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Harry M. Philo

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REVOKE THE LEGAL LICENSE TO KILL CONSTRUCTION WORKERS

HARRY M. PHILO*

INTRODUCTION

MORE than 2,700 construction workers are killed and 250,000 injured in the course of their employment annually in the United States.¹ This is a national disgrace which is caused primarily by the failure of lawyers, judges and legislators, as social architects, to meet their responsibility to fashion the law in such a way as to minimize the conflicts in construction and to prevent the hazards which exist in this industry from causing injury or death. The social responsibility for reducing the 2,700 deaths and 250,000 disabling injuries annually in construction lies not only with lawyers, judges and legislators, but primarily with the plaintiff's trial bar. This tragic toll is mute testimony to its past inadequacies and failures.

There is no reason for serious construction injuries and deaths. The owners who undertake construction carefully through outside contractors can minimize the risks which inhere in the operation. The duPont Corporation, for example, has had some two million construction workers on its projects in the last twenty years; if their

* Mr. PHILO received his J.D. from Detroit College of Law. He is a member of the Michigan Bar and is currently a partner in the law firm of Philo, Maki, Ravitz, Glotta, Adelman, Cockrel & Robb in Detroit. Mr. PHILO is a frequent lecturer on tort liability and is co-author of *LAWYERS DESK REFERENCE*.

1. This figure has increased since 1961 and the latest figures indicate that they may be higher than 2,700. See 1966 U.S. DEPT. OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 245. Another indication of the seriousness of the problem is that contract construction industries had frequency rates twice as high, and severity rates three times as high, as manufacturing. See 342 U.S. BUREAU OF LABOR STATISTICS REPORT, *INJURY RATES: BY INDUSTRY* 18 (1964-65).

accident rate determined the national total, there would only be 45 construction deaths and 4,300 injuries annually.²

Construction workers are injured and killed because of illogical, unwarranted and unconstitutional immunity granted to those who profit by unsafe construction: the owners, the contractors, the architects and engineers, and the distributors of unsafe equipment. Common law courts have failed to understand that construction accidents can be *eliminated*, but that their elimination is a sophisticated task and the courts' granting of immunity is the greatest single hindrance to construction safety. Further, the courts fail to perceive that they are incapable, legally and practically, of framing rules of behavior that amount to rules of law simply because they do not know anything about accident prevention in construction.

In many jurisdictions, the courts have denied plaintiffs due process and equal protection of the law by granting immunity from suit to employers of contractors, as to injuries suffered by employees of the contractor, while requiring the remainder of society to use due care. As soon as the courts adopt the simple common law rule which imposes on every person engaged in the prosecution of an undertaking an obligation to use due care or to govern his actions so as not to unreasonably endanger the person or property of others, then liability costs will exceed accident prevention costs on the graphs and safety will result.³

If our common law develops as it must and places legal liability on those whose lack of care causes construction injuries and death, then the death toll will be less than one hundred each year and the injury toll will decline to less than 10,000 annually. This has begun to happen.

In the past two years there have been several important decisions revoking the legal license of principals,⁴ architects,⁵ and insurance

2. See McElroy, *Specifying Safety in Contracts*, Nat'l Safety News, April, 1964, at 20.

3. For an analysis of how this safety will follow see *Graphic Trees Help Study of Reliability v. Cost*, PRODUCT ENGINEERING, Jan. 30, 1967, at 48.

4. *Hamilton v. Armstrong Cork Co.*, 371 F.2d 139 (5th Cir. 1967); *Associated Engineers Inc. v. Job*, 370 F.2d 633 (8th Cir. 1967); *Van Arsdale v. Hollinger*, 68 Cal. Rptr. 20, 437 P.2d 508 (1968); *McDonald v. City of Oakland*, 63 Cal. Rptr. 593 (1967); *Giarratano v. The Weitz Co. Inc.*, 259 Iowa 1292, 147 N.W.2d 824 (1967).

5. *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967); *Holt v. A.L. Salz-*

companies⁶ to kill construction workers by their adopting of inadequate safety specifications or allowing sloppy performance. In one instance, an appellate court approved punitive damages against an owner who knowingly adopted inadequate specifications, and who knowingly allowed negligent performance.⁷

In a recent case, the United States, as the landowner of a lighthouse in Muskegon Harbor, was held liable for the damages sustained by an independent contractor's employee who fell from the unguarded lighthouse platform.

The United States contracted with the Whittaker Electric Co. to repair a lighthouse located on a breakwater. Gowdy, one of Whittaker Electric's employees, had a number of jobs to perform in conjunction with the repairs, including assisting in the removal and replacement of the steel door of the machinery room (located in the lighthouse) at the beginning and end of each working day. The door was removed and replaced through the use of a chain hoist. . . . To operate the lift . . . Gowdy had to stand about one foot from the edge of the roof, lean forward toward the edge of the roof, and reach over his head with one of his hands to grasp the end of the ratchet hoist handle. The ratchet was about eighteen inches long. Because of his height, Gowdy was only able to reach approximately three inches of the handle of the ratchet. While in this position, Gowdy lost his balance and fell from the top of the roof to the concrete foundation below. Gowdy sustained serious injuries including comminuted fractures of both heels which caused, besides pain and suffering, hospitalization and treatment over an extended period of time, loss of earnings, and medical expenses.

The trial was held before the court without a jury. The court awarded damages of \$289,248.82.⁸

This case, *Gowdy v. United States*, is a landmark case because it is the first common law decision which states with clarity for all to read that an owner employing an independent contractor owes to employees of the independent contractor the duty of due care.

Also important is that the trial judge criticized "open sesame phrases" and "honorary degrees," pointing out that in situations where there is fault resulting in harm to another, some courts have excused the wrongdoer by holding that there was no duty owed by the wrongdoer to the injured party. However, what Judge Fox said

man & Sons, 88 Ill. App. 2d 306, 232 N.E.2d 537 (1967); Nauman v. Harold K. Beecher & Associates, 19 Utah 2d 101, 426 P.2d 621 (1967); Mallow v. Tucker, Sadler & Bennett, Architects & Eng., Inc., 245 Cal. App. 2d 245, 54 Cal. Rptr. 174 (1966).

6. Nelson v. Union Wire Rope Corporation, 31 Ill. 2d 69, 199 N.E.2d 769 (1964).

7. Hennigan v. Atlantic Refining Company and City of Philadelphia, 282 F. Supp. 667 (E.D. Pa. 1967).

8. 271 F. Supp. 733 (W.D. Mich. 1967), *rev'd* 412 F.2d 525 (1969).

in *Gowdy*, with caustic decisiveness, was simply a clarification of an early Michigan case involving negligent injury to an employee of an independent contractor by an owner's lack of care.⁹ Citing the earlier Michigan decision, he noted:

Justice Voelker's admonition to analyze all of the evidence in each case and to avoid uncritical application of general rules is particularly appropriate to the present case, since the thinking inherent in such "open sesame phrases" as whether a danger was obvious, or whether defendant controlled the employees of the independent contractor, or whether there was a duty owing plaintiff from defendant, could make for simple and swift resolution of this case, despite a multitude of facts and circumstances which militate to the contrary.

Some courts in situations where there is fault resulting in harm to another have excused the wrongdoer from liability by saying there was no duty owed by the wrongdoer to the injured party. . . .

It is important . . . to distinguish . . . between the problem of restricting liability to a negligent party, and the problem of restricting the liability of the defendant even though he was negligent. . . . This distinction . . . is one that is fundamental to an understanding of cases involving personal injuries for open and obvious danger.¹⁰

The United States was found liable in *Gowdy* because the court found: That the government, as a principal employing an independent contractor, had not as a matter of fact used due care; that the plaintiff was in the "target area of protection"; and that it was reasonably foreseeable that Mr. Gowdy could be injured by that lack of due care.

Although this article is intended to advocate a dramatic change in the law along doctrinal lines, following the *Gowdy* rationale, nevertheless the common denominator and policy goal prevalent throughout will be accident prevention. This policy of reducing job hazards and preventing injury and death will be analyzed in a historical perspective in order to show the reasons for the development of the principal's immunity in construction torts, and to posit arguments for its eradication in light of modern day conditions. An attempt will be made to show how duty as a tort concept has been used by those who would keep society in the dark ages and by those who are not capable of understanding, to thwart the development of any meaningful elimination of the construction negligence which causes injury and death.

Finally, a definitive statement of the law of liability will be sug-

9. *Johnson v. Spear*, 76 Mich. 139, 42 N.W. 1092 (1889).

10. *Gowdy v. United States*, *supra* note 8, at 739.

gested which might assist in bringing about a return to the liability that existed a century ago.

HISTORICAL DEVELOPMENT

The general rule as to the non-liability of an employer for physical harm caused to another by the act or omission of an independent contractor was the original common law rule. The explanation most commonly given for it is that, since the employer has no power of control over the manner in which the work is to be done by the contractor, it is to be regarded as the contractor's own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it.

The first departure from the old common law rule was in *Bower v. Peate*,¹¹ in which an employer was held liable when the foundation of the plaintiff's building was undermined by the contractor's excavation. Since that decision, the law has progressed by the recognition of a large number of "exceptions" to the "general rule."¹² They are so numerous, and they have so far eroded the "general rule," that it can now be said to be "general" only in the sense that it is applied where no good reason is found for departing from it. As was said in *Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co.*: "Indeed it would be proper to say that the rule is now primarily important as a preamble to the catalog of its exceptions."¹³

Most authorities¹⁴ contend that the theory of respondeat superior and the exceptions to that rule, of which the above is an example, are of very recent origin. The very early common law developed with the premise that an individual should not be responsible for another person's tortious conduct.¹⁵ This early immunity was compromised with the doctrine of respondeat superior, which emerged due to the

11. 1 Q.B.D. 321 (1876).

12. These exceptions are stated in the RESTATEMENT (SECOND) OF TORTS §§ 410-29 (1965).

13. 201 Minn. 500, 227 N.W. 226 (1937).

14. PROSSER, LAW OF TORTS 480-81 (3d ed. 1964).

15. "However, our common law when it took shape in Edward I's day did not, unless we are much misled, make masters pay for acts that they had neither commanded nor ratified. Had it done so, it would have 'punished' a man for an offence in which he had no part." II POLLACK & MAITLAND, THE HISTORY OF ENGLISH LAW 533-34 (2d ed. 1903), citing Bogode Clare's case (1290) Rot. Parl. i. 24.

recognition that the master could more easily compensate the plaintiff than his servant.¹⁶ The early Anglo-Saxon law declared this liability as absolute:

The doer of a deed was responsible whether he acted innocently, because he was the doer; the owner of an instrument which caused harm was responsible, because he was the owner, though the instrument had been wielded by a thief; the owner of an animal, the master of a slave, was responsible because he was associated with it as owner, as master. . . .¹⁷

The development of respondeat superior and its attendant outgrowth of employer immunity is a good example of common law judges being willing to compromise rules in order to satisfy public policy.¹⁸ The prevalent economic thought at the time was characterized by *laissez-faire* and the judicial encouragement of individualistic industrial enterprise whose burdens were made as light as possible in order to facilitate general expediency.¹⁹ As late as 1685, the common law judges were still following the medieval rule that the master was not responsible for the torts of his servant.²⁰ It was not

16. See Wigmore, *Responsibility for Tortious Acts: Its History-I*, 7 HARV. L. REV. 315, 330 (1894), for the discussion of the historical antecedents of the master's liability for harms connected with the servant. See also Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339 (1934) for an excellent analysis of the development of respondeat superior and the entrepreneur theory of liability.

17. See III WIGMORE, SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 480 (1909), cited in PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 463 (5th ed. 1956). Also included in presentation of the historical extract of early Anglo-Saxon liability is the following passage from the laws of Aethelred which indicate this rule of respondeat superior was flexible and not as harsh as would appear. "And always the greater a man's position in this present life or the higher the privileges of his rank, the more full shall he make amends for his sins, and the more dearly shall pay for all misdeeds; for the strong and the weak are not alike nor can they bear alike burden, any more than the sick can be treated like the sound. And, therefore, in forming a judgment, careful discrimination must be made between age and youth, wealth and poverty, health and sickness, and the various ranks of life, both in the amends imposed by ecclesiastical authority, and in the penalties inflicted by the secular law. And if it happens that a man commits a misdeed involuntarily or unintentionally; and likewise he who is involuntary agent in his misdeeds should always be entitled to clemency and better terms, owing to the fact that he has acted as involuntary agent." PLUCKNETT, at 464.

18. For a statutory development and trend in this direction, see POLLOCK & MAITLAND, *supra* note 15, at 533 n.1. The practical application and consequences of such a rule were effected by the circumstances surrounding the Industrial Revolution.

19. This theory is suggested by E.H. DOWNEY, HISTORY OF WORK ACCIDENT IMMUNITY IN IOWA (1912) and Walter F. Dodd, *Administration of Workmen's Compensation*, THE COMMONWEALTH FUND (1938) cited in I LARSON, WORKMEN'S COMPENSATION LAW 26 nn. c. 8 & 9.

