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Negligence—Doctrine of Macpherson v. Buick—Liability of Remote Supplier

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review the formula for restricting freedom of speech, by fixing a standard to determine when a danger is clear, when it is present and what degree of evil shall be deemed sufficient to justify abridgement of free speech." See 2 SYRACUSE L. REV. 171, 173 (1950). This was at best an ingenuous suggestion. The area of free speech defies formulae. As "damned racketeer" and "damned Fascist" are considered "fighting words" in *Chaplinski v. New Hampshire*, 315 U. S. 568 (1941), so now are the words, "rise up in arms," uttered by a Young Progressive to an audience of mixed sympathies. The courts will always attempt to solve free speech cases within the time honored framework of case and controversy, and will wisely avoid going any further. But it now can be seen that the Court has opened a Pandora's box. On the one hand, Terminiello can rant and rave although cordons of police are needed to keep off a riotous mob of 2,300 people, but Feiner, addressing 70 somewhat restless people, is silenced because one man threatens to assault him. The New York statute, aside from the question of its vagueness, which must cast a shadow upon its constitutionality, obviously embodies a threat to freedom of speech. It is hardly an argument that three New York courts cannot be wrong, or that judges sitting in Albany can better understand conditions in Syracuse than judges sitting in Washington. The Feiner case is simply an unfortunate holding. It mirrors the post-war reaction to thoughts or ideas which in any manner can be connected with unpopular politics. The application of the *Gitlow* doctrine to such vaguely drawn statutes may now be an effective weapon in the hands of local police officials to silence the expression of opinions hostile to the majority view in the particular community.

Edward S. Spector

NEGLIGENCE — DOCTRINE OF MACPHERSON v. BUICK — LIABILITY OF REMOTE SUPPLIER

Defendant, who owned and made a business of supplying cranes, rented one of them to another supplier, also a defendant, who kept it for two days and then re-rented the crane to the plaintiff's employer for use in its shipyard. Thirteen months later, a chain on the crane gave way, injuring the plaintiff who was working nearby. Expert testimony indicated that a fracture had existed in a link of the chain for at least two years and had at all times been discoverable by "visual inspection." The owner of the more than ten-year-old crane had agreed to repair it during the rental period. *Held* (5-2): the owner of the crane as well as the intermediate supplier can be held liable under the principle of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916). The owner is not relieved of liability merely because the plaintiff's employer had an equal opportunity to discover the defect and would also be within "the compass of the MacPherson doctrine." *LaRocca v. Farrington*, 301 N. Y. 247, 93 N. E. 2d 829 (1950).

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The *MacPherson* case held the manufacturer of a finished automobile liable for injuries suffered by an ultimate purchaser on the theory that the manufacturer, by reasonable inspection, could have discovered the defect and had no reason to believe that the purchaser would discover the defect which caused the accident. "The manufacturer of a thing of danger is under a duty to make it carefully." 217 N. Y. at 389, 111 N. E. at 1053. These cases eliminated any need for a contractual relationship between the manufacturer and the injured person and extended the duty of care to those whose injury is fairly to be foreseen.

The approach of the *MacPherson* case has been applied in the case of repairers. *Kalinowski v. Truck Equipment Co.*, 237 App. Div. 472, 261 N. Y. Supp. 657 (4th Dep't 1933). And, prior to the *MacPherson* decision, a similar result was reached concerning suppliers in *Connors v. Great Northern Elevator Co.*, 90 App. Div. 311, 85 N. Y. Supp. 644, *aff'd*, 180 N. Y. 509, 72 N. E. 1140 (1904). This case dealt with an intermediate supplier who owned and furnished a power shovel to the employer of plaintiff's intestate. A rope on the shovel was defective and the supplier was held responsible on the ground of having violated his duty to furnish serviceable appliances. The stage was set for the instant case by *Richards v. Texas Co.*, 245 App. Div. 797, 280 N. Y. Supp. 950 (3d Dep't 1935), *motion for leave to appeal denied*, 268 N. Y. 728, wherein the supplier of a used gas pump was held liable for injuries resulting from a defect, although the defect could have been discovered by the plaintiff's employer through a reasonable inspection. Thus, where a supplier of *used* chattels fails to remedy a defect that is discoverable by reasonable inspection, he will not be relieved of liability by the subsequent negligence of employers using the chattel where a third party brings the action. The present case merely adds another intermediary, the second supplier, with no change in result. Were the action brought by the intermediate supplier or employer against the owner of the chattel, the result would be different; their contributory negligence seemingly would bar recovery, at least on a negligence basis. The only recovery then by either the employer or the second supplier would be against his immediate supplier on the basis of implied warranty of fitness. *Matter of Casualty Co., Bliss Co. claim*, 250 N. Y. 410, 165 N. E. 825 (1929).

