logically drop out of a negligence case against the maker when it is shown that the purchaser knew of the dangerous condition . . . it should be a question for the jury whether reasonable care demanded such a precaution (installation of a guard or safety release), though its absence is obvious . . . the obviousness of a condition will still preclude liability if the obviousness justifies the conclusion that the condition is not unreasonably dangerous. . . ." 2 Harper & James, Torts § 28.5 at 1543 (1956).

[69] 416 Pa. 469, 206 A. 2d 376 (1965).

joined the pipe sub-contractor with the land developing contractor-grantor. An award of $11,500 was affirmed in the Pennsylvania Supreme Court based on the jury finding that the sub-contractor's negligent installation of the sewer line had been the proximate cause of the damage.

> [W]hen it is obvious to the contractor that a third party would necessarily, in the natural course of events, be brought into contact with, or would use the defective construction, then the contractor will be liable for injuries sustained by the third person caused by the negligence of the contractor.[70]

A case from the west, depending on many of the same precedents as above, was *Dorlac v. John Todd, Inc.*[71] It involved a septic tank contractor who installed two tanks behind the lessor-owner's restaurant which was leased by plaintiff. Two days after completion and acceptance, plaintiff fell through the improperly back-filled soil around said tanks. The evidence clearly established that the contractor's work was so negligently completed and covered over that there were empty spaces around the top and sides of the tanks. The court remanded the case for trial on all issues, overruling the prior dismissal.[72]

---

[70] *Id.* at 378. Note that this case involved a pure latent defect which was not subject to discovery upon even the most thorough investigation. The defect was not influenced by intervening causes such as faulty repair or lack of it. And there was no sudden accident or event; the damage was gradual.

[71] 156 Colo. 271, 398 P. 2d 45 (1965).

[72] The decision relied strongly on Krisovich v. John Booth, Inc., 181 Pa. Super. 5, 121 A. 2d 890 (1956). Involved, herein, was the negligent back-filling and tamping of soil into a public utility trench which crossed a pedestrian walkway. An injured pedestrian recovered against the negligent contractor under a liberal reading of the MacPherson Doctrine.

> ". . . Following the Grodstein case (Grodstein v. McGivern, 303 Pa. 555, 154 A. 794), our Supreme court has consistently extended the principle of the MacPherson case by imposing liability also on any person who on behalf of the possessor of *land* negligently creates an artificial condition resulting in injury to others; and this, regardless of whether the contractor has surrendered possession of the land and his work has been accepted." *Id.* at 892.

Further precedent was the oft-cited Russell v. Arthur Whitcomb, Inc., 100 N. H. 171, 121 A. 2d 781 (1956). It, too, involved improper filling of an excavation, but no trial of the facts was had. The parties certified to the highest court the precise question whether completion and acceptance of the work by the municipal contractee absolved the contractor of all liability. Taking the lead from Prosser on Torts, the court ruled:

> "We adopt the view outlined by Prosser that independent building and construction contractors should be held to a general standard of reasonable care for the protection of third parties who may be foreseeably endangered by the contractor's negligence even after acceptance of the work. This rule is subject to the following qualification:
>
> '. . . The employer's failure to discover the defect will not relieve the contractor of liability, but . . . if he discovers the danger, or it is obvious to him, his responsibility supersedes that of the contractor.'" Prosser, Torts § 85 at 519 (2d ed. 1955); and *Id.* at 782.

The latter clause in § 85 cited above has not been adopted in those jurisdictions which have seriously adopted the trend. However, it rings of a clear logic by making the owner in possession the one primarily responsible for correcting with least effort the obvious defects. A further ruling was that completion and acceptance is not conditional upon payment in full. *Ibid.*

(Continued on next page)

The *MacPherson* Doctrine has been applied to negligent construction under the general Maritime Tort Laws.[73] In *Whorton v. T. A. Loving & Co.*,[74] this maritime doctrine was applied to negligent removal of bridge supports which proximately caused the sinking of plaintiff's boat in the intercoastal waterway. The contractor was tentatively held liable, pending a retrial of the facts, under the conflict of laws principles which applied the above Maritime Tort Doctrine instead of the North Carolina laws which did not follow the *MacPherson* trend. The court, per dictum, could find no valid reason for distinguishing between manufacturer's and contractor's liability and believed direct liability should be invoked.[75] The old rule of non-liability following completion/acceptance was displaced by the growing weight of authority.

Where a marine boom was negligently remodeled and repaired so that a cotter key was insecure and caused a block and rigging to give way injuring plaintiff longshoreman, the Oregon Supreme Court held that a good cause of action was stated and should have been submitted to a jury for trial.[76] The most important issue confronting the court was whether the *MacPherson* Doctrine was applicable in an action between a third party and the defendant repair contractor for an accident occurring six months after completion and acceptance. They decided that lack

---

(Continued from preceding page)

Accord, Strothman v. Houggy, 186 Pa. Super. 638, 142 A. 2d 769 (1958), where a negligently built fireplace mantel gave way causing injury to a child, liability was imposed upon the builder-lessor after evidence that said mantel was originally inadequately secured by too little mortar. This court found within the lease a corresponding liability for failure to warn or protect against and prevent injuries from defects within areas under the lessor's control. The court also strictly construed the lessor's exculpatory clause which specifically failed to mention injury from negligent construction. If the parties had intended to release such matters, they were obligated to do so in more specific terms.

