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OWNER-CONTRACTORSHIP LIABILITY IN BUILDING CONSTRUCTION AND REPAIR CASES IN NEW YORK

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To business visitors, such as workmen, the general rule is that the owner of property owes them the legal duty of exercising reasonable care, either of providing them with a safe place to work, or to warn them of any known, or reasonably discoverable, unusual danger on the premises which might entail their injury.[1] Such obligation rests upon the well-established common law principle that an invitation to another to enter a dangerous place, extended by one in control, carries with it an implied assurance of the invitee's safety.[2] Such assurance does not, however, justify the abandonment of all care on the part of the invitee, as the owner is not deemed an insurer of the invitee's safety, particularly when the latter is a worker on the premises; it being generally a jury question whether the invitee was contributorily negligent under the circumstances.[3]

Where, however, a worker-invitee has been warned by the owner of a dangerous situation on the property, which warning the worker deliberately disregards, he is guilty of contributory negligence as a matter of law.[4] The owner's duty to supply a proper plant extends also to employees of an independent contractor.[5] In such circumstances, the duty of protection is independent of the employer-servant relation. This was so at common law,[6] and is true today by statute.[7]

This does not mean that the owner thereby stands in the shoes of the contractor and becomes liable for the contractor's mere col-

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1 Haefeli v. Woodrich Engineering Company, 255 N. Y. 442, 175 N. E. 123 (1931); Wohlfron v. Brooklyn Edison Company, 238 App. Div. 463, 265 N. Y. S. 18 (2d Dep't 1933), *aff'd,* 263 N. Y. 547, 189 N. E. 691 (1933).

2 Christensen v. James S. Hannon, Inc., 230 N. Y. 205, 129 N. E. 655 (1920), and cases cited therein.

3 Koehler v. Grace Line, Inc., 285 App. Div. 154, 136 N. Y. S. 2d 87 (1st Dep't 1954).

4 Nicholas v. New York State Electric & Gas Corp., 283 App. Div. 291, 127 N. Y. S. 2d 490 (4th Dep't 1954), *aff'd,* 308 N. Y. 930, 127 N. E. 2d 84 (1955), where plaintiff engaged to paint an electric sub-station disregarded a warning by the station's superintendent to remain on the ground until the necessary switching had de-energized the bus-bars of the structural steel work to be painted.

5 Caspersen v. LaSala Brothers, 253 N. Y. 491, 494, 171 N. E. 754, 757 (1930).

6 Coughtry v. Globe Woolen Company, 56 N. Y. 124 (1874).

7 EMPLOYERS' LIABILITY LAW (Laws of 1921, ch. 121) § 2; CONS. LAWS, ch. 74; N. Y. LABOR LAW, § 200; CONS. LAWS, ch. 31.

lateral negligence arising casually out of the performance, or in the progress of the work.[8] Nor is an employer responsible for the negligence of a contractor's failing to furnish safe appliances to the contractor's employees,[9] although the result would be different if the owner himself had furnished a defective appliance, even though he did not direct or supervise the work being performed.[10] Nor does the owner's obligation to furnish a contractor's employees a safe place to work make the owner responsible to those employees for the sufficiency of the contractor's own plant, tools, and methods.[11] Similarly, the "place" which under the New York Labor Law, section 200, the owner is required to keep safe does not include the subcontractor's own plant and equipment, or extend to the very work he is doing.[12]

[8] May v. 11½ East 49th Street Co., Inc., 296 N. Y. 599, 68 N. E. 2d 881 (1946). This is so even where the work is inherently dangerous. Thomas v. Gimbel Brothers, 9 Misc. 2d 201, 170 N. Y. S. 2d 114 (Sup. Ct. N. Y. County 1957), unless it can be shown that the owner had notice of the dangerous condition which could have been guarded against, or which he knowingly permitted to remain on the premises after completion of the work. Fragiacomo v. 404-8 East 88th Street Realty Corp., 269 App. Div. 635, 58 N. Y. S. 2d 109 (1st Dep't 1945).