The dissent here felt that the experience of the plaintiff's employer in dealing with cranes and the length of time the crane was used by the employer, plus the age of the crane should place liability on the employer, i.e., made it practically appropriate to cut off the owner's liability because of remoteness. The view of the dissent was that the transaction savored more of an arms-length relationship, with the experienced lessee expecting and able to cope with such defects. A return to the common law rule, casting liability for defects on the possessor of the chattel rather than the absent owner was advocated. Analogy was made further to the maritime rule placing liability on the charter

party of a ship rather than the owner for defects in a vessel, *Muscelli v. Frederick Starr Contr. Co.*, 296 N. Y. 330, 73 N. Y. 2d 536 (1947), and to real property liability concepts whereby the lessee in possession is held liable alone when he has had time to make efficient inspection and is competent to do so, *Pharm v. Lituchy*, 283 N. Y. 130, 27 N. E. 2d 811 (1940). As regards negligence concepts, the present decision properly plays down the relieving effect of intervening negligence. On the facts here presented, the decision seems sound, especially in view of the owner's contractual duty to repair, though the court placed no reliance thereon. How far liability will be extended in future cases cannot be definitely ascertained, nor the point at which a defect becomes so patent as to break the metaphorical chain. See e.g., *Campo v. Scofield*, 301 N. Y. 468, 95 N. E. 2d 802 (1950).

A possible motivation of the dissent, which was not discussed—or apparently considered—may have been some features of New York law which, in a case of this sort, may present a windfall to the employer by excusing him from liability for his concurring negligence. This results from the combined effects of first, the Workmen's Compensation Law which makes compensation the employee's exclusive remedy against a negligent employer (§ 11) and, in some cases, subrogates the employee's action against third party tortfeasors to the party liable for compensation, i.e. the employer of his insurance carrier (§ 29); and second, the inability of one tortfeasor to implead a co-tortfeasor, *Fox v. Western N. Y. Motor Lines, Inc.*, 257 N. Y. 305, 178 N. E. 289 (1935). See note in 34 IOWA L. REV. 724 (1949) for a discussion of similar problems in Iowa, as raised in *Kittelson v. American Dist. Tel. Co.*, 81 F. Supp. 25 (N. D. Iowa 1948), *reversed*, 179 F. 2d 946 (8th Cir. 1950).

Taking the instant case as an example, the injured employee has three options. He may claim workmen's compensation and allow any other claims he may have to be subrogated to his employer or the insurance carrier. He may, in addition to claiming compensation, bring an action within six months of the compensation award against third party tortfeasors only, here the crane owner and the second supplier; but his recovery is subject to a lien held by the employer or carrier to the extent of any compensation paid, § 29, Work. Comp. Law. Finally, the employee can forego any claim to compensation and proceed against the third party tortfeasors; and if he succeeds, his employer escapes all liability because the other tortfeasors have no right to recover over against the employer unless the situation is one where common law indemnity notions come into play. The New York cases afford no clear rules as to when such indemnity can be had; compare *Westchester Light Co. v. Westchester Small Estates Corp.*, 278 N. Y. 175, 15 N. E. 2d 567 (1938) (indemnity allowed) with *Havens v. Hartshorn*, 184 Misc. 310, 55 N. Y. S. 2d 698 (Sup. Ct. 1945) (indemnity not allowed). These cases both raised the question in regard to indemnity against employers liable for compensation in any case. Aside from

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problems of compensation, the test as to whether indemnity will be allowed is discussed sometimes in terms of active versus passive negligence and also, in terms of primary and secondary duty. See PROSSER ON TORTS (1941 ed.) § 109. By the usual tests, it would seem that there could be no indemnity in the present case. The only way that suppliers of chattels can definitely insure contribution from an employer co-tortfeasor in New York, therefore, lies in an indemnification agreement. See, e.g., *Rappa v. Pittston Stevedoring Corp.*, 48 F. Supp. 911 (E. D. N. Y. 1943).