[73] Todd Shipyards Corp. v. U. S., 69 F. Supp. 609 (D. C. Maine 1947); The S. S. Samovar, 72 F. Supp. 574 (D. C. N. D. Calif. 1947); Sieracki v. Seas Shipping Co., Inc., 149 F. 2d 98 (3rd Cir. 1945); *aff'd.*, Seas Shipping Co., Inc. v. Sieracki, 328 U. S. 85, 66 Sup. Ct. 872 (1946).

[74] 344 F. 2d 739 (4th Cir. 1965).

[75] *Id.* at 745. *Accord*: The Wonder, 79 F. 2d 312 (2d Cir. 1935), where a contractor was held liable for negligently laying a power cable across a draw bridge. Injury occurred five months after completion and acceptance.

Further support for the Whorton decision is found in Moran v. Pittsburgh-Des Moines Steel Co., 166 F. 2d 908 (3rd Cir. 1948). Following the East Ohio Gas catastrophe in which a faulty cylinder of liquified natural gas gave way, an action on behalf of the deceased's estate was instituted against the designing engineers and builders. This court held that a good cause of action had been stated on the questions of negligent construction raising the defendant's liability following completion and acceptance. Said cause should be submitted to the jury.

> "One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others within or without the land 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 stated in (Restatement, Torts) §§ 394 to 398, 403-404 as determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others." *Id.* at 916.

[76] Strandholm v. General Construction Co., 235 Ore. 145, 382 P. 2d 843 (1963).

of privity of contract between plaintiff and defendant was no defense.[77] It was believed that as much liability should apply to the contractor as the courts currently apply to a manufacturer under *MacPherson.*[78] If there were any intervening causes between the negligent work and injury, it would be up to the jury to determine whether the original tortfeasor should thereby be absolved of liability.[79]

A companion Oregon case[80] involved property damage one and one-half years after acceptance of a newly-constructed grocery warehouse. The insurance company, having paid for the damages, proceeded successfully against the general contractor and sprinkler system sub-contractor. The affirming court stated:

> A builder owes the other party to his contract a contractual duty to construct the building in a good, workmanlike manner. He also owes those who foreseeably will use the building a duty not to build into the building defects that will cause harm to the users. The probability of harm resulting from pouring concrete walls on a water pipe without protecting the pipe is not so remote that we can rule out, as a matter of law, the duty to guard against such harm.[81]

Joinder of parties defendant and their liability for a faulty terrazzo entranceway into a retail store were the issues in *Prost v. Caldwell Store, Inc.*[82] Judge Musmanno, in granting a joinder of the owner-contractee with the general and sub-contractors, refused to follow the old rule of non-liability because to do so would result in an absolution of those building contractors who were the most flagrant violators of the duty not to create a lurking danger.[83] That duty is blatantly violated

---

[77] *Id.* at 849. *Accord,* Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A. 2d 517 (1949); American Reciprocal Insurers v. Bessonette, 235 Ore. 507, 384 P. 2d 223, 385 P. 2d 759 (1963).

[78] "It is difficult to see any distinction between a person who manufactures goods of a particular kind for general sale to the public, such as an automobile manufacturer, and one who builds or manufactures a particular chattel made for a precise use. In fact, when one builds for a particular use and knows how and by whom the product will be used the matter of foreseeability would seem to be more acute than would be true of one who manufactures for general use and for many purposes. It appears futile to determine liability by attempting to find if a particular function were that of a contractor or a manufacturer. . . . It would appear better to determine liability by conduct, not by a label to be attached to the actor." Strandholm v. General Construction Co., *supra* n. 76 at 848.

[79] *Id.* at 849-850. Also, American Reciprocal Insurers v. Bessonette, *supra* n. 77.

[80] American Reciprocal Insurers v. Bessonette, 235 Ore. 507, 384 P. 2d 223, 385 P. 2d 759 (1963), *aff'd.* 241 Ore. 500, 405 P. 2d 529 (1965). The first reported decision denied as a defense lack of privity of contract between the contractor and the corporate tenant. It also stressed the importance of lapsed time between the acts and the damage, i.e., intervening cause, as a jury question.

[81] *Id.,* 405 P. 2d at 532.

[82] 409 Pa. 421, 187 A. 2d 273 (1963). Owner is often joined where his conduct is doubtful under issue of causation.

[83] *Id.* at 276, where it is alleged that faulty material, workmanship, and method of construction created an overly slippery terrazzo public walk-way. *Accord,* Bisson v. John B. Kelley, Inc., 314 Pa. 99, 170 A. 139 (1934).

when any defendant fails to guard against a foreseeably dangerous condition.[84]

Texas overruled the completion and acceptance rule in a well reasoned case[85] involving abandoned and unmarked post-holes along a highway. It was reasoned that there was no logic behind a rule which pinned liability on a contractor before completion and eliminated it the day after.