[9] Borshowsky v. B. Altman & Co., 280 App. Div. 599, 601, 111 N. Y. S. 2d 299, 301 (1st Dep't 1952), *aff'd*, 306 N. Y. 798, 118 N. E. 2d 818 (1954); Ranney v. Habern Realty Corp., 281 App. Div. 278, 119 N. Y. S. 2d 192 (1st Dep't 1953), *aff'd*, 306 N. Y. 820, 118 N. E. 2d 825 (1954).

[10] Koenig v. Patrick Construction Corp., 298 N. Y. 313, 83 N. E. 2d 133 (1948). The supplier of the defective appliance must, however, have knowledge or notice of the defect. DellaMorgia v. Weinberg, 303 N. Y. 835, 104 N. E. 2d 376 (1952). N. Y. LABOR LAW, § 240, provides, in part: "1. A person employing or directing another to perform labor of any kind in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed or directed." This section thus places the duty of furnishing these devices on the immediate employer of the labor, and it would not mean an owner or general contractor, unless such person was actually doing the work himself without the intervention of a subcontractor. Komar v. Dun & Bradstreet Co., Inc., 284 App. Div. 538, 132 N. Y. S. 2d 618 (1st Dep't 1954). Nor is a property owner responsible under this section unless the employee can show that he was injured by the exact appliance or device that the owner supplied, and that it was defective. Klutz v. Citron, 2 N. Y. 2d 379, 141 N. E. 2d 547 (1957). And there is no "direction" within the meaning of the section, if performance of the work is left solely to the judgment and experience of the independent contractor, and the owner's limited power of general supervision is merely to ascertain whether the work is being done. Blackwood v. Chemical Corn Exchange Bank, 4 App. Div. 2d 656, 168 N. Y. S. 2d 335 (1st Dep't 1957). Nor is N. Y. LABOR LAW, § 240 applicable to domestics engaged in window cleaning on private dwellings, as the word "cleaning" as used in the statute refers only to such work done in connection with building construction, demolition, or repair. Connors v. Boorstein, 4 N. Y. 2d 172, 149 N. E. 2d 721 (1958).

[11] Iacono v. Frank & Frank Construction Co., 259 N. Y. 377, 182 N. E. 23 (1932).

[12] Zucchelli v. City Construction Co., 4 N. Y. 2d 52, 149 N. E. 2d 72 (1958); Hess v. Bernheimer & Schwartz Brewing Co., 219 N. Y. 415, 114 N. E. 808 (1916), where

Other limitations appear equally well settled. An owner is relieved of responsibility, either to furnish a safe place to work, or to give warning of danger, (a) where the structure is defective and the workman is employed for the specific purpose of correcting or repairing the defect,[13] (b) where the prosecution of the work itself makes the place and creates the danger,[14] (c) where the worker's injuries result from an apparent defect on the premises in connection with the work performed,[15] (d) where the worker unnecessarily endangers himself by going to a place on the premises which he was expressly warned by the owner to avoid,[16] (e) where the worker is injured as a result of putting an object on the premises to an unintended use,[17] and, (f) where the employee voluntarily undertakes to do something on the premises which was not part of his employment.[18]

The foregoing principles reveal that, although it is the general contractor on the job who has the primary duty of general supervision over the work in progress, that nevertheless a property owner may also concomitantly be charged with the duty of reasonable care in

it was held that N. Y. LABOR LAW § 200 does not impose on the owner a fresh obligation to supervise, in the interest of employees of a sub-contractor the latter's operation of its own plant through its own employees.

This section provides: "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein. The board shall make rules to carry into effect the provisions of this section."

[13] Kowalsky v. Conreco Co., 264 N. Y. 125, 190 N. E. 206 (1954), on the ground that an owner should not be charged with liability to one injured by a dangerous condition which the latter has undertaken to repair.

[14] Smulian v. Independent Warehouses, Inc., 296 N. Y. 880, 72 N. E. 2d 613 (1947); Thorsen v. Slattery Contracting Co., Inc., 272 App. Div. 931, 71 N. Y. S. 2d 77 (2d Dep't 1947). See, however, the recent Court of Appeals case of Circosta v. 29 Washington Square Corp., 2 N. Y. 2d 996, 143 N. E. 2d 346 (1957), for a strict construction of this principle. with a strong dissenting opinion by Van Voorhis, J.