From the foregoing, it is evident that the employer or carrier stands in a very fortunate position, assuming there is a good third party action and common law indemnity is not possible. By the second and third options, he actually pays no part whatsoever of the damages, by compensation or otherwise. And by the first option in which the employee's unprosecuted action is assigned to him, § 29 provides that of the recovery, one-third of the excess over compensation paid plus expenses inure to him, the remainder going to the employee. In the last situation, the employer or his carrier can make an overall profit. All of this is possible despite the employer's own concurring negligence, since that defense is no bar to the third party action brought by the employer or carrier. This point seems settled, though there are no Court of Appeals decisions on the point, by *Caulfield v. Elmhurst Contr. Co.*, 268 App. Div. 661, 53 N. Y. S. 2d 25 (2d Dep't 1945), followed in *Employer's Mutual Insurance Co. v. Refined Syrup Sales Corp.*, 184 Misc. 941, 53 N. Y. S. 2d 835 (Sup. Ct. 1945). Those cases dealt with the assignment by operation of law (subrogation) of wrongful death actions to employers' insurance carriers, but the courts left little doubt that the same rule would be applicable to the facts of the instant case. The employer and his insurance carrier have been so far treated as being

identical. This is strictly true only in the relatively infrequent cases where the employer is a self-insurer, but it might be considered appropriate in any case to impute the employer's negligence to his carrier. This is certainly the rule in the usual non-compensation case when a subrogee prosecutes claims originally accruing to his insured.

In the principal case, the employer's carelessness may seem more than usually difficult to swallow. The practicalities stressed by the dissent—the experience of the employer, the age of the crane and the length of time it was in the hands of the employer—may make the employer's duty of care seem more nearly dominant as compared with the two suppliers, in that he was better able to prevent the accident. Thus, his negligence, though technically “concurrent,” was the more active causative factor.

The difficulty with the analysis just set forth is that this is not the usual subrogation situation. The carrier's claim is not derived from the insured em-

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ployer, nor is the employer's claim truly his own—both derive their actions from the employee, assumed here to be free from contributory negligence. And the bulk of the recovery against third parties does accrue to the employee, whatever the benefits going to the employer. If the employer's negligence were to bar "subrogated" third party actions by him or his carrier, one of the main incentives to such actions would disappear, with the employee the ultimate loser, and with a resulting increase in the cost of compensation.

In the present case, under the existing statutes, to relieve the owner of liability because of his remoteness or because, thus, the employer's negligence might otherwise be forgiven, would deprive the injured employee of all common law claims, leaving him only compensation. This the court was unwilling to do, possibly because compensation schedules so largely fail to actually compensate injured workmen.

Phyllis J. Hubbard

David S. Reisman

WORKMEN'S COMPENSATION — INJURIES ARISING OUT OF AND IN COURSE OF EMPLOYMENT — WHEN DOES HORSEPLAY AMOUNT TO ABANDONMENT OF EMPLOYMENT?

As permitted by his employer, claimant left the department where he worked five minutes before quitting time, and went to another department for the purpose of securing a ride to his home with a friend and fellow employee. The fellow employee offered him a drink from a bottle labelled "Gin." Claimant stepped out of sight and took a drink. The bottle in fact contained poisonous carbon tetrachloride which the fellow employee had secured from the employer for his personal use. Under the employer's contract with the plant union, possession of or drinking liquor on the premises at any time was cause for immediate dismissal. Claimant admitted that he had been given a copy of the contract, but would not admit that he had read it. There had been no drinking in the plant previously. The Workmen's Compensation Board found that claimant's injuries arose out of and in the course of his employment. The Appellate Division affirmed. *Held* (4-3): affirmed. Claimant's conduct did not amount to an abandonment of employment as a matter of law. A violation of the no-drinking rule should be treated no differently for the purposes of compensation than the violation of any other rule designed to improve plant efficiency and to safeguard employees. Claimant, although he participated in the event, was an innocent victim of another's horseplay. *Matter of Burns v. Merritt Engineering Co.*, 302 N. Y. 131, 96 N. E. 2d 739 (1951).

The New York courts have long displayed a liberal attitude toward the administration of the Workmen's Compensation Law. The present decision, while