20. *Kingston v. Booth*, Skinner 228, 90 Eng. Rep. 105 (1685). For a statement of the facts and holding of this case, see Wigmore, *Responsibility for Tortious Acts: Its History-II*, 7 HARV. L. REV. 383, 391 (1894).

until 1691 that the rule of respondeat superior was actually judicially enunciated. In *Boston v. Sandford*²¹ the issue was whether the owners of a ship were responsible for goods received by the master and spoiled by his negligence. Lord Holt declared that "[t]he owners are liable in respect of the freight and as employing the master; for whoever employs another is answerable for him, and undertakes for his care to all that make use of him."²² Holt was basing the employer's liability on the broadest base of convenience and general policy of social duty.²³

Although a distinction is ascertainable between the early rule of absolute liability for tortious conduct and the vicarious liability of an innocent master for unauthorized torts of his servant,²⁴ a sense of its harshness with respect to the business conditions of the time, and a desire to restrict its operation are mainly responsible for employer immunity. In 1799 the problem of an independent contractor was for the first time clearly presented in *Bush v. Steinman*.²⁵ In that case, *A*, having a house, contracted with *B* to repair it for a fixed sum. *B* then contracted with *C* to do the work, and *C* contracted with *D* to furnish the materials. The servant of *D* placed lime on the road in front of *A*'s premises, by reason of which plaintiff's carriage collided with the lime, injuring plaintiff. The court held that *A*, the owner, was liable in damages to plaintiff, although a satisfactory basis for the decision was not explicated. However, Chief Justice Eyre, alluding to an earlier decision, said:

A master having employed his servant to do some work, the servant out of idleness employed another to do it, and that person, in carrying into execution the orders which had been given to the servant, committed an injury to the plaintiff for which the master was held liable. The responsibility was thrown on the principal from whom the authority originally moved. This determination is certainly highly convenient and beneficial to the public. Where a civil injury of the kind now complained of has been sustained, the remedy ought to be obvious, and the person injured should have only to discover the owner of the house which was the occasion of the mischief not be compelled to enter into concerns between that owner and other persons, the inconvenience of which would be most heavily felt than any which can arise from a circuitry of action.²⁶

21. 91 Eng. Rep. 382, 2 Salk 440 (1691).

22. *Id.*

23. *Contra*, I BLACKSTONE, COMMENTARIES 430 (4th ed. 1914).

24. See Hayser, *The Basis of the Immunity of an Employer of an Independent Contractor*, 10 IND. L.J. 494, 495-6 (1935). The continuity of principle is evident in early English case law.

25. 1 Bos. & P. 404 (1799).

26. *Id.* at 408.

Justice Brooke added:

I am of the same opinion. He who has work going on for his benefit, and on his own premises, must be civilly answerable for the acts of those whom he employs. . . . He ought to reserve such control. And if he deprives himself of it, the law should not permit him to take advantage of that circumstance in order to screen himself from an action. . . . The person from whom the authority is originally derived is the person who ought to be answerable, and great inconvenience would follow if it were otherwise.²⁷

Although the struggle to find a legal principle upon which to base a decision is clearly evident, the judges in *Bush v. Steinman* denied the defendant immunity on the grounds of respondeat superior and that an owner of real estate is liable for damages resulting from work negligently done upon his land as well as off.

From 1826 through 1876, the English common law courts, troubled by the sweeping rule of *Bush* in which the principal was held liable on a respondeat superior doctrine for off-premises injuries, whittled away at the rule and gave immunity to the principal employing an independent contractor for off-premises injuries. After *Bush* two minor decisions²⁸ followed the rationale enunciated therein, but in 1826 in *Laugher v. Pointer*²⁹ the immunity of the owner was first developed. In that case the owner of a carriage who had hired horses and a driver from a livery stable was held not responsible for the negligent operation of the carriage by the driver.

The English bench in *Laugher v. Pointer* examined *Bush*, found it wanting in precedential vigor, and distinguished it factually. As a result of that decision, decisions which followed *Laugher* also distinguished *Bush* as being concerned only with injuries involving realty.³⁰ The *Bush* rationale was finally discarded and complete insulation was established in *Reedie v. London & N. W. Ry.*³¹ Baron Rolfes' decision in *Reedie* was simply that the employer could not be held liable on the principles of respondeat superior. What is of vital importance was his acknowledgement that the owner of land might

27. *Id.* at 409-10.

28. *Sly v. Elgley*, 6 Esp. 6 (1806), where a bricklayer who was employed to clean a sewer left open an excavation into which the plaintiff fell, and *Mathews v. West London Waterworks Co.*, 3 Compl. 403 (1813), where contractors laying pipes threw rubbish into street and stage coach was wrecked.

29. 5 B. & C. 547 (1826).

30. See Comment, *Responsibility for the Torts of an Independent Contractor*, 39 YALE L.J. 861, 863 n.9 (1930).

31. 4 Ex. 244 (1849).

be liable for damage caused by another not his servant. Such liability "must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others."³² Thus the employer was given full insulation and it was not until a quarter of a century later that the judges were able to make inroads upon it.

Moreover, the initial decision in which an employer was held liable was based not upon the existence of a responsibility enacted by statute. In *Ellis v. Sheffield Gas Consumer's Co.*,³³ in which plaintiff stumbled over a pile of stones left in a pathway by employees of an independent contractor, the work was illegal because no permit had been procured for its continuance. The court held the employer liable on the ground that the principal cause of the accident was the illegal act for which the defendant had contracted.

The courts, however, came to recognize that the liability of the principal had to be much broader and soon devised a number of exceptional situations wherein a general employer could not relieve himself from liability for negligent injuries by the simple means of employing an independent contractor. In *Pickard v. Smith*,³⁴ wherein a coal dealer negligently left open a coal hole, the doctrine was first promulgated that the duty of the employer in such a situation to take precautions was one he could not avoid by entrusting it to another. Mr. Justice Williams found that the defendant was under a duty to the plaintiff and asserted:

The defendant employed the coal merchant to open the trap in order to put in the coals; and he trusted him to guard it whilst open, and to close it when the coals were all put in. The act of opening it was the act of the employer, though done through the agency of the coal merchant; and the defendant, having thereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted; and the fact of his having intrusted it to a person who also neglected it, furnishes no excuse, either in good sense or law.³⁵

This rationale was followed by *Gray v. Pullen*³⁶ wherein the employer was held responsible for a contractor's negligence in filling a drain, the theory being that the act authorizing the defendant to break

32. *Id.* at 256.

33. 2 E. & B. 767 (1853).

34. 10 C.B. (NS) 470, 142 Eng. Rep. 535 (1861).

35. *Id.* at 480.

36. 5 B. & S. 970 (1864). For a list of English cases following the rationale of these decisions, see Jolowicz, *Liability for Independent Contractors in the English Common Law—A Suggestion*, 9 STAN. L. REV. 690, 693 n.18 (1957).

up the street provided that he must keep it in a safe condition. The final and most fruitful and forceful decision in negating employer insulation was *Bower v. Peate*,³⁷ in which an employer was held liable when the foundation of the plaintiff's building was undermined by the contractor's excavation. Chief Justice Cockburn placed the employer's responsibility upon the broad ground that:

*a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.*³⁸

The development of the law in America followed the two trends coinciding with the *Bush v. Steinman* and *Laugher v. Pointer* dichotomy. A number of early decisions held the employer responsible on the *ratio decidendi* that he was the "author" of the work.³⁹ However, the doctrine which was accepted as the prevailing view seemed to be influenced by the rationale of *Laugher v. Pointer*.⁴⁰ The incongruity in the development of the law is that *Bower v. Peate*, standing for the proposition that an employer is liable for injuries

37. *Supra* note 11.

38. *Supra* note 11, at 326 (emphasis added).

39. In *Lowell v. Boston & Lowell R.R.*, 23 Pick. 24 (Mass. 1839), the court stated that the employer was liable because "The work was done for their benefit, under their authority and by their direction. They are therefore to be regarded as the principals, and it is immaterial whether the work was done under contract for a stipulated sum or workmen employed directly by the defendant's at lay wages. This question was fully discussed and settled in the case of *Bush v. Steinman*." *Id.* at 31. In *Stone v. Cheshire R. Co.*, 19 N.H. 427 (1849), the plaintiff was injured by the blasting of a contractor hired by defendant. The court said: "Now in this case the soundness of the decision in *Bush v. Steinman* is not questioned nor is there any inconsistency between the two cases. . . . The railroad corporation made a contract with certain persons to construct a part of the railroad. . . . The defendants employed the persons that did the injury, and we are not aware that to such a state of facts the case of *Bush v. Steinman* and the other cases in accordance with it, have been held to be inapplicable, or their doctrine considered as unsound." *Id.* at 441-42.

40. In *Blake v. Ferris*, 5 N.Y. 48 (1851), the general rule was laid down that an employer is not liable for the tortious acts of an independent contractor or his servants, and *Bush v. Steinman* was repudiated as it was in England. However, just as in England, the American courts sensing the harshness of the rule in certain cases decided to qualify it with certain measurements, which in actuality reasserted *Bush v. Steinman*. A valuable and exhaustive summary of the New York cases in this area may be found in NEW YORK LAW REVISION COMMISSION REPORT, RECOMMENDATIONS AND STUDIES 411-688 (1939).

caused by the independent contractor's failure to use due care in the performance of work which is "inherently" or "intrinsically dangerous," has been given merely lip service by the American judiciary. A careful analysis of *Bower v. Peate* shows that the presumed fault aspect of the case—albeit to a lesser degree than the absolute liability theory of *Rylands v. Fletcher*⁴¹—limited the application of *Bower v. Peate* to certain details of the work, but, as so qualified, made it apply to all transactions wherever likelihood of harm to third persons was reasonably foreseeable. Chief Justice Cockburn's argument in *Bower* was as follows:

[The] case is therefore an authority for saying that where a work is being executed from which danger may arise to another, and it thereby becomes incumbent on the party doing or ordering it to be done to take measures to prevent damage resulting to others, he cannot divest himself of liability by transferring the duty to a contractor.⁴²

The "intrinsically dangerous" doctrine,⁴³ although applied as an exception to the general rule by most courts,⁴⁴ cannot be reconciled with the remaining language of *Bower v. Peate*. The concept of who was responsible to ensure prevention of injury was summarized by Cockburn in these words:

There is an obvious difference between committing work to a contractor to be executed from which, if properly done no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury, resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise.⁴⁵

An early Michigan decision, *Johnson v. Spear*,⁴⁶ followed *Bower v. Peate* in theory and held that:

As between the employer and his employees, it is the duty of the master to furnish suitable machinery, and to see that it is kept in proper repair, and he is bound to

41. 3 H.L. 330 (1868). See Steffen, *Independent Contractor and the Good Life*, 2 U. CHI. L. REV. 501, 505 (1934).

42. *Supra* note 11, at 329.

43. The first use of the concept "intrinsically dangerous" work seems to be in DILLION, *MUNICIPAL CORPORATIONS* 792 (1st ed. 1872).

44. For a collection of these decisions, see 41 CAN. L.J. 49, 159 (1905) and 66 L.R.A. 941 (1905).

45. *Supra* note 11, at 327.

46. 76 Mich. 139, 42 N.W. 1092 (1889).

exercise reasonable care to prevent accidents. His duty is not discharged by furnishing suitable machinery and appliances in the first instance, and fit and proper for carrying on the business, but he is in duty bound to see that they are kept so. He must exercise reasonable and proper watchfulness as to their condition, and guard against dangers liable to arise from ordinary wear and use from which they may become weakened or unfit for the purpose for which they are supplied. . . . The principles above enunciated apply to the relation of master and servant. It does not follow, however, that the defendant is not liable for injuries which may be received by those persons employed by his contractor to unload vessels at his dock. If the injuries result from the negligence of the defendant while work is being done upon his premises, and through his fault in not keeping them in a suitable and safe condition, he is liable to any servants of the contractor for injuries resulting to them from defects therein; not because there is any contract obligation between the parties, but arising out of his obligation or duty to provide safe appliances for the servants of the contractor to use, and to keep his premises upon which such servants are at work in a reasonably safe condition, whether the contract provides for it or not.⁴⁷

However, just as in England, so too in America, the overwhelming political, economic, and social objective of the early twentieth century was commercial exploitation, more euphemistically stated as "progress."⁴⁸ *Bower v. Peate* was forgotten. Most judicial authority was caught in the wave of expansion and was imbued with the ideas of individualism. Courts found it convenient to allow the contractor's business to thrive while on the other hand encouraging his employer by shielding him from liability. With these historical influences and case decisions in mind, we turn to an analysis of why the law of principals employing contractors has not developed in relation to modern day requirements thereby removing the immunity principle completely.

MODERN VIEW OF PRINCIPALS EMPLOYING CONTRACTORS

RULES IN EVERY JURISDICTION CLOUDED

When the early legislative attempts resulted in an alienation of the burden of industrial accident losses, it was assumed that the theory underlying the compensation acts would alleviate the onerous situation which existed at common law. Despite the rationale that the coverage would include only those within the statutory framework (those instances where employer-employee or master-servant

47. *Id.* at 142-43, 42 N.W. at 1092-93.

48. This development is described and analyzed in great detail by Arnold, *Theories About Economic Theory*, 172 ANNALS 26, 27 (1934).

relation is present) the general immunity of the principal was retained.

The statutory provisions apply only to those persons falling within clearly defined categories. While the acts themselves are specific in their definition of these categories, the great mass of litigation that has developed under these provisions resulted from the effort to apply the definition of a particular fact situation.

In twenty states⁴⁹ the principal employing a contractor is given immunity by a statute which makes him a "statutory employer" if the activity conducted by the principal is in the trade or business. In order to come within the test, a determination must be made as to whether the particular work resulting in the injury is directly connected with the commercial function of the "statutory employee" as opposed to activities which are ancillary or incidental to that commercial function.