[15] Borshowsky v. B. Altman & Co., 280 App. Div. 599, 116 N. Y. S. 2d 299 (1st Dept' 1952), *aff'd*, 306 N. Y. 798, 118 N. E. 2d 818 (1954). And Cosby v. City of Rochester, 1 N. Y. 2d 396, 735 N. E. 2d 706 (1956) may also be consulted in this connection.

[16] Nicholas v. New York State Electric & Gas Corporation, 308 N.Y. 930, 127 N. E. 2d 84 (1955).

[17] Italiano v. Jeffrey Garden Apts. Section 2, Inc., 3 App. Div. 2d 677, 159 N. Y. S. 2d 358 (2d Dep't 1957), *aff'd*, 3 N. Y. 2d 977, 147 N. E. 2d 245 (1957); Marshall v. City of New York, 308 N. Y. 836, 126 N. E. 2d 177 (1955).

[18] Garlichs v. Empire State Building Corp., 3 N. Y. 2d 780, — N. E. 2d — (1957), defendant owner held not liable for failing to furnish a safe place to work to plaintiff window cleaner who was injured while attempting to open a stuck window contrary to instructions, despite the fact that the defect was reported to defendant who promised to correct the fault before the accident occurred. In a strong 4-3 minority opinion, Froessel, J., contended that a jury could find (as it did in the lower court) that plaintiff was relieved of the assumed risk by defendant's promise to repair.

its performance, depending upon the nature of the work which he initiates.[19] This aspect of the problem of owner responsibility generally arises out of cases where an owner is charged vicariously with negligence for the act or omission of a worker on the property causing injury to a non-employee, for example, a pedestrian, a visitor, or a tenant in the building. Thus, although an owner has the right to rely upon a contractor to perform properly the work he was engaged to do,[20] where, from the nature of the work the duty of care in its performance is nondelegable, and the owner is put on notice of the existence of a dangerous condition created by the contractor or his employee, the owner may properly be held responsible even to a third party non-worker, who is injured by the negligent act of such contractor or his employees.[21]

In conformance with these general principles, an owner of a building under construction has been held liable to a pedestrian

[19] Tipaldi v. Riverside Memorial Chapel, 273 App. Div. 414, 78 N. Y. S. 2d 12 (1st Dep't 1948), *aff'd,* 298 N. Y. 686, 82 N. E. 2d 585 (1948).

[20] Harrington v. 615 West Corp., 1 App. Div. 2d 435, 151 N. Y. S. 2d 564 (1st Dep't 1956), mod. 2 N. Y. 2d 476, 141 N. E. 2d 602 (1957).

[21] Schwartz v. Merola Bros. Construction Corp., 290 N. Y. 145, 48 N. E. 2d 299 (1943). The general doctrine has been epitomized in Janice v. State of New York, 201 Misc. 915, 919-922, 107 N. Y. S. 2d 674 (Ct. Claims 1951): To the general rule that the owner or employer is not responsible for the negligence of an independent contractor there are, however, a number of exceptions, all based on the concept that there are certain legal duties and responsibilities which can not be avoided by delegation to another.

One of these exceptions is that an employer is subject to a nondelegable duty with respect to work which in the natural course of events will produce injury unless certain precautions are taken. . . . 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 (quotation from Bower v. Peate 1 Q.B.D. 321, 326). . . . A second exception, closely akin to the first mentioned, is that an employer or owner remains 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 or intrinsically dangerous. . . . Still another rule of law which constitutes an exception to the independent contractor doctrine is that there is a nondelegable duty on the person in possession of land or other fixed property to keep his premises in such state that invitees shall not be unduly exposed to danger. Under this rule the employment of an independent contractor to do work likely to render the premises dangerous to invitees does not relieve the owner from his duty to see that due care is used to protect such persons. . . . In addition, a whole series of cases involving obstructions, excavations and openings, in or near public thoroughfares, have built up a rule that a person who employs a contractor to do work in a place where the public is in the habit of passing, which will endanger the public unless precautions are taken, must see that the necessary precautions are in fact taken. . . . Finally, another exception to the general independent contractor rule is that the employer remains liable if he fails to use reasonable care to select a competent contractor, if it turns out that the contractor was in fact incompetent."