> The retention of the "accepted work" doctrine would inevitably yield the same unwieldly results as have come about in virtually every other jurisdiction that has formally adhered to the rule. The rule eventually becomes enveloped by complex exceptions to cover such situations as nuisance, hidden danger, and inherently dangerous conditions. The result would be that in each case, after having first decided that there was an acceptance of the work, we would then have to decide issues involving all the various exceptions to the rule and in case any exception were found applicable, the basic issues of negligence and proximate cause would still remain for consideration.[86]

No better statement of the old rule's inadequacies could be made. It will mark our transition into an analysis of Ohio law.

Ohio

Adherence to the majority rule of non-liability after completion and acceptance[87] has meant that only rarely has an injured third party recovered under negligence principles; and then, only from the property owner. For instance, in a 1930 appellate case,[88] a factory owner was found liable for permitting a one-sixteenth inch projection to exist on the edge of one step of its stairway which had been rebuilt and accepted six days prior to the accident. Adjudged a dangerous condition, liability was based upon acceptance of the defective work and failure to correct while it existed.

---

[84] *Id.* at 277. *Accord,*

> "Even though the owner (of the premises) actually had accepted the work, the defendant still owed a 'social-legal' duty to users of the sidewalk and he was properly charged with negligence in failing to anticipate and guard against a foreseeable dangerous condition created by him." (Cement contractor completes a sidewalk with obstruction injurious to a pedestrian.) Bastl v. Papale, 142 Pa. Super. 33, 15 A. 2d 476, 478 (1940).

[85] Strakos v. Gehring, 360 S. W. 2d 787 (Tex. 1962). The holes were 3 feet deep and covered by grass and weeds. Those involved in the injury happened to be near a well-traveled farm access gate.

[86] *Id.* at 791.

[87] Sumner v. Lambert, 96 Ohio App. 53, 121 N. E. 2d 189 (1953), where a trenching subcontractor was not liable for an injurious cave-in following his completion and its acceptance by the general contractor because the total circumstances of the situation did not fall within an exception to the general rule of non-liability. See also, 28 Ohio Jur. 2d, Independent Contractors § 35.

[88] Toledo Factories Co. v. Stapleton, 8 Ohio L. Abs. 121 (1) (Ct. App. 1930).

The *MacPherson* Doctrine with the latent defect concept has been adopted and applied but only as to chattels.[89] This has meant that knowledge of a defect will be inferred from a manufacturer's awareness of accidents involving his products.[90] Once a chattel becomes incorporated into building construction, the above rules are adhered to strictly with the result that real property equipment is controlled by chattel doctrines contorted to fit the situation.

In the 1966 case of *Lonzrick v. Republic Steel Corp.*[91] an allegedly defective steel roof joist which was secured in place to the horizontal structural steel girders comprising the erected building framework was characterized as a chattel. The Ohio Supreme Court, promptly applying products liability concepts, recognized three possible causes of action: (1) in tort for negligence, (2) in contract, and (3) in tort for breach of a representation of merchantable quality and fitness for intended use.[92] Because this case involved an employee of a sub-contractor against the steel manufacturer, the court had to resort to the *Toni Home Permanent* case[93] to overcome the privity concept[94] inherent in action #3. It went on to say that

> prior to the time of the recognition of an action for breach of warranty based on contract, there existed the action for breach of warranty in tort. This "kind of warranty" arose not out of a contract of sale but out of the duty of a manufacturer or seller of a product to protect the person consuming or using that product in the ordinary way in which it was intended to be used from the harm of injury to person or property caused by a defect in the product. It is a failure to distinguish between these two different kinds of warranties that has caused confusion in the law, and, in our modern-day mass-production and mass-distribution industrial system, this has resulted in some of the unjust technical decisions based upon outmoded and irrelevant concepts of privity.[95]

---

[89] 48 Ohio Jur. 2d, Sales § 157. See also Burns v. Pennsylvania Rubber & Supply Co., 117 Ohio App. 19, 189 N. E. 2d 645 (1961). This case involved the explosion of a service station hydraulic lift. The defendant was the retailer and manufacturer of the lift mechanism.

[90] Findlay Brewing Co. v. Bauer, 50 Ohio St: 560, 35 N. E. 55 (1893).

[91] 6 Ohio St. 2d 227, 218 N. E. 2d 185 (1966).

[92] *Id.* at 229-230.

[93] Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N. E. 2d 612 (1958).

[94] Lonzrick v. Republic Steel Corp., *supra* n. 91 at 233-236. *Accord,* Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N. E. 2d 583 (1965), which extended the tort action based on breach of warranty from personal injury to property damage.

[95] Lonzrick v. Republic Steel Corp., *supra* n. 91 at 233-234.
The warranty concept based on contractual principles has been codified in the Uniform Sales Act and Uniform Commercial Code. However, the trend has been away from these in order to re-establish the tort action for breach of warranty.

> "The recognition of such a right of action rested on the public policy of protecting an innocent buyer from harm rather than on the ensuring of any contractual rights." Haman v. Digliani, 148 Conn. 710, 716, 174 A. 2d 294, 296 (1961).