49. New Mexico, Nevada, Idaho, Hawaii, South Carolina, South Dakota, Vermont, Missouri, Maryland, Massachusetts, Pennsylvania, Connecticut, Kansas, Tennessee, Washington, Louisiana, Kentucky, Virginia, Georgia, and Oklahoma. See CONN. GEN. STAT. ANN. § 31-291 (Supp. 1969); GA. CODE ANN. § 114-112 (1935); HAWAII REV. LAWS § 97-1 (Supp. 1965); IDAHO CODE ANN. § 72-811 (1949); KAN. GEN. STAT. § 44-503 (1949); KY. REV. STAT. ANN. § 342.060 (1962); LA. REV. STAT. §§ 1061-1063 (1950); MD. ANN. CODE art. 101, § 62 (1957); MASS. ANN. LAWS ch. 152, § 18 (1958); MO. ANN. STAT. § 287.040 (1965); NEV. REV. STAT. § 616.085 (1967); N.M. STAT. ANN. § 59-10-12.15 (Supp. 1967); OKLA. STAT. ANN. tit. 85, § 11 (1952); PA. STAT. ANN. tit. 77, § 52 (1952); S.C. CODE ANN. §§ 72-111 *et seq.* (1962); S.D. CODE § 64.0108 (1939); TENN. CODE ANN. § 50-915 (1955); VA. CODE ANN. §§ 65-5 *et seq.* (1968); VT. STAT. ANN. tit. 21, § 601 (Supp. 1967); WASH. REV. CODE § 24.010 (1969). In seven additional states: North Dakota, Mississippi, Arkansas, Colorado, Illinois, Ohio, and North Carolina, a principal employing a contractor is a statutory employer if that contractor has not secured workmen's compensation insurance. See ARK. STAT. ANN. § 81.1306 (1948); COLO. REV. STAT. § 81-9-1 (1953); ILL. REV. STAT. ch. 48, § 138.a (1950); MISS. CODE ANN. 6998-04 (1942); N.C. GEN. STAT. § 97-19 (1965); N.D. CENT. CODE § 65-01-02 (1960).

In Texas and Nebraska, the principal is a statutory employer if he subcontracts to avoid workmen's compensation liability. See TEX. REV. CIV. STAT. art. 8306 (1948); NEB. REV. STAT. §§ 48-101 *et seq.* (1943). There is no statutory immunity in the great majority of the remaining jurisdictions. See ALA. CODE tit. 26, § 253 (1958); ALASKA STAT. § 30.230 (1962); CAL. LABOR CODE § 3353-3357 (West 1955); DEL. CODE ANN. tit. 19, § 2311 (1953); D.C. CODE ANN. § 36-501 (1961); IND. ANN. STAT. § 40-2205 (Supp. 1969); IOWA CODE ch. 85A *et seq.* (1962); NEV. REV. STAT. § 1-47 (1954); MICH. STAT. ANN. § 17.150 (1968); MINN. STAT. ANN. § 176.205 (1966); N.H. REV. STAT. ANN. § 281-10-15 (1966); N.J. STAT. ANN. § 15-1:15-40 (1939); N.Y. LAW tit. 64 § 2 (McKinney 1965); ORE. REV. STAT. § 656.154 (Supp. 1967); R.I. GEN. LAWS ANN. § 35-58 (1956); W. VA. CODE ANN. §§ 23-2-6, 23-2-9 (1966); WIS. STAT. ANN. § 102.06 (1957); WYO. STAT. ANN. § 27-40-27-60 (1957).

It is understandable that this statutory immunity clouds an already cloudy area of the law and causes the unsophisticated substantial problems in attempting to discern a correct statement of the law. Much of the litigation involving principals employing independent contractors has been under the Federal Tort Claims Act⁵⁰ since the federal government is far and away the largest employer of contractors in annual dollar volume. Major agencies employing contractors are the Corps of Engineers, General Services Administration, United States Navy, Bureau of Reclamation, Department of Agriculture and the United States Coast Guard. The federal government is immune from suit if: the tort is willful, absolute liability is involved, or a discretionary function is involved, and the wrongful conduct is an act or omission of an employee of the federal government. These exceptions have added nothing but confusion.⁵¹

RESTATEMENT OF TORTS NOT DEFINITIVE

Although the principal has a preferred position, it has been gradually whittled away by exceptions which are so numerous, and that have so far eroded the "general rule" that it can be said to be "general" only in the sense that it is applied where no good reason is found for departing from it.⁵²

This list of liability-imposing exceptions indicates a concern by the judiciary for individual rights. The exceptions are embodied within the framework of the *Restatement of the Law of Torts*.⁵³ The exceptions⁵⁴ include: (1) the personal fault of the employer;⁵⁵ (2)

50. 28 U.S.C. § 1346(b) (1965).

51. See Comment, *Federal Tort Claims Act: An Examination of the Rule of Nondelegable Duty*, 13 WAYNE L. REV. 572-80 (1967).

52. See PROSSER, *LAW OF TORTS* 481 (3d ed. 1964). See also *Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co.*, 201 Minn. 500, 277 N.W. 226 (1937); *Van Arsdale v. Hollinger*, *supra* note 4, at 25, 437 P.2d at 513.

53. RESTATEMENT (SECOND) OF TORTS §§ 409-29 (1965); see also 2 HARPER & JAMES, *TORTS* § 26.11 (1956).

54. Each of those categories has numerous exceptions within the group; nonetheless they are generally categorized within this broad classification.

55. This involves the landowner-contractee's *active negligence* in such areas as: (a) *negligently selecting an independent contractor*—see *Associated Engineers v. Job*, 370 F.2d 633 (8th Cir. 1966); *Hunt v. McNamee*, 141 F. 293 (4th Cir. 1905); *Ellis & Lewis v. Warner*, 180 Ark. 53, 20 S.W.2d 320 (1929); *Mullich v. Brocker*, 119 Mo. App. 332, 97 S.W. 549 (1905); *Fox v. Ireland*, 46 App. Div. 541, 61 N.Y.S. 1061 (1900); *Jolly Motor Livery Corp. v. Allenberg*, 188 Tenn. 452, 221 S.W.2d 513 (1949); RESTATEMENT (SECOND) TORTS § 411 (1965); (b) *providing de-*

non-delegable duty of the employer;⁵⁶ and (3) respondeat superior.⁵⁷

The term "nondelegable duty" is the basic concept underlying the entire catalogue of exceptions to the rule of employer immunity. Whether the reason for prohibiting the delegation is the inherently hazardous nature of the activity or the broader application of a statutory duty or some special status between the employer and the injured person, liability is imposed because the duty of care which the employer had was one which could not be delegated or contracted away. This principle has been generally adopted in the *Restatement of Torts*:

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take

fective equipment—see *Brady v. Joy*, 111 La. 1071, 36 So. 132 (1904); *Johnson v. J.I. Case Threshing Mach. Co.*, 193 Mo. App. 198, 182 S.W. 1089 (1916); *Mack v. Marshall Field & Co.*, 218 N.C. 697, 12 S.E.2d 235 (1940); *Peters v. Carolina Cotton & Woolen Mills Inc.*, 199 N.C. 753, 155 S.E. 867 (1930); *Paderick v. Goldsboro Lumber Co.*, 190 N.C. 308, 130 S.E. 29 (1928); *Kuhn v. P.J. Carlin Const. Co.*, 145 Misc. 892, 278 N.Y.S. 635 (1935); (c) *negligently giving ambiguous instructions pursuant to the work*—see *Starr v. Standard Tilton Milling Co.*, 183 Ill. App. 454 (1913); *Board of County Comm'rs v. Vickers*, 62 Kan. 25, 61 P. 391 (1900); *State Highway & Pub. Works Comm'n v. Diamond Transp. Corp.*, 226 N.C. 371, 38 S.E.2d 214 (1946); *Besner v. Central Trust Co.*, 230 N.Y. 350, 130 N.E. 577 (1921); and (d) *negligent failure to exercise control retained by principal over the work*—see *Quinones v. Township of Upper Moreland*, 293 F.2d 237 (3rd Cir. 1961); *Spinozzi v. E. J. Lavino & Co.*, 243 F.2d 80 (3rd Cir. 1957); *Giarratano v. The Weitz Co. Inc.*, 259 Iowa 1292, 147 N.W.2d 824 (1967); *Bissel v. Ford*, 176 Mich. 64, 141 N.W. 860 (1913); *Berquist v. Penterman*, 46 N.J. Super. 74, 134 A.2d 20 (1957); *Allen v. Texas Electric Service Co.*, 350 S.W.2d 866 (Tex. Civ. App. 1961).

56. This group concerns those non-delegable duties imposed by statute; e.g., *Hess v. United States*, 282 F.2d 633 (9th Cir. 1960); *Schmid v. United States*, 273 F.2d 172 (7th Cir. 1959) (an excellent example of non-delegable duty under a scaffolding act); *Snyder v. Southern California Edison Co.*, 44 Cal. 793, 285 P.2d 912 (1955); *John Griffiths & Son Co. v. National Fire Proofing Co.*, 310 Ill. 331, 141 N.E. 739 (1923); *Ferguson v. Ashkenazy*, 307 Mass. 197, 29 N.E.2d 828 (1940) (landlord-tenant relationship to provide safe premises); *Blancher v. Bank of California*, 47 Wash. 2d 1, 286 P.2d 92 (1955) (to keep premises safe for business invitees); *Davis v. Summerfield*, 133 N.C. 325, 45 S.E. 654 (1903) (afford support to adjacent property owners); *Van Arsdale v. Hollinger*, *supra* note 4; *Watkins v. Gabriel Steel Co.*, 260 Mich. 692, 245 N.W. 101 (1932); *Janice v. State*, 201 Misc. 920, 107 N.Y. Supp. 2d 679 (1952); *United States v. Pierce*, 235 F.2d 466 (6th Cir. 1956); *McDonald v. City of Oakland*, 63 Cal. Rptr. 593 (1967).

57. If the liability is non-delegable, then liability may also be vicarious, and the architect, general contractor, and subcontractors are all agents in carrying out non-delegable duties. The principal is therefore vicariously liable on a respondeat superior theory. See the cogent discussion of this responsibility in *McDonald v. City of Oakland*, *supra* note 4, at 597, 598.

such precautions, even though the employer has provided for such precautions in the contract or otherwise. . . .⁵⁸

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, of which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.⁵⁹

Liability for breach of a non-delegable duty arises out of the nature of the activity which the employer of the independent contractor or the landowner has initiated. Because the activity is inherently hazardous, the employer or landowner must see to it that the necessary precautions are taken to prevent injury. If he does not see to it himself, he has not exercised due care. He may entrust the duty to a competent contractor; but if the contractor does not exercise due care, it is the duty of the employer or landowner to do so. This rule was expressed by a New York court thusly:

To this rule however, there is a distinct and well-grounded exception. If the character of the work creates the danger or injury remains, then the owner of the property who made the contract *remains* liable to persons who are injured by a failure to properly guard or protect the work, even though the same in its entirety is entrusted to a competent independent contractor.⁶⁰

Later the rule was interpreted in this manner:

Where one owes a duty to another, he cannot acquit himself of liability by delegating performance of the duty to an independent contractor. . . . The Christman Company was principal contractor for the erection of the building on the premises in question, and cannot evade liability by the mere fact it hired Gohr to do excavating with a steam shovel. *It* was bound to see that the excavating, which as a part of its contract it was bound to do, was not done by a subcontractor in a negligent manner.⁶¹

The rule states, in effect, that he who creates an inherently hazardous situation, be he landowner or general contractor, owes to those endangered by that situation the utmost vigilance to protect them from the inherent hazards. That requirement of vigilance is placed, first and foremost, upon that person who initiates the hazard. In effect, the negligence of the independent contractor provides the

58. RESTATEMENT (SECOND) OF TORTS § 416 (1965).

59. RESTATEMENT (SECOND) OF TORTS § 427 (1965). Prosser states that "these exceptions making the employer liable overlap and shade into one another; and cases are comparatively rare in which at least two of them do not appear." PROSSER, TORTS § 70, at 481 (3d ed. 1964).

60. *Murphy v. Perlstein*, 76 N.Y.S. 657, 659 (1902) (emphasis added).

61. *Wright v. H.G. Christman Co.*, 244 Mich. 208, 215, 221 N.W. 314, 317 (1928) (emphasis added).

plaintiff with a theory of recovery additional to or alternative with that of the personal fault of the employer. A recent North Carolina decision sets out the essential rationale of holding the employer liable for the contractor's fault. In *Dockery v. World of Mirth Shows, Inc.*,⁶² the employer failed to inspect and supervise the operation of the ride. The court stated that the liability of such owner or general concessionaire is predicated *either* upon his nondelegable duty to maintain a reasonably safe place for the patrons, in accord with which he must answer for the negligence of the sub-concessionaire—in rendering the premises and devices unsafe—or merely upon the general ground that such owner or general concessionaire is responsible for his breach of duty to keep the premises, including the devices, reasonably safe, without reference to any separate act or omission of the sub-concessionaire.⁶³

The liability arising out of the breach of a non-delegable duty is not absolute. In order for there to be liability, an act of negligence—lack of due care—must have occurred. Section 427 of the *Restatement* clearly requires a failure to take reasonable precautions as a prerequisite to liability. The Seventh Circuit Court of Appeals examined these issues at length in *Schmid v. United States*:⁶⁴

The duty of compliance of an owner of property being repaired or constructed by an independent contractor, designated as "independent" and "nondelegable" by the Illinois Supreme Court does not create absolute liability or render the owner an insurer. The statute creates a standard of care for the persons therein designated: namely, the obligation that all scaffolds shall be erected in a "safe, suitable and proper manner". Any owner who knows or, in the exercise of reasonable care could have known that the scaffold was not erected in such a manner becomes liable for noncompliance with the duty placed upon him by the terms of the Scaffold Act. The owner's liability is predicated on his failure of compliance, not on any negligence of an independent contractor.⁶⁵

Another case following this rationale was *Pierce v. United States*⁶⁶ wherein it was shown that the United States contracted with an independent contractor to perform certain alterations to the electrical plant on United States premises. The contractor negligently

62. 264 N.C. 406, 142 S.E.2d 29 (1965).

63. *Id.* at 411, 142 S.E.2d at 33 (emphasis added).