injured when a plank fell from a bridge constructed over a public sidewalk by the general contractor, where it was found that the owner had at least constructive notice of the existence of the dangerous condition created;[22] where the owner had notice that unexploded percussion caps had been left by a contractor in the cellar of the building after the completion of excavation work, thereby causing injury to an infant;[23] where the owner failed to warn a tenant in the building of the presence of a rope strung across the roof by a painting contractor, which device was used to stay a scaffold erected for the purpose of painting the fire escapes and trim on the building;[24] and, where the owner failed to warn passengers of the danger of a fast-closing elevator door negligently repaired by a service contractor, which condition was known to the building superintendent.[25]

To recapitulate: A property owner has the right generally to rely upon an independent contractor or his employees to perform their task properly, without resultant negligence or injury, both as regards the other workers on the building, and as regards third persons rightfully on the premises. Thus the primary obligation of keeping the premises free from danger rests not on the owner, but on the general contractor, unless the work is non-delegable by statute, or unless the owner is chargeable with the contractor's derelictions by reason of the fact that the owner exercises direction, supervision, or control over the contractor's activities. And an owner is legally responsible for a dangerous condition created on the property by a contractor which causes damage or injury to another person, who may

[22] See note 19, *supra.*

[23] Fragiacomo v. 404-6 East 88th Street Realty Corp., 269 App. Div. 635, 58 N. Y. S. 2d 109 (1st Dep't 1945).

Where an article allowed to remain on the property is inherently dangerous, such as explosives, an owner may be liable even to trespassers who are injured thereby, particularly if they are infants. Kingsland v. Erie County Agricultural Society, 298 N. Y. 409, 84 N. E. 2d 38 (1949). And an owner is clearly liable where, by affirmative action, he changes a condition existing at the site of the danger or creates new perils there. Calore v. Domnitch, 5 Misc. 2d 895, 162 N. Y. S. 2d (City Ct. Queens Co., 1957).

[24] Harrington v. 615 West Corp., 2 N. Y. 2d 476, 141 N. E. 2d 602 (1957), where the court stated at p. 483: "It does not follow from the fact that the contractor had put the rope in place, that the landlord was entitled to rely upon the contractor to protect the tenants in going to the clothesline area in order to dry their wash."

[25] Meltzer v. Temple Estates, 203 Misc. 602, 116 N. Y. S. 2d 546 (City Ct., N. Y. Co., 1952).

For an interesting discussion of the possible liability of a builder, sounding in negligence, for injuries to third persons not in privity with him, as a result of a latent fault or hidden danger in the design or construction of a building, under the doctrine of MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916), see, Inman v. Binghamton Housing Authority, 3 N. Y. 2d 137, 143 N. E. 2d 895 (1957).

be either a co-worker or a third-party invitee, provided the owner had notice of such condition and failed to remedy or correct it within a reasonable time.

I. THE LIABILITY OF A GENERAL CONTRACTOR FOR NEGLIGENCE IN BUILDING CONSTRUCTION AND REPAIR CASES

A GENERAL contractor, at common law, is not responsible for the independent negligent act of his subcontractor, and the mere retention of the power of general supervision to see that the overall work proceeds properly, and to coordinate the activities of several subcontractors on the job will not cast him in damages for the negligent conduct or omissions of the latter.[26] Nor is the general contractor obliged to protect employees of his subcontractors against the negligence of their immediate employer.[27] These common law rules, as is frequently true, yield under the circumstances of a particular case where the situation is governed by statute such as the New York Labor Law,[28] or, where the general contractor, by his act or conduct, assumes control and gives specific instructions which necessarily involve the safety of the sub-contractor's employees.[29]

Hence, a general contractor who *exercises* control and superintendence of the over-all work being performed owes to employees of sub-contractors the duty of reasonable care to make safe the places of work provided by him, as well as the approaches thereto.[30] But, such obligation is to be clearly distinguished from cases where the negligent act of a sub-contractor occurs as a mere detail of the work, that is, where the prosecution of the work itself makes the "place" and creates the danger.[31] Nor does Section 200, of the Labor Law[32] impose upon the general contractor a new duty to supervise, in the interest of the sub-contractor's employees, the operation of such sub-contractor's own plant through their own employees.[33] And it seems equally well-

[26] Moore v. Charles T. Wills, Inc., 250 N. Y. 426, 165 N. E. 735 (1929).