Note that the words "duty of a manufacturer . . . to protect the person . . . using that product in the ordinary way in which it was intended to be used from the harm of injury to person or property caused by a defect . . ." convey the same duty concept applied to builder-vendors in the previous section. It is a tragicomedy that our highest court, so close to an outright statement of the trend, labors over such a pronouncement about a "chattel" affixed to the land.

The extent of the warranty implied in the sale was held to stem from the term good and merchantable quality: that defendant's product was fit for the ordinary purposes for which such product was to be used.[96] Because of the above, plaintiff had stated a good cause of action under breach of warranty.[97] If he decided to take his case to a jury the elements for a prima facie case would be:

(1) that the joist was defective,

(2) that it was defective at the time the defendant-manufacturer sold it,

(3) that such defect caused the collapse while it was being used for the ordinarily intended purpose,

(4) that the defect was the direct and proximate cause of plaintiff's injury, and

(5) that plaintiff's presence was in a place which defendant could have reasonably anticipated.[98]

Since there had been no trial, the three-man dissent[99] concentrated its objection upon the nearly strict liability this decision imposes; a development in other jurisdictions which have so interpreted this warranty.[100]

---

[96] Lonzrick v. Republic Steel Corp., *supra* n. 91 at 235-236. Ohio Revised Code § 1302.27: "Goods to be merchantable must be at least such as . . . are fit for the ordinary purposes for which such goods are used," was discussed, but its influence on the decision is debatable.

[97] "The petition in this case states a good cause of action grounded in tort, based upon a breach of the representations which are implicit when a defendant manufactures and sells a product, which if defective, will be a dangerous instrumentality." *Id.* at 240.

[98] *Id.* at 237. Any paucity of evidence for elements (1) and (2) would necessitate resorting to the *Res Ipsa Loquitur* Doctrine.

[99] *Id.* at 240-252.

[100] "In imposing liability upon manufacturers to ultimate consumers in terms of implied warranty even though no privity exists, the courts have used a convenient legal fiction to accomplish this result. Ordinarily, there is no contract in a real sense between a manufacturer and an expected ultimate consumer of his product. As a matter of public policy, the law has imposed on all manufacturers a duty to consumers irrespective of contract or of privity relationship between them. The search for correct principles to delineate manufacturer's responsibility to consumers has found expression in the doctrine of tort and strict liability. The 'strict tort liability' doctrine is 'surely a more accurate phrase' than breach of implied warranty of suitability for use." Mitchell v. Miller, 26 Conn. Sup. 142, 214 A. 2d 694, 697 (1965). *Accord,* Wights v. Staff Jennings Inc., 241 Ore. 301; 405 P. 2d 624, 629 (1965); Goldberg v. Kollsman Instrument Corp., 12 N. Y. 2d 432, 437, 240 N. Y. S. 2d 592, 191 N. E. 2d 81 (1963).

Accompanying this growth is the test of foreseeability,[101] the same test applied to contractors under the new trend. As we learn to recognize how inadequate and strained the old concepts have been, the sooner will our courts overcome their timidity to apply negligence concepts of duty of care and foreseeability to cases like *Lonzrick*.

Could Ohio develop its own contractor liability rule without lifting the *MacPherson* lid further? Yes, under a progressive expansion of an exception to its prevailing rule of non-liability. For example, a District of Columbia court[102] held a builder-vendor liable for his negligent construction which was the proximate cause of injury to the vendee-owner who fell from his exterior wooden stairway three months after taking possession. It was established that the defendant had inadequately and defectively attached the bottom of these stairs to a concrete platform so that as the earth settled, the platform and stairs became separated, causing the latter to hang and swing loosely. This liability concept, encompassing the vendee and his invitees, was couched in terms of undiscoverable defect but without relying on *MacPherson*.[103]

Is there an easier method without distorting logic with expanded exceptions? Has a doctrine placing liability upon the building contractor ever been analyzed in Ohio? It clearly was in 1948 in *Moran v. Pittsburgh-Des Moines Steel Co.*[104] This court, after establishing that the *MacPherson* Doctrine had been adopted and applied to chattels[105] and extended beyond the ultimate consumer to those reasonably within its

---

101 "The trend toward applying the doctrine of strict liability in the case of an injury arising from the manufacture of a product which may be unreasonably dangerous and from which the likelihood of injury arising from its use is reasonably foreseeable is expanding. Foreseeable or reasonable anticipation of injury from the defect is becoming the test. Reliance on representations or notice of injury are no longer absolute conditions precedent." Mitchell v. Miller, *supra* n. 100 at 698. This case indicates an abandonment of contract and sales principles for establishment of tort liability.

102 Caporaletti v. A.-F. Corp., 137 F. Supp. 14 (D. D. C. 1956), *rev'd on other grounds*, 240 F. 2d 53 (D. C. Cir. 1957).

103 ". . . this court will adopt and apply the principle that a builder who defectively constructs a house, is liable to the purchaser or any other invitee, for personal injuries sustained by the latter, if the defect could not have been discovered on inspection by the ordinary man in the street. In this case, the builder must be charged with knowledge of his own negligence. The defect was of such a character that only a person skilled in the details of building construction could have discovered it and realized its significance. Under the circumstances, the court is of the opinion that the builder and vendor should be held liable for personal injuries caused to the purchaser, or any invitee as a result of this negligence." *Id.* 137 F. Supp. at 19.