64. 273 F.2d 172 (7th Cir. 1959).

65. *Id.* at 176; see also *American Exchange Bank of Madison, Wisc. v. United States*, 257 F.2d 938 (7th Cir. 1958), and *Hess v. United States*, 361 U.S. 314 (1960).

66. 142 F. Supp. 721 (E.D. Tenn. 1955).

planned and coordinated its work. The plaintiff alleged that the United States owed to him a non-delegable duty; an allegation with which the court agreed. The court found that precautions which would have prevented plaintiff's injuries could have been taken by the defendant but were not. The defendant interposed the defense that the breach of a non-delegable duty was not a negligent or wrongful action or omission as envisaged under the Federal Tort Claims Act. To this defense, the court responded as follows:

As the doctrine of nondelegable duty is applied in this state it is not a rule of strict liability regardless of fault. Negligence is required, the sole effect of the doctrine being to preclude the owner-employer from escaping liability for negligence which was a proximate cause of injury on the ground that others may have been guilty of negligence, which was also a proximate cause of injury. . . . Therefore, if the Act requires negligence, the Tennessee cases are in complete conformity with the requirement, liability being imposed upon proof of failure to exercise due care.⁶⁷

The view, persuasively argued in *Pierce*, is that when the danger is great, the care owed is proportionately great and may not be delegated. For this reason, the liability is neither absolute nor necessarily vicarious.

In recent years the United States Supreme Court has decided two leading cases involving suits by employees of contractors against owners: *Hess v. United States*,⁶⁸ in which there was recovery after remand to the lower court, the Court having found that the United States could be liable as owner—under Maritime law, Oregon law and Federal Tort Claims law—to the employee of an independent contractor on a non-delegable duty theory; and *Halecki v. United New York & New Jersey Sandy Hook Pilots Association*,⁶⁹ which allowed a suit against a shipyard owner under New Jersey law by an employee of a subcontractor because the owner did not take the special precautions required when there is a recognized hazard.

While the principal may not delegate the duties, he can require, by contract of indemnity, that he be held harmless in the event of injury because of violation of a duty by both himself and the contractor. In other words, the principal can delegate the task but this

67. *Id.* at 734. There is an excellent annotation on the subject of construction site liability and particularly the duty of owners to contractor employees by a leading tort writer, Dean Lambert, in Comments on Recent Important Personal Injury (Tort) Cases, 29 NACCA L. J. 46, 82 (1962-63).

68. 361 U.S. 314 (1960).

69. 358 U.S. 613 (1959).

act does not free the principal from the legal duty to third persons. There are, however, inroads being made upon this possible indemnity. A recently enacted Michigan statute⁷⁰ has declared it to be against public policy for one to enforce an indemnity agreement whereby one is held harmless for his own negligence.

Construction is inherently hazardous work; that is, work which if negligently done could cause serious injury or death. There is an obvious difference between entrusting to a contractor work which, if properly done, will occasion no injurious circumstances and committing to him work from which mischievous consequences will arise unless preventive measures are adopted. While it may be just, in the former case, to hold the party authorizing the work free from liability for negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences, if such consequences are not in fact prevented notwithstanding whose default occasioned the omission to take the necessary measures for such prevention.

Inherently hazardous activity has been characterized by the *Restatement* as follows:

The rule stated in this Section is commonly expressed by the courts in terms of liability of the employer for negligence of the contractor in doing work which is "inherently" or "intrinsicly" dangerous. It is not, however, necessary to the employer's liability that the work be of a kind which involves a high degree of risk of such harm, or that the risk be one of very serious harm, such as death or serious bodily injury. It is not necessary that the work call for any special skill or care in doing it. It is sufficient that work of any kind involves a risk, recognizable in advance, of physical harm to others which is inherent in the work itself, or normally to be expected in the ordinary course of the usual or prescribed way of doing it, or that the employer has special reason to contemplate such a risk under the particular circumstances under which the work is to be done.⁷¹

Clearly, whether an activity is inherently hazardous is a factual question, subject to proof.⁷² The Eighth Circuit Court of Appeals recently examined this question and answered:

The question of what type of work is considered inherently dangerous is not always readily soluble. Our research indicates that courts have found no rule of universal application by which they may abstractly draw a line of classification. At least one court has said: "Generally speaking, the proper test is whether danger 'inheres' in

70. MICH. STAT. ANN. ch. 265, § 26.1146(1) (Supp. 1969).

71. RESTATEMENT (SECOND) OF TORTS § 427, comment b (1965).

72. See *Ross v. Heitner*, 156 So.2d 869 (Fla. 1963).

performance of the work, and important factors to be understood and considered are the contemplated conditions under which the work is to be done and the known circumstances attending it. It is not enough that it may possibly produce injury. Stated another way, intrinsic danger in an undertaking is one which inheres in the performance of the contract and results directly from the work to be done—not from the collateral negligence of the contractor.”

In North Dakota, the question whether the undertaking is inherently dangerous is primarily a fact question for the jury to determine. *Taute v. J.I. Case Threshing Machine Co.*, *supra*, 141 N.W. at 136. Judge Register submitted the issue by an instruction which properly included all the facets of the doctrine. The jury was told that “inherently or intrinsically dangerous means that an element of danger exists in the performance of the contract resulting directly from the work to be done, and not from the negligence of the party actually performing the work” The construction of the bridge involved extremely heavy steel girders and the use of machines and men working at a height of 18 to 20 feet, to name only a few factors. A witness for appellee who had been a structural engineer for the North Dakota State Highway Department, stated unequivocally that the construction was inherently dangerous and hazardous. We conclude that the evidence warranted submission of the issue to the jury.⁷³

Even by having an activity performed by an “independent contractor,” a person cannot avoid responsibility when the activity involves unreasonable risk of harm to others.⁷⁴ One recent expression of the California Supreme Court’s attitude on the inherently dangerous activities rule appears in *Ferrel v. Safway Steel Scaffolds*,⁷⁵ in which the court held that there was sufficient evidence to bring the owner within the ambit of the rule and that, although the evidence indicated that the owner was unaware of the dangers involved, such evidence was insufficient to absolve the owner as a matter of law. This decision was based on the theory of Section 413, comment (b) of the *Restatement of Torts*.

Prior to *Ferrel*, the concept of “independent contractor” furnished a fair amount of protection to owners and general contractors, who were allowed to have sufficient contacts to give knowledge of conditions on the jobsite without being labeled as inviters. Under the inherently dangerous activities rule, as expanded by *Ferrel*, the owner or general contractor who retains sufficient overall control

73. *Schultz & Lindsay Construction Co. v. Erickson*, 352 F.2d 425, 436 (8th Cir. 1965).

74. *See PROSSER, supra note 59*, at 484-86; *RESTATEMENT (SECOND) OF TORTS* § 413 (1965); *see also, Vanoy v. City of Warren*, 15 Mich. App. 158 (1969).

75. 57 Cal. 2d 651, 21 Cal. Rptr. 575, 371 P.2d 311 (1963). *See also MacDonald v. City of Oakland, supra note 4*, and *Van Arsdale v. Hollinger, supra note 4*.

and contacts must nevertheless assume responsibility for minimizing risks in the manner of performance.⁷⁶

Personal Negligence of Principal

The law regarding a principal's personal negligence is stated succinctly in the *Restatement (Second) of Torts*, Section 414:

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

In a situation where any control remains in the contractee, *Quinones v. Township of Upper Moreland* is applicable.⁷⁷ In that case, the defendant claimed that it retained no control over the work. The contract entrusted the entire sewer project involved to an independent contractor, McCabe. The Third Circuit said:

[I]t was wholly within McCabe's power to hire, fire, control and supervise its employees; the contract specifically provided that shoring of trenches was to be per-

76. See Brooks, *Tort Liability of Owners and General Contractors for On-The-Job Injuries to Workmen*, 13 U.C.L.A. L. REV. 99, 115 (1965).

See RESTATEMENT (SECOND) OF TORTS § 413 (1965): "One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiarly unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer: (a) fails to provide in the contract that the contractor shall take such precautions, or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions."

See also RESTATEMENT (SECOND) OF TORTS § 416 (1965): "One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise."

The apparent inconsistency is cleared up by RESTATEMENT (SECOND) OF TORTS § 416 comment c, which permits indemnity but does not relieve liability: "Section 413 states the liability of one who employs an independent contractor to do such work and does not provide in the contract that the contractor shall take the precautions necessary to make its progress safe. This Section deals with the liability of one who employs a contractor to do such work, even though he stipulates in his contract or in a contract with another independent contractor that the precautions shall be taken, for bodily harm caused by the negligent failure of either contractor to take such precautions. In such case the contractor who is employed to take the precautions is under a duty to indemnify his employer for any liability which the contractor's negligence in failure to take reasonably adequate precautions may bring upon him. However, the fact that the contract contains express stipulations for the taking of adequate precautions and that the contractor agrees to assume all liability for harm caused by his failure to do so, does not relieve his employer from the liability stated in this Section."

77. 293 F.2d 237 (3d Cir. 1961).

formed in compliance with Pennsylvania Laws and regulations; the work was to be performed in accordance with the specifications set forth in the contract and Township's "Engineers" (Harris, Henry & Potter, Inc., an engineering firm) was authorized to insure compliance by McCabe with the specifications and "to decide all questions which may arise with the Contractor relative to . . . the manner, performance . . . and acceptable fulfillment of the contract on the part of the Contractor."

With respect to the happening of the accident it is undisputed that the trench was then about 25 feet deep and four or five feet wide; it was not shored as required by the Pennsylvania statute and its pertinent regulations; decedent was operating a drill at the bottom of the trench when its walls collapsed and a large quantity of dirt buried him; he died almost instantly of suffocation and a skull fracture, and the absence of shoring was the proximate cause of decedent's injuries and death.⁷⁸

Dean Prosser suggests that: "So far as he . . . retains any control over any part of the work . . . he must likewise interfere to put a stop to unnecessarily dangerous practices."⁷⁹

An employer of an independent contractor owes a duty to third persons to employ a competent and careful contractor.⁸⁰ This duty exists not merely as to the initial selection, but also as to a continuous determination that the contractor is doing his work in a careful and competent manner. The more hazardous the job, the greater the duty of continuing surveillance.

Certain factors are important: (1) the danger to which others will be exposed if the contractor's work is not properly done; (2) the character of the work to be done—whether the work lies within the competence of the average man or is work which can be properly done only by persons possessing special skills and training; and (3) the existence of a relation between the parties which imposes upon the one a peculiar duty of protecting the other. . . . So too, a master owes to his servant not only the duty to exercise care in the selection of a contractor to whom he entrusts the preparation of a safe working place and appliances but also, as stated in Section 412, Comment (e), a duty to inspect the working place and appliances in order to discover whether the contractor's work has been properly done.⁸¹

78. *Id.* at 240.

79. PROSSER, TORTS 368 (2d ed. 1955). See also *Parsons v. Blount Bros. Const. Co.*, 281 F.2d 414 (6th Cir. 1960).

80. *Associated Engineers, Inc. v. Job*, *supra* note 4. The same rule is more particularly delineated in RESTATEMENT (SECOND) OF TORTS § 411 (1965):

"An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons."

81. RESTATEMENT (SECOND) OF TORTS § 412, comment c (1965). See *Hooey v. Airport Construction Co.*, 253 N.Y. 486 (1930); *Caspersen v. LaSala Brothers*, 253 N.Y. 491 (1930); *Kuhn v. Carlin Construction Co., Inc.*, 154 Misc. 892 (N.Y. 1935) (particularly the extended discussion concerning the duty of one who knows or

Inadequacies of Restatement

Lawyers and judges are busy people. They seek quick solutions to complex legal problems. Since the *Restatement* is a distillation of the law from fifty-one different jurisdictions, with half of the states granting statutory immunity to principals, it has been extremely difficult for the Restatement Committee to state the law definitively. The inability or the unwillingness of the bar to read the *Restatement* in historical context, conceptually rather than mechanically, and to understand the statutory limitations on a general statement, has resulted in the following limitations: (1) The *Restatement* is thought to state a "general rule" of immunity when it no longer serves a useful purpose and in fact constitutes a legal license to kill; (2) the *Restatement*, read mechanically, defines in the late twentieth century, a scientifically outmoded concept that suggests that standards of prudent conduct can be set forth long in advance and amount to propositions of law;⁸² and (3) the *Restatement* fails to define "third persons" to include employees when that protection is absolutely essential to a moral society.⁸³

CONSTRUCTION SAFETY—PROBLEMS NOT TACKLED

There are seven basic reasons why construction safety has not become an integral part of our legal framework and all are attributable to an inadequate social policy.⁸⁴

First, the owners who are undertaking construction enjoy both the advantage of a cheap bid and immunity from liability in too many jurisdictions. The contractors who recognize the need to use nets, trench shoring, safe personnel hoists, etc., are faced with a

in the exercise of due care should know that his contractor is using unsafe equipment or improper methods).

82. See *Bishop v. N.Y. Central R.R.*, 348 Mich. 345, 83 N.W.2d 278 (1957) wherein the court warns against postulating such rules in advance. See also James, *The Qualities of the Reasonable Man In Negligence Cases*, 16 MO. L. REV. 1 (1951).

83. For an example of the resultant confusion see the horrendous example of a legal license to kill given by the court in *Lipka v. United States*, 369 F.2d 288, 466-67 (2d Cir. 1966). At the same time the Second Circuit, interpreting New York law, was denying recovery to a project employee because of workmen's compensation contribution by the principal, the New York Court of Appeals in *Belt v. Port of Authority of N.Y.*, 19 N.Y.2d 850 (1967), was approving recovery to a project employee despite workmen's compensation contribution by the principal.