[27] Iacono v. Frank & Frank Constr. Co., 259 N. Y. 377, 182 N. E. 23 (1932).

[28] See note 10, *supra*.

[29] Wawrzonek v. Central Hudson Gas & Electric Corp., 276 N. Y. 412, 12 N. E. 2d 525 (1938).

[30] Hooey v. Airport Construction Co., 253 N. Y. 486, 171 N. E. 752 (1930). See also, Olsommer v. Walker & Sons, 4 App. Div. 2d 424, 166 N. Y. S. 2d 323 (4th Dep't 1957), *aff'd*, 4 N. Y. 2d 793, 149 N. E. 2d 528 (1957).

[31] Mullins v. Genesee County Electric Light, Power & Gas Co., 202 N. Y. 275, 95 N. E. 689 (1911); Wohlfron v. Brooklyn Edison Co., 238 App. Div. 463, 265 N. Y. S. 18 (2d Dep't 1933), *aff'd*, 263 N. Y. 547, 189 N. E. 691 (1933).

[32] See N. Y. LABOR LAW § 200, *supra*, note 12.

[33] Hess v. Bernheimer & Schwartz Brewing Co., 219 N. Y. 415, 114 N. E. 808

established that the New York courts will not impose liability upon a general contractor for personal injuries to an employee of a sub-contractor, resulting from a defective appliance used in the work, in the absence of evidence that the general contractor supplied, constructed, or assumed control of such appliance used in connection with the sub-contractor's own plant.[34]

Thus, whereas a general contractor is under a common law duty of exercising proper care as regards his own plant, or appliances furnished by him to his employees, he is not responsible with respect to appliances supplied by a sub-contractor in improving the latter's own plant.[35] A general contractor is under responsibility, however, to use reasonable care in favor of workmen on common ways and appurtenances, and to prevent sub-contractors working on the building from performing their work in a reckless and negligent manner such as subjects other workmen to unnecessary risks that are not normally to be anticipated and guarded against.[36]

An interesting case involving the liability of a general contractor for injury to an employee of a sub-contractor was decided by the Appellate Division, First Department, in March 1958. In *Mendes v. Caristo Construction Corp.*,[37] the question for review was whether an oral reply made by a general contractor's superintendent to an employee of a sub-contractor, "You will find a rope sling in our other shanty; in our tool shanty," was sufficient to import control over the work performed by the sub-contractor's employee, so as to render the general contractor liable for the employee's injury. The employee stated that he and his foreman had previously gone to the general contractor's main field office for the purpose of borrowing a sling,

(1916). See also the recent case of Zucchelli v. City Construction Co., 4 N. Y. 2d 52, 56, 149 N. E. 2d 72, 74 (1958).

[34] Butler v. D. M. W. Contracting Co., Inc., 309 N. Y. 990, 132 N. E. 2d 898 (1956): 2 N. Y. L. F. 340, 341 (1956).

[35] Iacono v. Frank & Frank Construction Co., 259 N. Y. 377, 182 N. E. 23 (1932). Nor where the subcontractor's employee elects not to use the general contractor's proffered appliances, and makes his own place of work. Morris v. A. M. Hunter & Son, Inc., 1 N. Y. 2d 696, 134 N. E. 2d 68 (1956).

[36] Soderman v. Stone Bar Associates, Inc., 3 App. Div. 2d 680, 159 N. Y. S. 2d 50 (2d Dep't 1957); Basciano v. Fuller Company, 4 Misc. 2d 322, 150 N. Y. S. 2d 312 (Sup. Ct., Bronx Co., 1956), *mod. with opinion*, 3 App. Div. 2d 14, 157 N. Y. S. 2d 534 (1st Dep't 1956), allowing the general contractor the right of indemnity over against the sub-contractor as the active tort-feasor, where the general contractor did not erect the ramp on which plaintiff, an employee of the sub-contractor, was injured, or supervise the work.