On appeal, this decision was reversed and remanded to the lower court for trial on the grounds of error in failure to instruct the jury on negligence, especially the element of proximate cause.

104 166 F. 2d 908 (3d Cir. 1948), *cert. den.*, 334 U. S. 846, 68 Sup. Ct. 1516 (1948) involving the negligent design and construction of a liquified natural gas storage cylinder which exploded 13 months after completion and acceptance.

105 White Sewing Machine Co. v. Feisel, 28 Ohio App. 152, 162 N. E. 633 (1927); Dow Drug Co. v. Neiman, 57 Ohio App. 190, 13 N. E. 2d 130 (1936).

ambit of use,[106] could not find a case applying the Doctrine to real estate construction. Therefore, it had to rely on the *Restatement*[107] when it said

> The Ohio decisions cited and discussed in this opinion cite, quote, and follow fully the analysis of the problem of liability as it is set out in the *Restatement of Torts*. We have no doubt that an Ohio court confronted with the question would, in accordance with the development of the law, shown in its previous decisions, extend the liability of the manufacturer to negligence involved in building a structure even though that structure was affixed on another's land.[108]

A concurrent cause of action, founded upon the same catastrophe, decided in Pennsylvania, illuminates this new extension with a degree of logic brilliant and prophetic for its grasp of the basic concept.

> [I]t would obviously be absurd to hold that a manufacturer would be held liable if negligent in building a small, readily movable tank which would undoubtedly be a chattel, but not in building an enormously large and correspondingly more potentially dangerous a one that legalistically was classified as realty. The principle inherent in the *MacPherson v. Buick Motor Co.* case and those that have followed it is that one who manufactures and delivers any article or structure with the knowledge that it will be subjected to use by others, must, for the protection of human life and property, use proper care to make it reasonably safe for such users and for those who may come into its vicinity; certainly the application of that principle cannot be made to depend upon the merely technical distinction between a chattel and a structure built upon the land.[109]

Regardless of its wisdom, regardless of the subsequent case opportunities, Ohio has lacked the jurisprudential spirit to extend *MacPherson* to contractors through the logic of *Moran*. It had a factually perfect opportunity in a 1959 case[110] involving a defective fire escape on which an employee of a roofing contractor was injured. Although the jury found the fire escape contractor and building owner guilty of negligence, which was the proximate cause of the collapse, the court would not take the state precedents farther than they had previously gone.

> On the first question [privity of contract], the court applied the law as laid down by the Court of Appeals of New York in the case of *MacPherson v. Buick Motor Co.* . . . As to the second point, with reference to the lapse of time between the installation and the accident, that question was submitted to the jury as a question of fact.

---

106 Gilbride v. James Leffel & Co., 47 N. E. 2d 1015 (Ohio App. 1942), involving negligent manufacture of a boiler; White Sewing Machine Co. v. Feisel, *Ibid.*

107 Restatement, Torts §§ 385, 394 to 398, 403, 404 (1934).

108 Moran v. Pittsburgh-Des Moines Steel Co., *supra* n. 104 at 916.

109 Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A. 2d 517, 533 (1949).

110 Cornett v. Ficks Reed Co., 87 Ohio L. Abs. 567, 172 N. E. 2d 183 (1959), *affirmed as to defendant contractor*, Cornett v. Wm. Lang & Sons Co., 175 N. E. 2d 105 (Ohio App. 1960).

> The doctrine of the *MacPherson* case has never been squarely decided by the Supreme Court of this state to be the law of Ohio.[111]

This, then, represents Ohio's uncertain and indefinite protection of the third party from building contractor negligence. How does the vendee fare under the same problem?

The most exhaustive and exemplary decision for this analysis is *Mitchem v. Johnson.*[112] Here, a vendee is seeking property damages from his home-builder-vendor for poor workmanship and construction causing roof leaks, flooding, and inoperative septic tank and toilets. The flooding and inoperative sewage system were caused by the builder's failure to install subterranean drain tiles which would have compensated for the low topography of the lot. The leaking was from improper construction with inferior roofing and insulating materials, all conditions undetectable at the moment of deed conveyance.

In a 7 to 0 decision, the Ohio Supreme Court affirmed the appellate reversal of the lower court holding for the plaintiff vendee. It remanded the case for trial, not on warranty grounds, but upon the builder's reasonable workmanlike conduct under all the circumstances.[113] These jurists evolved a most liberal decree by their resort to tort phraseology of duty of care and hidden defect.[114] It is extraordinarily similar to the *MacPherson* trend and may presage the foundation necessary for a change.

The concept of "implied warranty of fitness for intended use" was specifically not applied[115] because the court refused to go beyond the terms of the express warranties and would not extend any warranty beyond the time period intended. However, it is this warranty which is the

---

111 Cornett v. Ficks Reed Co., *supra,* n. 110, at 185-6.

112 7 Ohio St. 2d 66, 218 N. E. 2d 594 (1966).