84. See Address by Harry M. Philo, *What's Wrong with Construction Safety In The United States*, National Safety Congress, October 23, 1967.

choice of computing their costs as part of the bid price and losing the bid, or not computing them in the bid and therefore being handcuffed in their use and winning the bid. Death's handyman is the victor.

Second, in every construction bid, all aspects of safety are presumably part of the bid price rather than major safety items being paid for on a cost-plus basis above the bid price.

Third, "hold-harmless" agreements, which are contrary to public policy, encourage negligent performance and should be outlawed everywhere.

Fourth, most construction contract specification writers are totally incompetent to write the safety specifications of the contract. No architectural and engineering firm in the country employs a construction safety engineer. It requires great arrogance for these specification writers and architectural superintendents to write or supervise safety specifications with their level of safety sophistication. No contractor can or should be held to job tolerances in the area of safety performance that are not part of the specifications upon which the bid price was calculated.

Fifth, the construction industry has not begun to adopt the safety standards, codes and safe practices which are required in the exercise of due care.

Sixth, there have been no major efforts to replace totally inadequate construction equipment, which remains unguarded, not interlocked or fail-safed, with poor lateral acceleration capability.

Seventh, salaries for construction safety men are unrealistic and totally inadequate. The safety man is often the lowest paid employee on the project. Underpaid safety personnel are perfectly capable of telling workers to "be careful" and to wear their unsafe helmets and also capable of performing their role in ridiculous safety awards programs. But they are incapable of recognizing major job hazards and of establishing the safety programs necessary to prevent serious injury or death.

WHY THE PRESENT SITUATION EXISTS

LACK OF APPRECIATION OF THE SOCIAL PURPOSE OF TORT LAW

The conflict existing in the field of torts which was present when

Justice Talbot Smith was writing *Collateral Negligence*⁸⁵ in 1941—namely, the conflict whether principles of fault or social considerations should govern the employer's tort liability—still exists today. The development of ergonomics, biotechnology and safety engineering, however, make it mandatory that the social purpose of the tort law be accident prevention; only when the law fails in achieving its primary social purpose should compensation for the victim be weighed against other conflicting principles. Both Prosser⁸⁶ and Seavey⁸⁷ take the position that the function of the law of torts is directed toward the compensation of individuals for harm which they have suffered.

There are two basic interests which come into conflict in the area of tort law: The security interest of the individual plaintiff against damage and the defendant's claim to freedom of action. Generally, the former requires compensation irrespective of fault and the latter requires compensation only when intentional harm or undue lack of care is shown. The primitive law sought security. The eighteenth century stressed economic movement and freedom of action. Toward the end of the nineteenth century a balance was attempted which fostered the development of the rationale that one who engages in activity and employs or controls others should be liable for the harm caused by his activities, agencies or things, and conversely, non-wrongful conduct shielded the actor from liability.⁸⁸ Tort law in the late twentieth century has begun to recognize that accident prevention must be preceded by liability.

Be the exceptions more or less numerous, the general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation or estate, at the hands of his neighbors, not because they are wrong, but because they are harms. The true explanation of the reference of liability to a moral standard, in the sense which has been explained, is not that it is for the purpose of improving

85. See the excellent collection of background articles contained in Smith, *Collateral Negligence*, 25 MINN. L. REV. 399 n.2 (1941).

86. PROSSER, TORTS 56 (3d ed. 1964) citing Wright, *Introduction to the Law of Torts*, 8 C.A.M.B. L. J. 238 (1944) where it is stated that with: "the various and ever-increasing clashes of the activities of persons living in a common society, carrying on business in competition with fellow members of that society . . . there must of necessity be losses, or injuries of many kinds sustained as a result of the activities of others. The purpose of the law of torts is to adjust these losses and to afford compensation for injuries sustained by one person as the result of the conduct of another." *Id.* at 238.

87. Seavey, *Principles of Tort*, 56 HARV. L. REV. 72 (1942).

88. *Id.* at 73-74.

men's hearts, *but that it is to give a man a fair chance to avoid doing the harm before he is held responsible for it.* It is intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury. . . . As the law, on the one hand, allows certain harms to be inflicted irrespective of the moral condition of him who inflicts them, so, at the other extreme, it may on grounds of policy throw the absolute risk of certain transactions on the person engaging in them, irrespective of blame-worthiness in any sense.⁸⁹

Not only has there been a failure to recognize the social function of tort law, but the development of a technologically complicated society has made new demands upon the old tort doctrine. These demands necessitate a new fabric. Harlan F. Stone characterized the situation in these terms:

In the brief space of about seventy years our law has been called upon to accommodate itself to changes of conditions, social and economic, more marked and extensive in their creation of new interests requiring legal protection and control, than occurred in the three centuries which followed the discovery of America. Rapid social change, more than all else, puts to the test a legal system which seeks its inspiration and its guidance in a past which could make no adequate prophecy of the future.⁹⁰

The failure is attributable in part to changing economic conditions and the need to adapt. Fleming James has described the situation and indicated its import in the formulation of theories of tort liability:

[A]s scientific knowledge advances, more risks can be discovered and avoided. Those who deal with matters affected by these advances must keep reasonably abreast of them. What is excusable ignorance today may be negligence tomorrow. As techniques for detecting accident proneness become perfected, employers will have to take account of them so as to remove accident prone employees from posts of danger. Perception of the risk is the sum of all that has heretofore been dealt with in this section. It is the correlation of past experience with the specific facts in a situation. If a reasonable man with the actor's own knowledge and experience plus the knowledge and experience with which he is charged would perceive a risk in the conduct in question the actor will be held to perceiving that risk. The courts, of course, set the outer boundary to what a man may reasonably be held to foresee. But a judgment upon this question, in the nature of things, may be exercised within wide limits, and this is one of the focal points where the concept of negligence is being expanded. Not only have the scientific advances noted above enlarged the scope of what a jury may find to be foreseeable, but a quickening social conscience and the general trend towards wider liability have led the courts to perceive risks in ordinary activities of men where not so long ago they ruled them out of the permissible range of what might be found.⁹¹

89. HOLMES, *THE COMMON LAW*, 144-45 (1881) (emphasis added).

90. Stone, *The Common Law in the United States*, 50 *HARV. L. REV.* 4, 11 (1936).

91. James, *supra* note 82, at 13, 14.

A SAFETY UNCONSCIOUS SOCIETY

Generally

There are approximately 110,000 accidental deaths and more than 10 million disabling injuries in the United States annually.⁹² This is a sad indictment of a legal system charged with minimizing the harms and conflicts between people and things. The recent auto safety controversy has made the legal profession aware of the lack of attention which has been given to safety engineering. The injury and severity rates are higher in construction than for the same exposure in motor vehicle travel. In September, 1899, the first recorded death by automobile occurred in the United States. It wasn't until 1,250,000 lives had been lost that a congressional committee began considering a study into the causes of such a large casualty rate. The lack of appreciation for safety in this area as well as others was expressed by one congressman:

I am getting tired of introducing bills and holding hearings on safety matters. This is certainly not a far reaching bill. But it is a bill that can save a lot of lives. And when the Department continually comes up here and recommends against a very small step in the direction of the safety of our people on the highways, roads, and streets of this country, it seems to me that certainly we ought to investigate and find out what is wrong with the Department of Commerce. . . . They constantly opposed every effort the Congress made for safety in that field. I am not going to be satisfied until we find out what is happening at the Department level.⁹³

Fifteen years ago the board of directors of any American corporation that allocated any substantial sum for accident prevention, except for prevention of injuries to their own employees, was not maximizing profits in accord with their responsibility to their stockholders; a secure position, since there was negligible liability for negligent performance.

Because lawyers, judges, legislatures and tort writers were slow in developing liability, the slogans "Drive Safely," "Operate Your Machine Safely," "Be Careful," etc., became not only the safety slogans, but also the safety philosophy of the nation. The idea that accidental injury is always the individual's own fault was perpetuated and developed by a society placed in a strait jacket by the law. This emphasis on individual responsibility did not develop as a logical conclusion of a safety profession which, unfettered by re-

92. NAT'L SAFETY COUNCIL, ANNUAL ACCIDENT FACTS.

93. NADER, UNSAFE AT ANY SPEED 299-300 (1965).

strictions, had researched, investigated, studied, catalogued and analyzed injury statistics objectively. The emphasis resulted from the legal strait jackets placed upon the safety profession by the law. Unable, because of immunity, privity, jurisdictional limitations, notice requirements, etc., to formulate correct principles of safety engineering they were forced to turn to safe practices.⁹⁴

Construction Specifically

The statistics at the beginning of this article are testimony to the lack of safety in construction.⁹⁵ Four vignettes will assist the reader in understanding what is wrong with construction safety.

About ten years ago, the top safety engineer for the United States Coast Guard wrote to the Coast Guard commandant and heads of Civil and Naval Engineering that due care required specific safety rules in bid specifications. The written response was that it would be too expensive and would limit their ability to get contractors, since contractors would not want to be so regulated or would insist upon more money if they were compelled to perform safely.⁹⁶

On February 24, 1967, the man in charge of all major construction for the Ford Motor Company testified in a federal court matter that, in his opinion, it was not necessary to cover a floor hole adjacent to a pallet of bricks and under which employees of contractors were expected to work.⁹⁷

On July 27, 1967, the assistant director of safety for General Motors testified that upon being subpoenaed to bring the A.S.A. Safety Code For Building Construction and A.S.A. Code For Cranes, Derricks and Hoists and Accident Prevention Manual in Construction that he was unable to find them and, as far as he knew, General Motors never had them.⁹⁸

General Motors' engineers testified that their legal department had,

94. See *Human Factors Engineering—What Research Found for Safetymen in Pandora's Box*, NAT'L Safety News (August 1968).

95. See also the published proceedings of the first Associated General Contractors National Safety Conference (1968).

96. See testimony of Fred Bisel, *Gowdy v. United States*, *supra* note 8.

97. See testimony of Thomas Dunlop, *Gaston v. Ford Motor Co.*, No. 25772 Federal District Court Eastern District of Michigan.

98. See testimony of Benj. J. Cieslik, *McDonough v. General Motors*, Genessee County Mich., Cir. Court No. 4074.

fifteen years before, written safety specifications for a construction contract, and that General Motors employed architectural firms to custom-fit the safety specifications to the contract. However, the architects were incapable of writing the safety specifications because of lack of expertise.⁹⁹

Such testimony has caused the Associated General Contractors to hold its first safety conference in February of 1968.¹⁰⁰ It is particularly significant that at this first national safety conference in this organization's fifty year history, the implicit theme was one of heading off adoption of federal construction safety legislation. Fewer than one hundred of the 8,200 general contractors who are members cared enough about safety to have any representative present, and the overwhelming majority of the top four hundred firms, who do billions of dollars of construction annually, were conspicuous by their absence. Few of these firms employ trained safety engineers with duties solely related to safety.

Lack of safety in construction has caused the Construction Section of the National Safety Council to send an article entitled "Construction Safety and Legal Liability" to its members¹⁰¹ and invite an officer of the American Trial Lawyers to address its congress on "What's Wrong With Construction Safety in the United States?"¹⁰² It has resulted, in many states, in the first national "Construction Safety Day" in history. It has precipitated many articles on the cost of liability in the trade journals.¹⁰³ It has caused many construction companies to hire safety engineers and adopt safety programs. The engineering profession has begun to examine the adequacy of its contract safety specifications.¹⁰⁴

Safety sophistication is relatively new in the construction safety field also. It has only been in the last twenty years that reasonably prudent owners formulated and controlled all aspects of contractor safety. It is not surprising that few courts have had trial records

99. See testimony of William DeGrow Jr., *McDonough v. General Motors*, *Id.*

100. For report data see *supra* note 95.

101. NATIONAL SAFETY COUNCIL, *CONSTRUCTION SAFETY AND LEGAL LIABILITY* (1967).

102. See Address of Harry M. Philo, *supra* note 84.

103. Baxter, *Make It Safe or Be Sued*, *THE IRON AGE* 46 (1966).

104. See Latham, *It's Time To Re-Evaluate Our Safety Effort*, *CONSTRUCTOR* 34 (1967).

which would present factual proof of reasonably foreseeable risk to assist the courts in fulfilling their role as social architects in the field of accident prevention.¹⁰⁵ There has been a widespread recognition by owners and contractors that construction safety can be achieved only by strict owner supervision in every sense.¹⁰⁶

The large injury and death tolls have also caused a continuing controversy regarding "hold harmless" clauses in various parts of the country. This has generated legislative action in the form of statutes which render unenforceable clauses in construction contracts holding a contractor liable for damages arising out of injury to persons or damage to property that is the consequence of the negligence of the owner, his employees, or his agents.¹⁰⁷ The new law in Michigan declares as being against public policy, therefore void and unenforceable,

a covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, or indemnitee, his agents or employees.¹⁰⁸

There is one aspect of construction safety that magnifies a problem acutely peculiar to the industry. In almost all major industries, the bulk of the work is done by established firms who have industrial safety programs and who long ago realized that safety pays. Accordingly, such firms have made serious attempts at achieving low injury frequency and severity rates. This is not true in the construction industry however. There are approximately 700,000 contracting firms in construction, and few have adequate safety programs, trained personnel, or reasonably safe tools and equipment. "Probably the most common cause for controversies on the matter of job tolerances results from a contractor using poor construction equipment or unskilled labor with which the desired accuracy cannot

105. See dissent in *Douglas v. Edgewater Park*, 369 Mich. 320, 332 (1963) urging the court to adopt a rule which would prevent injury.

106. See Cummings, *Job Safety Must Be Pre-Planned*, *ROADS AND STREETS* 75 (1961) and McElroy, *Specifying Safety in Construction Contracts*, *National Safety News*, April, 1965, at 20.

