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Liability of Employer for Negligence of His Independent Contractor

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LIABILITY OF EMPLOYER FOR NEGLIGENCE OF HIS INDEPENDENT CONTRACTOR

The recent case of *Silveus v. Grossman*[1] illustrates an interesting development in Pennsylvania of the liability of an employer for the negligence of his independent contractor. In this case the defendant owned a large building which was destroyed by fire. The wall adjacent to plaintiff's property was left standing in a dangerously insecure and unsafe condition. The defendant employed one Nolan to remove the wall, making him an independent contractor. Nolan, in the course of his work, failed to exercise due care and as a consequence of his negligence the wall fell, injuring the plaintiff's property. The question was whether the defendant, having employed an independent contractor to do the work, was thereby absolved from liability.

The general rule, relative to the immunity of an employer from responsibility for the acts of his independent contractor, is firmly established to be that the owner or occupant of property upon which work is to be done by another under contract, not as a servant, but as an independent contractor, is not liable for injuries resulting to third persons from the negligent or wrongful performance of the work, where there is no want of due care in the selection of such contractor.[2] The plaintiff contended, however, that the defendant remained liable for the injury done under an exception to the general rule which was stated to be: An employer is liable for injuries caused by the failure of an independent contractor to exercise due care in respect to the performance of work which is inherently

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[1]102 Pa. Super. Ct. 365 (1931).

[2]Allen v. Williard, 57 Pa. 374 (1868); Hanison v. Collins, 86 Pa. 153 (1878); Miller v. Merritt, 211 Pa. 127 (1905); Painter v. Pittsburgh, 46 Pa. 213 (1863); Brooks v. Buckley & Banks, 291 Pa. 7 (1927); 34 Harv. L. R. 551; 39 C. J. 1324; 23 A. L. R. 1017 et. seq.

An independent contractor has been defined by our Pennsylvania Supreme Court to be: "One who carries on an independent employment in pursuance of a contract by which he has entire control of its work and the manner of its performance." Smith v. Simmons, 103 Pa. 32 (1883). Also Bojarski v. Hamlett Inc., 291 Pa. 485, 489 (1928).

or intrinsically dangerous, unless certain precautions are used, and liability cannot be evaded by employing an independent contractor to do such work.[3] It was contended that the work done was intrinsically or inherently dangerous and that the taking of proper precautions was a non-delegable duty, owing to third persons who may sustain injuries from the work, and therefore the contractor was to be considered as agent or servant for whose acts his employer was responsible. The lower Court applied this principle of law to the case and a judgment for the plaintiff resulted. On appeal to the Superior Court the judgment was reversed and the general rule as to non-liability of the employer followed, the court declaring, per Gawthrop J.:

"While the statement of law which the court below applied to this case is in harmony with the decisions of the courts of some jurisdictions it is not supported by any decision of our Supreme Court, or this Court, which the industry of counsel or our own examination could discover. The Supreme Court has consistently held, 'that persons not personally interfering with or directing the progress of a work but contracting with third persons to do it, are not responsible for a wrongful act done or for negligence in the performance of the contract if the act agreed upon be lawful'. *Wray v. Evans, 80 Pa. 102, 105.* * * * * The rule in this state is that if the act may be done without causing actionable injury to third persons or their property, in the exercise of due care, the independent contractor alone is liable for the acts done by him or his servants. * * * * The doctrine, that work which is merely dangerous of itself or 'inherently dangerous' cannot be delegated to an independent contractor, so as to relieve the contractee from re-

[3]For a full statement of this exception and the many states which follow it, see 39 C. J. 1331 and cases cited thereunder. Also exhaustive note in 23 A. L. R. 1084, et. seq.

The work is said to be inherently or intrinsically dangerous when the danger predicated is an unavoidable incident of the performance of the work, 23 A. L. R. 1085. The test is not whether a man of ordinary prudence would have anticipated the injury, 39 C. J. 1333.

sponsibility for the negligence of the contractor, has not been approved in this state. * * * * Therefore, we are forced to conclude that the court below fell into error in holding that the defendants were responsible for the negligence of their contractor because the work of razing the wall was a non-delegable duty and the contractor was therefore their servant for whose acts they were responsible."

This case, being a direct adjudication of the status in Pennsylvania of this important exception to the general rule, results signally in a more restricted liability of the employer of an independent contractor. Under the general rule, if the act may be done by the independent contractor in the exercise of due care, without causing injury, the contractor alone is liable for his negligence in performing the act, whereas if the exception were recognized the employer would be held liable for the contractor's negligence, if the work to be done was found by the court and jury to be inherently or intrinsically dangerous.[4]

An illustration of an exact opposite holding on almost identical facts is presented by the case of *Covington & Cincinnati Bridge Co. v. Steinbrook*.[5] Here the defendant employed an independent contractor to remove a fire wall. Plaintiff's property was damaged by the contractor's negligence in taking down the wall. It was held that the duty was a non-delegable one and that defendant was liable for the injury. Our court's adherence to the general rule in the *Silveus* case is consistent with the prior attitude

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[4]In 23 A. L. R. 1088 it is suggested that this description in a literal sense is applicable to almost every kind of work and as a matter of strict logic would compel an adoption of the broad theory that an employer is ordinarily bound at his peril to see that the stipulated work is carefully performed.

[5]61 Ohio 215, 55 N. E. 618, (1899). The doctrine of this case was approved and followed in Warden v. Penna. R. R. Co., 175 N. E. 208 (Ohio-1931).