113 "The trial court confused the operative effect of a warranty, even though implied by law, with the duty historically imposed by law upon all persons that they measure their conduct by that of the ordinarily prudent person under all the circumstances, which include the risk of harm from the natural and probable consequences of the conduct. We do not understand that a builder of structures on real estate is relieved of that duty any more than any other person in whatever capacity he may act." *Id.* at 72.

Defendant, on retrial, is to be permitted to take to the jury evidence of his good workmanship and use of proper materials having taken into consideration the risks of harm within the area.

114 "A duty is imposed by law upon a builder-vendor of a real-property structure to construct the same in a workmanlike manner and to employ such care and skill in the choice of materials and work as will be commensurate with the gravity of the risk involved in protecting the structure against faults and hazards, including those inherent in its site. If the violation of that duty proximately causes a defect hidden from revelation by an inspection reasonably available to the vendee, the vendor is answerable to the vendee for the resulting damages." Paragraph 3 of Syllabus (statement of law), Mitchem v. Johnson, *supra* n. 112.

115 Mitchem v. Johnson, *supra,* n. 112, at 70. *Contra,* Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N. E. 2d 819 (1957), which involved defective sewage lines in a newly completed residence. The builder-vendor was held liable under the implied warranty of fitness for intended use.

most appropriate in those cases where completion follows a signed purchase contract. A well-reasoned exposition of this appeared in the 1966 decision of *Robertson Lumber Co. v. Stephen Farmers Cooperative Elevator Co.*[116]

> This we believe to be an appropriate case for extending to construction contracts the doctrine of implied warranty of fitness for the purpose, under circumstances where (1) the contractor holds himself out, expressly or by implication, as competent to undertake the contract; and the owner (2) has no particular expertise in the kind of work contemplated; (3) furnishes no plans, design, specifications, details or blueprints, and (4) tacitly or specifically indicates his reliance on the experience and skill of the contractor, after making known to him the specific purposes for which the building is intended.[117]

Once applied these four factors would establish an expanded sphere of builder liability with greater protection for the innocent vendee. But the *Mitchem* court, not being so inclined, justified its denial of implied warranty by resurrecting a concept which insures the vendee's impotence and constricts the builder's liability into a nearly impregnable sanctuary.

> [T]he doctrine of *caveat emptor* is so ingrained in our customary real estate transactions that few, if any, attempts have been made to pierce the shield of protection from specious claims of defect which it affords to vendors, not only of older buildings but of newly completed structures. It may also indicate that real estate buyers generally experience little difficulty in securing express warranties or guaranties if they are insistent. . . .
>
> In any event, the rule of *caveat emptor* is firmly anchored in the fact that the purchase of real estate is invariably preceded by a lengthy period of inspection, consideration and negotiation. One does not purchase land under conditions in any way similar to the purchase of home permanents (citation), cooking appliances (citation), soap (citation), or electric blankets (citation).[118]

With arch conservatism we have stepped back into the 19th century to deny every warranty except those expressed. Unequivocally, this decision tells the buying public that it is too bad that they cannot go over an entire structure in a Sherlock Holmes fashion (as they do with cooking appliances!) or that they can never avoid problems with building

---

116 143 N. W. 2d 622 (Minn. 1966), which involved the faulty construction of a grain storage building.

117 *Id.* at 626. See Markman v. Hoefer, 252 Iowa 118, 123, 106 N. W. 2d 59, 62 (1960), which involved improper warehouse construction:

> "In building and construction contracts, in the absence of an express agreement to the contrary, it is implied that the building will be erected in a reasonably good and workmanlike manner and will be reasonably fit for the intended purpose."

118 Mitchem v. Johnson, 7 Ohio St. 2d 66, 71-72, 218 N. E. 2d 594, 598 (1966); See Shapiro v. Kornicks, 103 Ohio App. 49, 124 N. E. 2d 175 (1955), wherein the plaintiff-vendee inspected the unfinished home with an experienced carpenter.

construction. True as this may be, why perpetuate it at the vendee's expense?

> [T]o apply the rule of *caveat emptor* to an inexperienced buyer and in favor of a builder who is daily engaged in the business of building and selling homes, is manifestly a denial of justice.[119]

This was said by a court which permitted a vendee to rescind his contract because the home was unsuitable for habitation. It did so by invoking the implied and minimizing the express warranties.

> [A] buyer who has no knowledge, notice, or warning of defects, is in no position to exact specific warranties. Any written warranty demanded in such a case would necessarily be so general in terms as to be difficult to enforce.[120]

Schipper v. Levitt & Sons, Inc.[121] went further and put *caveat emptor* into the modern context of mass sales through mass advertising. Under these conditions, the buyer can no longer carefully inspect or avoid the high pressure tactics and form contracts.[122]

> When a vendee buys a development house from an advertised model . . . he clearly relies on the skill of the developer and on its implied representation that the house will be erected in reasonably workmanlike manner and will be reasonably fit for habitation. He has no architect or other professional advisor of his own, he has no real competency to inspect on his own, his actual examination is in the nature of things, largely superficial, and his opportunity for obtaining meaningful protective changes in the conveyancing documents prepared by the builder-vendor is negligible. If there is improper construction such as a defective heating system or a defective ceiling, stairway and the like, the well-being of the vendee and others is seriously endangered and serious injury is foreseeable. The public interest dictates that if such injury does result from the defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic

---

119 Bethlahmy v. Bechtel, 415 P. 2d 698, 710 (Idaho 1966).

120 *Id.* at 707; See also, Bearman, Caveat Emptor in Sales of Realty-Recent Assaults upon the Rule, 14 Vand. L. Rev. 541, 574 (1961):

> "The vendee's strongest argument is reliance. He is admittedly unskilled in the mysteries of house construction and must therefore rely heavily upon the superior skill and training of his builder-vendor. Inspection will be of little use, . . . in protecting the vendee, both because of the expense and because the defects are usually hidden. Though the vendor-vendee relationship may not be technically a fiduciary one, the trust placed in the vendor coupled with the relative helplessness of the vendee makes it one, . . . on which the law should impose that high standard."

Support for the above line of thinking is found in 7 Williston, Contracts §§ 926, 926 (A) (3d ed. 1963). Advocating an exception to *caveat emptor,* Prof. Jaeger stated ". . . it would be much better if this enlightened approach were generally adopted with respect to the sale of new houses for it would tend to discourage much of the sloppy work and jerry-building that has become perceptible over the years." § 926(A) at 818.

121 44 N. J. 70, 207 A. 2d 314 (1965).

122 *Id.* at 324-325.

position to bear the loss rather than by the injured party who justifiably relied on the developer's skill and implied representations.[123]

Neither can he protect himself through his deed.[124] Faced with this environment, it is time that Ohio realized that its primitive doctrine cannot cope with contemporary issues.

Now it cannot be overlooked that an impenetrable status has been welded around the building contractor. Unknowing vendees must pierce the sheaths of warranty and *caveat emptor,* then try to fit their cause into one of the numerous completed work exceptions, of which there are as many variants as inventive legal minds. And, the third party is as impotent when confronted with the completion and acceptance bulwark.

Thus a third party, if within the protected class, is forced to proceed against the owner-vendee for a breach of duty involving a condition originally created by the builder. This course is completely absurd where the vendee can recover because the implied warranty survives the deed. The duty of care concept presupposes that a vendee in possession knows of the harmful condition and has the power to carry out corrections. But the opposite is true where the complexities of the defect mix with ignorance to make it unrecognizable or hidden. Therefore, it is illogical to impose liability for harmful defects the vendee has not expressly assumed, over which he exercises no conscious control, and for which the builder is impliedly liable under warranty. Giving a right of recovery to the vendee is to acknowledge that he is not the primary tort-feasor for a condition that was harmful to a third party.

It is time we recognized these conditions and the builder's defenses for what they are: illogical and unjust. By enforcing them, the courts have impliedly encouraged negligent work. Only through an ascendancy

---

[123] *Id.* at 325-326; *Accord:*

"Conditions have radically changed since the origin of the general common-law rule. Homes are being constructed on a large scale by persons engaged in the building business for the purpose of selling them to individual owners. The ordinary purchaser is not in a position to discover a latent defect by inspection, no matter how thorough his scrutiny may be, because usually he lacks sufficient familiarity with the complexities of building construction and the intricacies of applicable regulations. He should be able to rely on the skill of the builder who sells the house to him. Otherwise he would be at the vendor's mercy. The realities of modern life necessarily lead to the conclusion that the builder should be liable for injuries caused by his negligence under such circumstances, either to the purchaser or to an invitee. Any other result would be unjust and intolerable. It would encourage unscrupulous builders who may be tempted to reduce their costs and increase their profits by palming off defective and inferior construction on their customers." Caporaletti v. A-F Corp., 137 F. Supp. 14, 16 (D. D. C. 1956); *rev'd on other grounds,* 240 F. 2d 53 (D. C. Cir. 1957).

[124] ". . . *caveat emptor* developed when the buyer and seller were in an equal bargaining position and they could readily be expected to protect themselves in the deed. Buyers of mass produced development homes are not on an equal footing with the builder-vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in a bill of sale." Schipper v. Levitt & Sons, Inc., *supra,* n. 121, at 326.

of the concept of the duty of care for completed construction will we right the tipped scales of justice.

Projection

Hopefully, the time is not distant when the ancient rule of completion and acceptance, together with its intricate exceptions, will be displaced by a "General Rule of Liability" under the new trend evolved from the *MacPherson* Doctrine. It will be easier to apply, more narrowly construed,[125] and inherently curbed by the burden of the prima facie case.

Adoption can be expected to have several manifest effects. While forcing the contractor to absorb and spread out the costs of injury into his future projects, it may ignite a countervailing effort toward raising the quality of construction. The building industry, severely constrained by its unions, has been the last hold-out against new methods and quality control standards. Yet, only through unitized materials, automatic tools, and pre-assembled components can it institute safety controls[126] commensurate with the risks involved. This must be recognized as one answer to *MacPherson.*

Another possibility would be repeated returns of the contractor to the completed project for thorough examination and repairs. This would eliminate those defects uncovered through use, but is extremely expensive. For the smaller contractors, whose cost and profit structure is very narrow in today's overly competitive market, such a step would be prohibitive. Protection in the form of extended coverage insurance, similar to that of manufacturers,[127] may be the only immediate answer.