107. See *Hold Harmless Disputes*, *Engineering News Record*, August 18, 1966 at 71.

108. *MICH. STAT. ANN.*, ch. 265, § 26.1146(1) (Supp. 1969).

be produced."¹⁰⁹ The marginal companies cannot afford to have a safety program, safe equipment, or trained personnel. They must gamble and hope for few accidents. The law of averages is against them. It is for this reason that the employers' workmen's compensation liability does little or nothing for construction safety.

Against this backdrop is the attempt by federal agencies to formalize a comprehensive program designed to put a halt to the inaction and penury in eliminating the carnage in the area of industrial accidents. Thus far such efforts have been stifled by the representatives of industry and commerce. The central issue is being skirted since it is to the benefit of big business to block federal bills. Former Secretary of Labor Wirtz told a Senate subcommittee on labor that the facts indicate a need to act before our society is engulfed in the growing industrial slaughter. In describing the main issue he said:

It is whether the Congress is going to act to stop a carnage which continues for one reason, and one reason only, and that is because the people in this country don't realize what is involved, and they can't see the blood on the food that they eat, and on the things that they buy, and on the services they get.¹¹⁰

WORKMEN'S COMPENSATION ELECTION STATUTES

A major impediment to the development of any meaningful law in the area of principals employing contractors was the election requirements of workmen's compensation statutes. Between 1905 and 1955 a construction worker injured at work by the negligence of a third party had to elect between the sure remedy of low workmen's compensation benefits and the gamble of collecting on a possible judgment rendered in a suit against the third party while being barred by statute from the compensation remedy because of such election. At the same time, legislatures felt it desirable to remain uninvolved in the prevention of industrial accidents.¹¹¹ Since the law is what the court will state in the next case when the precise issue is presented with adequate evidence, properly briefed and argued, rather than what it has said the last time, it is obvious that the absence of advo-

109. STUBBS, *Owners Engineer*, in HANDBOOK OF HEAVY CONSTRUCTION (1959).

110. See Nader and Gordon, *Safety on the Job*, NEW REPUBLIC, June 15, 1968, at 23.

111. See Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 76 (1967).

cacy, so necessary to the correct development of the law, has left the law undeveloped and in a state of limbo until recently when the election statutes were repealed.

COMMON LAW COUNTS

The early English common law pleadings have wreaked havoc with the logical development of tort law. The requirement that a pleading spell out conformance to a rule of a prior case has limited and hampered understanding of the elements of a tort case.

The early English law did not construct a broad concept of liability, but was interested in procedural conformance. The courts constructed and judicially developed a law of negligence that required an individual to adhere to and abide by a predetermined legal duty. Thus negligence and duty became correlatives and required the party injured to prove that a duty was owed and that the defendant failed to live up to the standard as the facts of the pleadings spelled out. In time there developed a body of law which declared that an individual would be responsible for the negligent performance of his personal undertaking.

The questions "what is duty?" and "what are duties?" gave rise to a great battleground with two mighty forces aligned on each side. On one side the concept of due care—on the other the vested interests, the sanctity of land championed by those who would limit the recovery of the many from the few. Land, manufacturing, construction, transportation have been owned by the few, and those who desire denial of recovery to persons injured in their undertakings have for more than one hundred years found judges willing to give immunity in circumstances where popularly elected legislatures were reluctant to grant such immunity from liability.

The courts have gone even further in thwarting justice in the past. When "duty" was too obvious for directed verdicts, the bench has proceeded to spell out duties.¹¹²

JUDICIAL CONFUSION OF THE CONCEPT OF DUTY

The concept of "duty" was wholly alien to Roman law and there

112. See *Ackerberg v. Muskegon Osteopathic Hosp.*, 366 Mich. 596, 115 N.W.2d 290 (1962).

is no trace of it in the modern Continental systems.¹¹³ It may well be asked: Does it serve any useful function at all?

When negligence began to develop as a separate basis of tort liability, the courts developed the idea of duty as a matter of some specific relation between plaintiff and defendant without which there could be no liability. The concept of duty was not in any way related to the activity or tortious conduct of the actor. It was based on a status relationship which is irrelevant in determining the actual commission of a tort. The amorphous term "duty" was invoked by the courts in order to insure the status quo. It served no useful purpose and was productive only in creating confusion.

From 1837 to 1842, three English cases were decided which led the judicial minds in later decades into the foggy realm of "duty."¹¹⁴ A good example of how the duty concept clouded judicial reasoning is found in *Le Lievve v. Gould*,¹¹⁵ decided in 1893. Lord Esher declared:

The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. . . . A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.¹¹⁶

This was a repudiation by Lord Esher of a concept of a general duty of reasonable care formulated in *Heaven v. Pender*¹¹⁷ and stated in this manner:

Whenever any person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.¹¹⁸

The conceptual error persisted in England for another forty years and was generalized by Lord Atkin in *Donoghue v. Stevenson*.¹¹⁹

The rule that you are to love your neighbour becomes in law, you must not injure

113. See Buckland, *The Duty to Take Care*, 51 L. Q. REV. 637 (1939), for an analysis of duty in Roman law, and PROSSER, TORTS 331 n.2 (3d ed. 1964).

114. *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (1842); *Vaughan v. Menlove*, 3 Bing. N.C. 468, 132 Eng. Rep. 490 (1837); *Langridge v. Levy*, 2 M. & W. 519, 150 Eng. Rep. 863 (1837).

115. 1 Q.B.D. 491 (1893).

116. *Id.* at 497.

117. Q.B.D. 503 (1883).

118. *Id.* at 509.

119. 1932 A.C. 562 (1932).

your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.¹²⁰

While the English judiciary was engulfing itself in a legal strait jacket, the concept of duty minus the status relation had already been formulated in one treatise.¹²¹

Before the law every man is entitled to the enjoyment of unfettered freedom so long as his conduct does not interfere with the equal liberty of all others. Where one man's sphere of activity impinges on another man's, a conflict of interests arises. The debatable land where these collisions may occur is taken possession of by the law, which lays down the rules of mutual intercourse. A liberty of action which is allowed therein is called a right, the obligation of restraint a duty, and the terms are purely relative each implying the other. Duty, then, as a legal term indicates the obligation to limit freedom of action and to conform to a prescribed course of conduct. The widest generalization of duty is that each citizen "must do no act to injure another."¹²²

The entire principle of subdividing or categorizing the duty of reasonable care has come under much judicial scrutiny in recent times. The courts have generally recognized that the practice of delineating and isolating specific "exceptions" or situations in which a duty is owed is an anachronism related directly to the old writs and common counts which required factual conformance to the particular rule before permitting recovery. The courts have long recognized that justice does not have any *a priori* relationship to the specific counts, and have generally adopted an *ad hoc* stance in particular cases, using only the "reasonable care" standard for guidance. The awareness of the narrow legalistic thinking was explicit in these words of about a decade ago:

Care does not increase or diminish by calling it names. We think the abstract concept of reasonable care is in itself quite difficult enough to grapple with and apply in our law without our courts gratuitously conferring honorary degrees upon it. There is only *one* degree of care in the law, and that is the standard of care which may reasonably be required or expected under all the circumstances of a given situation, whether arising in the manufacture of canned beans or cinder blocks.¹²³

120. *Id.* at 580.

121. I. BEVEN, *NEGLIGENCE IN LAW* (4th ed. 1928).

122. *Id.* at 7-8 cited in Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 42, n.4 (1934).

123. See *Spence v. Three Rivers Supply*, 353 Mich. 120, 90 N.W.2d 873 (1958).

The common law standard of care has been the same for centuries: a duty of reasonable care under all circumstances.¹²⁴ The problems confronting the judiciary in regard to this standard has been three-fold.

First, they have failed to recognize that due care is sophisticated knowledge. Believing it to be common sense, they have felt free to express as a matter of law the care which they believe was the limit of prudence required of the principal. They called this the duty owed. Due care, however, is what a jury would consider to be reasonable prudence after evidence of a standard of care rather than a trial judge's nineteenth century concept of due care.

Second, with their limited and unsophisticated views of how reasonably prudent owners obtain job safety, they have proceeded to limit the category of persons to whom duty is owed to exclude even those within the "zone of danger."¹²⁵

Third, they have confused the law of owner-invitee with the law of principal's employing contractors and thereby, in many instances, attached the lesser rules of prudent behavior judicially approved for the owner-invitee situation to the case involving an undertaking of a principal.

The American conceptualization of duty took place in the celebrated case of *Palsgraf v. Long Island R. R.*¹²⁶ In *Palsgraf*, plaintiff, a passenger standing on a station platform, was hurt by some scales which fell down on her as the result of an explosion some distance away. The explosion was caused by fireworks dropped by another passenger when an employee of defendant pushed him in order to help him board a crowded train. Nothing about the appearance of the package indicated its contents. The only negligence complained of was this action by the employee in pushing the unknown passenger. The court of appeals held that the defendant was not liable. Judge Cardozo held that, since Mrs. Palsgraf was not within the "zone of danger," there was no duty owed to her. He said:

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relative to her, it was not negligence at all. Nothing in the situation gave notice that

124. Goodman, *A Safe Place to Live: Exploring Safety Standards and Codes in the Cities*, 44 J. URBAN L. 341, 342 (1967).

125. See *Lipka v. United States*, 369 F.2d 288 (2nd Cir. 1966).

126. 248 N.Y. 339, 162 N.E. 99 (1928).

the falling package had in it the potency of peril to persons thus removed. . . . If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeing, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong . . . with reference to someone else What the plaintiff must show is a wrong to herself.¹²⁷

He reiterated the theory of the necessity for proving a status between the parties and that the wrong committed had to be reasonably perceived:

Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all. . . . Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended.

We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary.¹²⁸

This view presents the scope of "duty" as measured by the scope of the risk which negligent conduct foreseeably entails.¹²⁹

The dissenting opinion of Judge Andrews attacked the majority's view of the concept of duty. Negligence, he argued, is not dependent upon a status between litigants. It is the commission of a wrong which results in injury by the negligent conduct. His opinion stated that there is a duty toward the entire world, without regard to any particular existing relationship.¹³⁰ The limitations upon the tortfeasor's liability are whether the act was the proximate cause and whether the act caused the specific injury complained of.¹³¹

127. *Id.* at 341-43, 162 N.E. at 99-100.

128. *Id.* at 341-47, 162 N.E. at 99-102.

129. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372 (1939), 48 YALE L.J. 390 (1939), 39 COLUM. L. REV. 20 (1939).

130. James, *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95, 104 (1950).

131. "The result we shall reach depends upon our theory as to the nature of negligence. Is it a relative concept—the breach of some duty owing to a particular person or to particular persons? Or where there is an act which unreasonably threatens the safety of others, is the doer liable for all its proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger? . . .

"[I]n an empty world negligence would not exist. It does involve a relationship

With characteristic insight, Professor James has described the approach taken by the dissent in *Palsgraf* as follows:

Under this rule it will be seen that the inquiry into the scope of duty is concerned with exactly the same factors as is the inquiry into whether conduct is unreasonably dangerous (i.e. negligent). Both seek to find what consequences of the challenged conduct should have been foreseen by the actor who engaged in it. Neither inquiry stops with what might be called the physical range of foreseeable harm, or with mere proximity in time or space. In both we look to see what natural forces and what human conduct should have appeared likely to come upon the scene, and we weigh the dangerous consequences likely to flow from the challenged conduct in the light of these interventions. And in this inquiry foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful man would take account of it in guiding practical conduct. Just as this broadening of the quest adds to the risks which may make conduct unreasonably dangerous, just so does it add to the range of duty.¹³²

between man and his fellows. But not merely a relationship between man and those whom he might reasonably expect his act would injure. Rather a relationship between him and those whom he does in fact injure. If his act has a tendency to harm some one, it harms him a mile away as surely as it does those on the scene

"The proposition is this. Every one owes to the world at large, the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain Unreasonable risk being taken, its consequences are not confined to those who might probably be hurt. . . .

"[B]ut there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former. . . . What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. . . . And here not, what the [defendant] had reason to believe would be the result of his conduct, but what the prudent would foresee, may have a bearing. . . . for the problem of proximate cause is not to be solved by any one contention." Andrews, J. dissenting in *Palsgraf v. Long Island R.R.*, *supra* note 126 at 347-54, 162 N.E. at 99. See also PROSSER, *TORTS* 332-33 (3d ed. 1964): "The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. It is therefore not surprising to find that the problem of duty is as broad as the whole law of negligence, and that no universal test for it ever has been formulated. It is a shorthand statement of a conclusion, rather than an aid to analysis in itself [I]t should be recognized that 'duty' is not sacrosanct in itself, but only as expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection;" and 32 A.T.L.J. 177, 178 (1968) for very cogent comments on this subject.

132. James, *Scope of Duty in Negligence Cases*, 47 Nw. U.L. REV. 778, 781-82 (1953).

ABSENCE OF A CONSTITUTIONAL CHALLENGE

The fourteenth amendment to the United States Constitution provides in relevant part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Equal protection requires equal treatment under the law—nothing more, nothing less.

There has been no reported challenge to the immunity given to principals by statute or in those few instances in which a court has said the duty owed to everyone else is not owed to a project employee. It appears, however, that it is arbitrary, illogical and unreasonable for either the legislature or a common law court to classify a project employee, subjected to a possible risk of harm from a principal, differently from all others subjected to the same possible risk of harm when there is no benefit from such classification. Recent decisions have struck down rules of law on the basis of equal protection requirements. For example, the United States Supreme Court in May, 1968, decided that it was a denial of equal protection to give immunity to a tortfeasor causing the wrongful death of a child born out of wedlock when no immunity was granted in a cause of action brought by the mother of a so-called "legitimate" child.¹³³

Whether or not one accepts the majority or minority viewpoint as expressed in *Palsgraf*, a workman on the project is in the "zone of danger" of the principal's failure to use care, and this probably should be as a matter of law.¹³⁴

In Georgia Southern & Florida Ry. v. Seven-Up Bottling Co.,¹³⁵

133. *Giona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968).