Other fire wall cases in the United States are: Hudgins v. Hann, 240 Fed. 387 (5th Circuit—1917); Steppe v. Alter, 19 So. 147 (La.—1896); Anderson v. East, 19 N. E. 726 (Ind.—1888); Ainsworth v. Lakin, 180 Mass. 397, 62 N. E. 746 (1902); Fitspatrick v. Penfield, 267 Pa. 564 (1920).

of both Supreme and Superior Court. Thus in the early case of *Painter v. City of Pittsburgh*[6] the Supreme Court would brook no exceptions to the general rule declaring, per Strong J.: "They were in an independent employment and sound policy demands that in such a case the contractor alone be held liable. * * * * The public will be better protected if it is held that the contractor alone is responsible for his negligence."

Jackman v. Rosenbaum Co.[7] is an outstanding case adhering to the general rule. The defendant under a party wall statute[8] employed an independent contractor to remove a part of plaintiff's building so as to erect a party wall on the division line, as provided for and allowed by the statute. The plaintiff's property was damaged by the contractor's negligence. The plaintiff sued the employer claiming that he was liable for the injury as an insurer. Failing this, he claimed that the defendant was, at least under the circumstances, charged with a non-delegable duty. He failed in both contentions. The following statement of the trial judge was pronounced to be correct:

(Defendant having employed) "others who were recognized as and proved to skillful and competent in their professions and having given proper directions * * * * for the energetic * * * * execution of the work in proper manner * * * * it is apparent that the defendant is therefore legally relieved from liability in the premises." It is to be noted that the right to remove the wall was provided by statute but as there was no statutory liability for the damages here alleged, the common law remedies attached which makes the rule of this case applicable to cases in general.

In *Fitzpatrick v. Penfield*[9] there is dicta to the effect that, being the owner of a wall left standing after a fire, the "defendant was charged with a non-delegable duty to use ordinary care to make her property reasonably safe."

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[6]46 Pa. 213 (1883).
[7]263 Pa. 158, 23 A. L. R. 1053 (1919).
[8]Act of 1895, P. L. 135.
[9]267 Pa. 564, 570.

The true import of this statement was explained, however, in the *Silveus* case, the court saying:

"In that case the defendant's wall was left standing after a fire. More than one year later the wall fell and killed a child. * * * * The defendant sought to excuse her liability by showing she had experts examine the wall and that they declared the wall to be safe. She relied on their opinion and permitted the wall to stand. The Supreme Court held that her duty to use ordinary care to make her property reasonably safe * * * * was non-delegable: that is, as we understand it, the duty was not discharged by obtaining the opinion of experts that the wall was safe and sound. * * * * The question of whether the work required to make the wall reasonably safe could be delegated to an independent contractor, with the usual immunity of the employer from responsibility for the acts of such a contractor was not involved in that case."

Another exception to the general non-liability rule followed in England and some jurisdictions in United States and most clearly enunciated by Lord Cockburn in the famous case of *Bower v. Peate*[10] is that: "the duty of an employer in respect to work which will in the natural course of events produce injury unless certain precautions are taken is a non-delegable duty."[11] As this doctrine is of even broader application than the one contended for in the *Silveus* case, it doubtless would receive no recognition in Pennsylvania.

Although the exception contended for in the *Silveus* case was refused recognition, Pennsylvania does, in common with other jurisdictions, recognize certain exceptions to the general rule. Where the act contracted to be done,

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[10](1876) L. R. 1 Q. B. Div. 321. The exception was first enunciated, however, in the earlier case of Pickard v. Smith, 10 C. B. V. S. 476, 142 Eng. Reprint 536 (1861).

[11]This exception is analogous to the one previously named and little distinction is made by some courts. Historically, however, the two doctrines have been evolved separately and with relation to different precedents. For further comment and distinction, see 23 A. L. R. 1084 et. seq.

as distinguished from the manner of its performance, will create a nuisance the employer remains liable therefore.[12] The same is true where the act to be done is unlawful. Where the injury results directly from the doing of the work and not from the negligent manner of its performance the employer remains liable for any injury occasioned thereby,[13] which rule applies also where the injury is caused by defective plans or specifications furnished by the employer.[14] It is also held that a duty imposed on the defendant by statute or municipal ordinance cannot be delegated to an independent contractor so as to relieve the defendant from liability for the wrongful performance of the work.[15] The same is true where the performance of work is a duty imposed on a corporation by its charter.[16]

In conclusion it may be said that Pennsylvania follows very closely the general rule absolving the employer from liability for the wrongful or negligent performance of work done by an independent contractor. The doctrine that work which is inherently or intrinsically dangerous cannot be delegated to an independent contractor so as to relieve the contractee from the duty to use due care in its performance has been refused recognition in Pennsylvania, while the cases covered by the other recognized exceptions are few in number.

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[12]Smith v. Simmons, 103 Pa. 32 (1883).

[13]Silveus v. Grossman, 102 Pa. Super. Ct. 365; 2 Thompson on Neg. 903.

[14]Rose v. Philadelphia, 31 L. I. 165 (1874).

[15]Gray v. Pullen, 5 B. & S. 970; Smith on Neg. p. 88; 34 Harv. L. R. 551. This rule applies also where certain powers and privileges have been specifically conferred by the public upon an individual or corporation for private emolument in consideration of which certain duties affecting the public health and safety have been assumed. Lancaster Ave. Imp. Co. v. Rhoads, 116 Pa. 377 (1887); Fox v. Porter, 6 Pa. Dist. R. 85 (1897).

[16]Philadelphia R. R. Co. v. Hahn, 22 W. N. C. 32 (1888); Pennsylvania and Ohio Canal Co. v. Graham, 63 Pa. 290 (1869); Cambria v. Philadelphia R. R. Co., 218 Pa. 54 (1907).