During the period of transition the legal community should concentrate its attention upon the landowner's defense. One device is the in-

---

[125] Thornton & McNiece, Torts (American Survey), 33 N. Y. U. L. Rev. 165, 175 (1958). The liberality of the multiple exceptions under the rule of non-liability is so widespread that the rule itself is more nearly a categorizing tool for the vast list of cases under each exception. Nothing will stop this short of a complete redefinition of the rule within a modern context.

[126] Gas-fired machinery and electrically-powered built-ins should have safety inspections before and after installation; not simply a working test. All gas, water, and electrical connections must be tested by modern mechanical methods common in manufacturing processes. Continual on-site inspections of critical points of stress and weight-bearing should be conducted by the engineer, architect, and general contractor to verify durability, trustworthiness, and completion. Approval by the building inspector, often the only test, is no longer adequate. His municipal code and ability are far below the standard of care being invoked.

A contractor cannot exculpate himself for negligent construction by relying on the building inspector's approval of concrete caissons. Fireman's Insurance Co. v. Indermill, 182 Cal. App. 2d 339, 6 Cal. Rptr. 469 (1960).

[127] 7A Appleman, Insurance Law & Practice § 4508 (1962). Although such insurance must protect the manufacturer against millions of nationwide users, the liability period would be circumscribed by the use-life of the product. Whereas, although the contractor's completed product may have a limited number of users, it will exist for 25 to 40 years.

demnification agreement with the contractor. Of greatest importance in drafting is the inclusion of an expressed right of recovery for negligently created latent defects;[128] otherwise, the terms will be strictly and narrowly construed. Also there would be no rights of indemnity involving an owner's non-delegable statutory duty,[129] his actual or constructive notice of the existence of a dangerous condition,[130] or for his conduct which amounts to legal acquiescence therein.[131] Insurance for the owner in possession should be a logical consideration since the builder-vendor will have divested himself of all rights in the property, including reentry for either inspection or repair.[132]

Attention is needed on the statute of limitations, where a redefinition would clarify the uncertainty about the duration of liability.[133] There will always be doubts about this area of mixed tort-contract-property concepts when cases are decided against a contractor seven years after completion.[134] It has been suggested[135] that the builder-contractor institute a one year warranty period for defective construction and a six year statutory period for uncovering latent defects. There is much logic in this, especially where a practitioner must produce evidence of due care even after five years of constant use.

The profession should not overlook the irony of the problems eliciting such projected changes. These and other latent defects will be uncovered only after the new trend has been adopted.

---

[128] Inman v. Binghamton Housing Authority, 3 N. Y. 2d 137, 164 N. Y. S. 2d 699, 704-705 (1957). Negligent elevator repairs present a complex contract terminology problem. See Beinhocker v. Barnes Development Corp., 296 N. Y. 925, 73 N. E. 2d 41 (1947).

[129] Glasgow v. Mable Drakes, et al., 6 (N. Y.) Misc. 2d 830, 161 N. Y. S. 2d 635 (Sup. Ct. Kings Co. 1957); Rufo v. Orlando, 309 N. Y. 345, 130 N. E. 2d 887 (1955).

[130] Harrington v. 615 West Corp., 1 App. Div. 2d 435, 151 N. Y. S. 2d 564 (1956), *modified,* 2 N. Y. 2d 476, 141 N. E. 2d 602 (1957).

[131] Such acquiescence puts the landowner in *pari delicto* with the active tort-feasor, Stabile v. Vittullo, 280 App. Div. 191, 112 N. Y. S. 2d 693 (1952).

[132] ". . . insurance has been an important factor in many of the cases involving extensions of tort liability. It is extremely unlikely, however, that after selling the property a vendor would continue insurance coverage against liability such as plaintiffs seek to visit upon . . . [defendant] in this case. . . . On the other hand, the person who does own the property can conveniently insure himself against liability to third persons." Sarnicandro v. Lake Developers, Inc., 55 N. J. Super. 475, 151 A. 2d 48, 53 (1959).

[133] "As to both of these exceptions under which the vendor is held liable for injuries occurring after possession is transferred, it seems obvious that there must be some time limit upon the duration of the potential liability. A corporation, still in existence, can scarcely be required to pay for damages which occur a century after the grant. There are, however, very few cases which have considered the question. . . ." Prosser, Torts § 63 at 410 (3rd ed. 1964).

Accord, four years were too long as reasonable time for vendee to discover, Tri-Boro Bowling Center v. Roosevelt Eighty-Fifth St. Estates, 77 N. Y. S. 2d 74. (Sup. Ct. 1947); discovery of fraud, Pavelchak v. Finn, 153 N. Y. S. 2d 795 (Sup. Ct. 1956), *aff'd,* 6 App. Div. 2d 841, 176 N. Y. S. 2d 933 (1958).

[134] Hanna v. Fletcher, 97 App. D. C. 310, 231 F. 2d 469, 58 A. L. R. 2d 847 (D. C. Cir. 1956), *cert. den.,* 351 U. S. 989, 76 Sup. Ct. 1051 (1956).

[135] Note, 1963 Wis. L. Rev. 343.