134. See Justice Smith's incisive discussion in *Elbert v. City of Saginaw*, 363 Mich. 463, 109 N.W.2d 879 (1961) on who, as a matter of law, is in the "zone of danger." See also PROSSER, TORTS §§ 394-95 (3d ed. 1964): "The leading English case of *Indermaur v. Dames* laid down the rule that as to those who enter premises upon business which concerns the occupier, and upon his invitation expressed or implied, the latter is under an affirmative duty to protect them, not only against dangers of which he knows, but also against those which with reasonable care he might discover. The case has been accepted in all common law jurisdictions, and the invitee, or as he is sometimes called the business visitor, is placed upon a higher footing than a licensee. The typical example, of course, is the customer in a store. Patrons of restaurants, banks, theatres, bathing beaches, fairs and other places of amusement, and other business open to the public are included, as are drivers calling for or delivering goods purchased or sold, independent contractors doing work on the premises and the workmen employed by such contractors, as well as a large and miscellaneous group of similar persons who are present in the interest of the occupier as well as of their own." (emphasis added).

135. 175 So.2d 39 (Fla. 1965).

it was held that a state statute, which provided a comparative law remedy in suits against railroads was unconstitutional; this ruling was based on the observation that different legal treatment of railroads was not constitutionally proper in view of the development of competing modes of transportation.

Similarly in *Grasse v. Dealers Transport Co.*,¹³⁶ a case before the Illinois Supreme Court, it was held that the Illinois workmen's compensation statute was partially invalid in that it provided injured employees with a common law right of action against third parties not subject to the statute while transferring the cause to the employer when the third party was covered by the act. The court held that no ascertainable logic or policy supported the distinction; further, that in order for such a distinction to prevail,

it must appear that the particular classification is based upon some real and substantial difference in kind, situation or circumstance in the persons or objects on which the classification rests, and which bears a rational relation to the evil to be remedied and the purpose to be attained by the statute, otherwise, the classification will be deemed arbitrary and in violation of the constitutional guarantee of due process and equal protection of the laws.¹³⁷

Several courts have had occasion, recently, to point out (although not in a constitutional challenge) the lack of logic in treating project employees differently from others.

In *Woolen v. Aerojet General Corporation*,¹³⁸ the California Supreme Court noted:

[We have] held that employees of an independent contractor comes within the word "others" as used in sections 413, 414 and 428 of the Restatement of Torts, which like section 414 set forth rules relating to the liability of one hiring an independent contractor (Citations omitted). There is *no reason* to hold otherwise with respect to section 416.¹³⁹

Similarly, in *Associated Engineers v. Job*,¹⁴⁰ Judge Blackmun, in writing an opinion of the court involving South Dakota law, indicated that the duty imposed by Section 413 probably extends to an

136. 412 Ill. 179, 106 N.E.2d 124 (1952).

137. *Id.* at 193-4, 106 N.E.2d at 132.

138. 57 Cal. 2d 407, 410, 369 P.2d 708, 711 (1962).

139. See *Van Arsdale v. Hollinger*, 68 Cal. Rptr. 20, 437 P.2d 508 (1968) in which it was held that the duty imposed by statute was owed by a municipality to an employee of an independent contractor. See also *McDonald v. City of Oakland*, 63 Cal. Rptr. 20 (1967); and *Mallory v. Louisiana Pure Ice & Supply Co.*, 320 Mo. 95, 6 S.W.2d 617 (1928).

140. 370 F.2d 633, 645 (8th Cir. 1966).

employee of an independent contractor under the circumstances involved there.

There is no more justification for giving a principal employing a contractor immunity from liability to the project employee than there was for giving the defendant immunity in *Grasse*.¹⁴¹ In the opinion of the writer there will be constitutional challenges to this alleged immunity in every jurisdiction within the next decade.

STATING IT DOES NOT MAKE IT SO—FICTIONS THAT ARE USED
TO JUSTIFY IMMUNITY

Fictions, of course are not necessarily bad. The danger is that a court, after frequent repetition, will begin to believe that they are real and thus employing them reach inequitable results.¹⁴²

RIGHT TO RELY ON CONTRACTOR

In the practicalities of life, there is no greater absurdity than the statement that in construction the principal "can rely on the contractor."¹⁴³ In construction contract bids, the safety conscious contractor who recognizes the need to use nets will not win the bid if he adds \$50,000 for nets and his competitor submits a price which has been computed without nets. The contractor who figures a bid with \$30,000 for trench shoring loses to the competitor who plans to do it in the unsafe way. The same is true for safe construction of passenger elevators, for proper scaffolding, for guarded machinery, even for the salary of a safety engineer. If the contractor chooses to compete without figuring into the bid price the cost of safety items and he wins the bid, he cannot then use the safety items and achieve a profit.

It is well known that the construction field is highly competitive; in order to offer a bid with a chance of acceptance, a contractor must pare his expenses down to the bare minimum in order to arrive at a favorable estimate. It is not feasible to narrow expenses in the

141. *Supra* note 136.

142. *Lyshak v. City of Detroit*, 351 Mich. 230, 244, 88 N.W.2d 596 (1958).

143. See Editors, *Construction Safety*, National Safety News, Sept. 1968; *Specifying Safety in Construction Contracts*, National Safety News, April, 1965; duPont Engineering Department, I & II CONSTRUCTION DIVISION SAFETY OPERATIONAL METHODS; NATIONAL SAFETY COUNCIL, ACCIDENT PREVENTION MANUAL FOR INDUSTRIAL OPERATIONS § 14-1—14-57 (4th ed. 19); and *supra* note 95.

quality of materials to be used, for these materials are required to conform to a particular quality standard under *contractual compulsion*. The simplest, most effective means of cutting costs involves: (1) use of cheap or old machinery; (2) use of specialized machinery for a variety of uses; (3) accomplishing the given task in the quickest way possible (thus eliminating much of the overhead); and (4) elimination of whatever expenditures are not expressly or directly devoted to the construction of the building.

It would seem obvious from the above that the first expense to be eliminated is that of safety precautions; this, because adequate safety measures do not directly produce income, quality, nor do they contribute to expeditious construction. This consequence must follow if safety measures are not compelled by contract. Under the workmen's compensation law, a contractor is economically justified in gambling that no injuries will occur—for even if they do, a relatively small financial burden will arise. If an owner may escape liability by contracting over, regardless of safety specifications, it is clear that he will have received the benefit of low bids without having incurred any of the risks that the low bids entail. This risk is reserved for the workman. The end result is that there is no compelling economic reason for the owner to include safety specifications in the contract or for the contractor to implement safety measures on the job. In countenancing such a condition, the courts abdicate their traditional function as protectors of the helpless, as instruments of social progress.

RIGHT TO RELY ON THE EXPERTISE OF THE ARCHITECT OR ENGINEER—A FICTION

The architect and engineer enter the picture, whether it be a single residence or a multi-million dollar project. They contract with the owner as his agents in securing a quality job at the lowest price. They agree, for a consideration, to write the bid specifications, and superintend conformance. Since an aspect of the undertaking involves the safety of persons upon the construction site and a further aspect involves legal responsibility to pay damages, the architect's specifications include safety. The only problem is that there may be no architectural and engineering firm in the United States which is competent to write construction safety specifications. The recognition of construction hazards and the steps necessary to prevent them

from resulting in accidental injury or death require sophisticated knowledge and a familiarity with principles of safety engineering. While these firms may have several hundred architects, electrical, civil and mechanical engineers, few, if any, employ a trained construction safety engineer. They are, therefore, incapable of writing the contract provisions which will result in an accident-free job. To attempt to do so borders on willful and wanton misconduct.

The same firm agrees, for a price, to supervise job conformance. After warning the contractor to "be safe," the architect superintendent and his assistants parade around the job daily, making minute inspections to see that the nuts and bolts are of a certain quality and that the paint is of a certain grade—overlooking the fact that the trenches are not shored, the derricks are improperly rigged, holes are not covered, scaffolds are unguarded, and workers are working fifty feet in the air with neither nets nor safety belts. The architectural firm is not only incompetent to write specifications, it is also incompetent to supervise conformance.

The ethical standards of the architectural and engineering professions will have much more substance when enforced by legal liability. This has been proven by the increased number of cases involving architects and the trend in holding architects liable. Reliance upon the good faith of the architect in allowing the builder to depart from the safety plans is no defense.¹⁴⁴

A 1908 case, *Clinton v. Boehm*,¹⁴⁵ is a classic example of why the architect cannot and should not be relied upon. The court concluded that there was no duty to supervise the construction project and protect the principal from liability. In that case there was a state statute which required that all elevator shafts be guarded during construction. A workman recovered judgment against the owner for injuries received in falling down an unguarded shaft. The owner attempted to recoup his loss by suing the architect for negligence in not insisting on proper guards on the shaft. The owner's claim was rejected on the ground that the duty to supervise construction did not include the duty to see that guard rails were provided.¹⁴⁶

The privity theory has been rejected by the courts with respect to

144. See *Foelle v. Heintz*, 137 Wisc. 169, 118 N.W. 543 (1908).

145. 139 App. Div. 73, 124 N.Y.S. 789 (1908).

146. See *id.* at 75, 124 N.Y.S. at 792.

architects, and architects are now held liable unless they use due care. This was made clear in *Montijo v. Swift*,¹⁴⁷ in which the court stated:

An architect who plans . . . construction work . . . is under a duty to exercise ordinary care . . . for the protection of any person who foreseeably and with reasonable certainty may be injured by his failure to do so, even though such injury may occur after his work has been accepted by the person engaging his services.¹⁴⁸

Negligence in supervision was made the cornerstone of the decision in *Day v. National U.S. Radiator Corp.*¹⁴⁹ in which a safety valve called for in the design of the system had not been installed. The system, tested by the plumbing subcontractor, resulted in an explosion. In holding that the architect was liable for the extensive damage, the court pointed out that if the architect had properly supervised the work he would have observed the danger in the installation of the hot water system. The mere fact that the subcontractor had not requested inspection of this system did not relieve the architect of his responsibility.

The negligence of the architect combined with that of Vince in contributing to the injury and rendered him liable *in solido*. One whose negligence combines with that of another to cause injury cannot plead the negligence of such other as a defense to an action by the injured party.¹⁵⁰

DANGER IS OPEN AND OBVIOUS—A FICTION

One of the most cogent aspects of the *Gowdy* decision was the manner in which Judge Fox rejected the argument that the plaintiff could not recover for an "open and obvious" danger. The court realistically concluded that even the most "reasonable" person could not be attentive and knowledgeable as to hazardous situations. Relying on the argument that the United States had superior knowledge they said:

[W]e have found that the defendant should have been aware that the plaintiff would not, while operating the davit, recognize the danger inherent in working on an unguarded elevated working surface in a concrete and water environment, and that the absence of a guardrail presented a deceptive and hidden danger to the plaintiff.¹⁵¹

147. 219 Cal. App. 2d 351, 33 Cal. Rptr. 133 (1963).

148. *Id.* at 353, 33 Cal. Rptr. at 134-35.

149. 117 So.2d 104 (1959).

150. *Id.* at 125. For a discussion of this case see Witherspoon, *When Is An Architect Liable*, 48 A.B.A.J. 321, 323, n.22 (1962) wherein the author, indicates that the lower court decision in *Day v. National U.S. Radiator Corp.* was reversed by the Supreme Court of Louisiana in 241 La. 288, 128 So. 2d 660 (1961).

151. 271 F. Supp. 733, 745 (W.D. Mich. 1967).

In *Ackerberg v. Muskegon Osteopathic Hospital*,¹⁵² plaintiff sought to hold defendant liable for its failure to guard an elevated platform where the absence of the handrail was open, obvious and known to the plaintiff. A unanimous court in rejecting the defendant's position declared:

A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if he (a) knows, or by the exercise of reasonable care, could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them.¹⁵³

The significance of this decision is that the court's entire opinion regarding duty was based upon foreseeability of harm as the decisive fact question involved. The court did not devote one word to the antiquated and legally ridiculed argument "that there is no duty if the condition is open and obvious."

The logic and strength of *Gowdy* was evidenced when Judge Fox said it would be incorrect to permit a wrongdoer from escaping liability on the premise that no duty was owed and the danger was "open and obvious." A distinction had to be made and he proounded it in this way:

Cases in which an injured employee of an independent contractor sues a landowner for injuries sustained as a result of claimed negligence on the part of the landowner lend themselves to temptations to simplism. It is important in these cases to distinguish "between the problem of restricting liability to a negligent party, and the problem of restricting the liability of the defendant even though he was negligent. . . ." This distinction "is one that is fundamental to an understanding of cases involving personal injuries for open and obvious dangers."¹⁵⁴

This distinction was supported by an authoritative study in this area cited in a footnote to the opinion. A commentator has observed:

While statements are frequently made that without a duty there can be no negligence, this is misleading and not in accordance with the usage herein. A driver of a car can be negligent as a matter of law in failing to give a proper signal when turning to the left or right and yet not be liable to a passenger-guest who is hurt in precisely the manner that should have been anticipated. This is because for *various reasons of policy*, other than the need for limiting liability in some manner, courts have concluded in view of the relationship between the parties to *restrict the defendant's duty of care*. Thus, conduct more reprehensible than negligence must be found to justify the imposition of liability on a defendant to a passenger-guest in an automobile or to a trespasser on land. *The lack of a duty in such instances does not mean and should not mean that the defendant has acted prudently*. It simply means

152. See *Ackerberg v. Muskegon Osteopathic Hosp.*, 366 Mich. 596, 115 N.W.2d 290 (1962).

153. *Id.* at 600, 115 N.W.2d at 292.

154. *Supra* note 151, at 739.

that even though he was guilty of anti-social conduct and *conduct that should be discouraged, the achievement of other socially desirable ends or objectives that will be hindered by shifting the loss from the defendant to the plaintiff is a weightier consideration*. Admittedly, a judge will often say that there was no duty to do something when in reality he means that it could not be said that it was negligence not to do it. This is unobjectionable since there is no liability without fault, i.e., negligence, but the lack of duty in such a case is covered by the general requirement of fault, whereas there are numerous examples of non-liability even though the fault or negligence requirement of liability is satisfied.¹⁵⁵

The highly respected First Circuit Court of Appeals had the occasion recently to comment on this restrictive view of the landowner's duty to a business visitor when a defendant contended that knowledge of danger or warning of danger completely discharged defendant's duty:

Connecticut has embraced the more modern trend of opinion which at least partially rejects the extremely favored position of the landowner in the law of torts. Only two weeks after the decision in *Laube v. Stevenson*, supra, the Supreme Court of Errors in *Reboni v. Case Bros.*, 1951, 137 Conn. 501, 78 A.2d 887, clearly held that warning does not necessarily discharge the duty of due care. There, two employees of a general contractor were burned by electrocution upon close approach of a crane with which they were working, to high-tension wires while doing aerial work above defendant's factory yard. There was evidence that one of the plaintiffs not only was familiar with the danger of working near "hot" wires, but he had been warned of the danger and, indeed, had had personal experience with these wires in the past. The court, however, pointed to the extremely dangerous condition and held that the jury was warranted in finding that something more than a warning was required to discharge defendant's obligation to the plaintiffs.¹⁵⁶

Many of the decisions in the past had been based on the fact that since there was no "control" over the worksite, the injured persons should have been aware of the surrounding situation. This was emphatically rejected by a recent decision of the New Jersey Supreme Court:

The injured has no control over or relation with the contractor. The contractee, true, has no control over the doing of the work and in that sense is also innocent of the wrong doing; but he does have the power of selection, and in the application of concepts of distributive justice perhaps much can be said for the view that a loss arising out of the tortious conduct of a financially irresponsible contractor should fall on the contractee.¹⁵⁷

155. Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. PA. L. REV. 632, 639 (1952) (emphasis added).

156. *Csizmadia v. P. Ballantine & Sons*, 287 F.2d 423, 425 (2d Cir. 1961).

157. *Majestic Realty Ass'n Inc. v. Toti Contracting Co.*, 30 N.J. 425, 432, 153 A.2d 321, 325 (1959).

FICTIONS—THAT EMPLOYEES UNDERSTAND SAFETY ENGINEERING,
AND THAT EMPLOYERS WANT CONSTRUCTION WORKERS
TO “WATCH THEIR STEP”

It is important that lawyers, judges and writers in the tort field understand our advancing technology. The horrible injury and death toll is not the fault of a technology which has failed to recognize hazards, risks and dangers; rather it is the fault of an underdeveloped social policy. The biotechnologists have long played a key role in recognizing hazards and risks. They have recently made substantial additional contributions by their research in the area of risk acceptance which has particular significance in limiting the liability defeating concepts of contributory negligence and assumption of the risk.

Although assumption of risk has been used by the courts in several different senses,¹⁵⁸ the use of this defense in relation to principals employing contractors can easily be shown to be illogical and erroneous. The defense of assumption of risk presupposes that the plaintiff has knowledge, understands the risk, and that he is acting voluntarily.¹⁵⁹ Assumption of risk also presupposes the gathering of information through the use of an individual's senses. This, however, takes much deliberation,¹⁶⁰ and the economic aspects of the principal-independent contractor relationship requires that no such information be obtained by the employee.

The applicable law with respect to contributory negligence is stated in *Foster v. Buckner*,¹⁶¹ wherein the court held that contributory negligence is ordinarily a question of fact for the jury. It stated that the fact that plaintiff was attending to his duties at the time of the injury so that his attention was directed to objects other than the truck which injured him made contributory negligence a question of fact. Plaintiff was entitled to rely upon defendant's employees to perform their duty and to follow the general practice in such cases. In *Mayala v. Underwood Veneer Company*,¹⁶² it was contended that the

158. See Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122 (1961).

159. See *Cincinnati N.O. & T. R.R. v. Thompson*, 236 F.1 (6th Cir. 1916).

160. Burner & Rockwell, *Information Seeking in Risk Acceptance*, AMERICAN SOCIETY OF SAFETY ENGINEERS JOURNAL 6 (1968).

161. 203 F.2d 527 (6th Cir. 1953).

162. 281 Mich. 434, 275 N.W. 198 (1937).

plaintiff had been guilty of contributory negligence in going under a log to throw a chain in the course of loading a truck with logs. The record showed, however, that this was an ordinary incident of operation. The court determined that under such circumstances it could not hold plaintiff guilty of negligence as a matter of law.

A claim of contributory negligence may not be predicated upon the failure of the plaintiff to observe or remember if neglect to do so is occasioned by his pre-occupation with the purpose for which defendant invited him to the premises, or the physical position he was required to assume in carrying out that purpose.¹⁶³

Courts and legislatures have long recognized in common law decisions and in statutes that an industrial worker needs special protection to prevent injury. Liability tends to bring about preventive and corrective measures. Many persons may have knowledge as to dangers inherent in a type of work being performed. But with respect to the appreciation of the extent of the danger, only the safety specialist is fully cognizant of the accurate assumptions to be made. This requires training in the recognition of hazards, risks and danger. Hazard, risk and danger are relative terms. Hazardous in relation to what; risky in relation to what; dangerous in relation to what? Statistical experience in the frequency and severity of injury are key elements. Accident prevention, psychological studies on attention span, attention arresters, fatigue, monotony, noise, peripheral vision and epidemiology of injury are all relevant. The recognition in safety standards, codes, and safe practice data sheets of hazards, risks and dangers are relevant.

In *Gowdy*, the lower court rejected the government's position that the injured plaintiff assumed the risk or was guilty of contributory negligence. In fact, they rejected its viability in such a factual situation. The court said:

Defendant's claim that plaintiff was guilty of contributory negligence is unfounded. From the testimony of defendant's former safety experts, we conclude that the attention of a reasonable and prudent workman, such as plaintiff, while working on the second deck of the lighthouse, would be concentrated almost exclusively on his work effort and that lulled into a sense of security, he could easily be lured into a

163. See *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919); *Inouye v. Pac. Gas & Elec.*, 1 Cal. Rptr. 848, 348 P.2d 208 (1959); *Shreveport v. Southwestern Gas & Elec. Co.*, 145 La. 679, 82 So. 785 (1919); *Dennis v. City of Albermarle*, 242 N.C. 263, 87 S.E.2d 561 (1955); *Johnson v. Rulon*, 363 Pa. 585, 70 A.2d 325 (1950); *Bloomer v. Snellenburg*, 221 Pa. 25, 69 A. 1124 (1908).

position of danger.

Under such circumstances, a workman would not be guilty of contributory negligence. Plaintiff was not guilty of contributory negligence.¹⁶⁴

IT WAS NOT INHERENTLY HAZARDOUS

The limited safety sophistication of the trial court often expresses itself in the fiction, "it was not inherently dangerous." This article has discussed a definition of what is inherently hazardous and concluded that this is a jury question.

The recognition of hazards and risks is peculiarly within the scope of safety engineering. Often the most dangerous hazards are those which are most innocent in appearance.¹⁶⁵ Thus the construction safety engineer needs all the available tools, which are: (1) safety standards, codes and safety data sheets; (2) safety manuals; (3) statistics; (4) case histories; (5) reports of safety conferences; (6) expert consultants; (7) contract specifications of prudent owners; (8) safety films; (9) safety libraries; (10) literature of safety equipment manufacturers.

Help for the endangered construction worker should be forthcoming from the *Gowdy* case, the first in which expert testimony was offered to prove: (1) that the recognition of hazards and risks is sophisticated knowledge; (2) that particular construction work was

164. *Supra* note 151.

165. *See, e.g.*, *Grogan v. United States*, 225 F. Supp. 832 (W.D. Ky. 1963) and *West v. Atkinson Construction Co.*, 59 Cal. Rptr. 286 (1967) in which the court said scaffolding is not inherently dangerous; yet every construction safety engineer in the country would testify otherwise, and many states have held scaffolding so hazardous that they have enacted Scaffolding Acts. In the *West* case, a floating scaffold was involved, making the safety problem even more acute. *See also*, *Dees v. Largess*, 1 Mich. App. 421, 136 N.W.2d 715 (1965), wherein the trial court said that the operation of a crane next to overhead power lines was not inherently hazardous.

In each of these cases and others like them, it must be said that plaintiff's counsel did not assist the court with expert testimony on how really hazardous the operation was. It may be just as presumptuous to suggest that the trial court should have recognized the evidence as sufficient for a jury question, as it was for the court to presume that a jury could not so infer. A trial judge is not expected to know a completely separate discipline such as safety engineering and should be assisted by expert testimony in understanding that what looks simple to him is really much more complicated.

The operation of a crane near an electric power line is so hazardous that a prudent owner puts extensive language in the contract specifications so that extra expenditure of time and money is known to the contractor and the principal has complete control. *See, e.g.*, I duPont Engineering Department, *supra* note 143, at D13.

inherently hazardous with an explanation of the subtle character of the hazards; and (3) what is involved in risk acceptance.¹⁶⁶ *Gowdy* should signal the beginning of a trend favoring the use of expert testimony to assist the court and jury in assessing liability and to discourage the use of defense fictions.

A DEFINITIVE STATEMENT OF THE LAW

Courts have employed many fictions to circumvent the so called "immunity" expressed by the so called "general rule" to prevent the harshness and injustice of that rule. The time has come for a definitive statement of the law.

The following chart represents the *Restatement* rules interpreted dynamically and taking into consideration all possible statutory limitations and expansions. It is an expression of law that will markedly expand past concepts of liability. It will serve until a more moral society expands fault concepts to strict liability. It should result in as dramatic a reduction in the injury and death toll as has resulted from the auto makers decision to use energy absorbing steering columns.¹⁶⁷

There are three basic clarifications made by the chart: (1) It eliminates a general rule of immunity;¹⁶⁸ (2) The duty owed is only limited by the "zone of danger;" (3) *Restatement* duties are seen as examples of due care violations rather than mechanical rules.¹⁶⁹

166. See testimony of Robert Jenkins, former Chief of Safety of the U.S. Army Corps of Engineers and Fred Bisel, former Chief of Safety of the U.S. Coast Guard, in *Gowdy*, *supra* note 8.

167. See Address by Robert Brenner, Deputy Director of National Highway Safety Bureau, *Advancing Human Ecology Through Progress In Safety Research*, Annual Meeting of the American Society of Safety Engineers, August 5, 1968. See also *Larsen v. General Motors*, 391 F.2d 495 (8th Cir. 1968).

168. See *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968) for an excellent example of a court's willingness to throw out the special treatment land owners have received.

169. *Supra* note 87, at 75.

CHART OF LIABILITY WHERE PRINCIPAL UNDERTAKES WORK THROUGH INDEPENDENT CONTRACTOR

I. *Liability for Principal's Own Negligence*

The principal is liable for any lack of due care on his part. Examples of the negligent acts of the principal for which he may be liable:

- 1. The furnishing of a site which he knows or should know in the exercise of due care is unsafe.
- (A warning may or may not be enough).
- 2. The furnishing of unsafe equipment which he knows or should know in the exercise of due care is unsafe.
- 3. The negligent failure to make proper regulations or the giving of ambiguous orders.
- 4. The negligent performance of any affirmative acts gratuitously or for a consideration undertaken by the principal.
- 5. Reckless misconduct.
- 6. Violation of statutory duties.
- 7. Violation of other non-delegable duties (Section II).

II. *Liability for Affirmative Non-Delegable Duty Violations and Vicarious Liability*

The principal is liable vicariously and for affirmative care violations when:

- 1. The work is inherently hazardous,
- or
- 2. The principal retains the right of control,
- or
- 3. The principal exercises control,
- or
- 4. An incompetent contractor is employed,
- unless

The legislature by statute has in a constitutional manner granted immunity from such liability.

III. *Immunity From Affirmative Non-Delegable Liability and Vicarious Liability*

There is immunity from vicarious liability if all of the following exist:

- 1. The work is not inherently hazardous.
- 2. A competent contractor has been employed.
- 3. The principal retains no right of control.
- 4. The principal exercises no control.

The legislature by statute has required non-delegable duties of the principal.

MISCELLANEOUS POSSIBLE CONSIDERATIONS

- A) The principal by contract with the independent contractor may not limit his liability to third persons.
- B) Contributory negligence may or may not be a defense.
- C) Assumption of the risk may be a defense remaining in some jurisdictions.
- D) The defense of statutory employer in some jurisdictions may be unconstitutional in that there is an unreasonable classification in either those immune or those who may sue, or there may be a taking of property without due process.
- E) The duty is owed to everyone who might reasonably, foreseeably be injured by lack of due care.
- F) The duty owed is due care (due care includes the concept of reasonably safe place to work for employees on the site).

SUMMARY

The theme of the excellent construction safety handbook of the duPont Corporation is: "*Humans Are Not Expendable—Even By Fractions.*" The law can and must make this meaningful in construction. The common law, interpreted dynamically, can do this by subjecting principals employing contractors to the same requirement of due care that binds everyone else in society, and by ending the confusion generated by judicially approved examples of duty violations expressed as the parameters of prudent conduct.