[37] Mendes v. Caristo Construction Corp., 5 App. Div. 2d 268, 171 N. Y. S. 2d 494 (1st Dep't 1958).

as they had done on a previous occasion. After they asked for the sling and stated the purpose for which it was wanted, they received the reply above-mentioned. Thereupon the sub-contractor's employee went into the shanty, obtained a sling, tested and inspected it, attached it to a metal door framework (which was too heavy to lift manually) and proceeded to raise the frame into position. After the door buck had risen two feet off the ground, it fell, causing the employee's injury. The sling was described as having parted, "broken-in-two," when suspended from the hook on the block. While the court below made no reference to Section 240 of the Labor Law,[38] the verdict of the jury rendered in the employee's favor could be justified only on the applicability of that section. That is, the liability of the general contractor, under this section, had to rest on proof that the sub-contractor's employee was either supplied with, or directed by the superintendent to use the allegedly defective sling. Held, that the colloquy did not import an assumption of control over the work by the general contractor, and that there was no proof in the record, by word or conduct, of any direction by the superintendent to the employee, either to perform any specific item of labor or to use any particular equipment. Held further, (by way of dictum) that even if the conversation could be interpreted as constituting a "direction" under Section 240 of the Labor Law, to use the sling, the proof would still be insufficient as matter of law, to sustain the verdict, as the record was barren of any proof that the accident occurred because of a defect in the sling, especially where the general contractor had no responsibility with respect to the construction or operation of the hoist in connection with which the sling was used.

The decision seems sound in the light of a previous case decided by the same court in 1952, involving the same principle of law, and affirmed by the Court of Appeals.[39] A case of this type, quite apart from statutory interpretation, poses, however, the interesting but often vexed question of liability for negligent language, often referred to as the doctrine of negligence in the spoken word,[40] to the effect that there is a duty, if one speaks at all, to give the correct information.[41]

[38] See N. Y. LABOR LAW, § 240, *supra,* note 10.

[39] Glass v. Gens-Jarboe, Inc., 280 App. Div. 378, 113 N. Y. S. 2d 595 (1st Dep't 1952), *aff'd,* 306 N. Y. 786, 118 N. E. 2d 602 (1954), a decision upon which the Mendes opinion was based.

[40] Nichols v. Clark, Mac-Mullen & Riley, Inc., 261 N. Y. 118, 184 N. E. 729 (1933).

[41] In Webb v. Cerasoli, 300 N. Y. 603, 90 N. E. 2d 64 (1949), however, the Court of Appeals, *affirming,* 275 App. Div. 45, 87 N. Y. S. 2d 884 (3d Dep't 1949), held that a

The pertinent considerations would seem to be, (a) knowledge that the information desired is sought for a serious purpose, (b) that the receiver of the information intends to rely and act upon it, (c) that the information is false or erroneous, (d) that the words are uttered directly to one within the care of the speaker, and (e) that the receiver of the information was injured by reliance thereon.[42] All of these factors are exemplified in a case like *Broderick v. Cauldwell-Wingate Co.*,[43] decided by the Court of Appeals in 1950.

To recapitulate: A general contractor is liable for the negligence of workers on the job, both to co-employees injured on the premises, and to outsiders, when he exercises control and supervision over the work being performed. And he is responsible for the exercise of proper care both as regards his own plant, and as regards the appliances furnished by him to his employees. He is likewise often placed under a non-delegable statutory duty to maintain the premises in a safe condition for the benefit of those performing work thereon, regardless of the question of his negligence, or of whether he had notice of the condition which caused the accident,[44] and to make proper inspection to detect dangerous developments occurring during the work which may endanger a worker's safety, or the safety of outsiders. He is not responsible, however, for the mere collateral negligence of a sub-contractor,[45] although liability has sometimes been imposed on a general contractor for negligence when it is found that he has given an assurance of safety, although merely verbal, to a worker when he knew, or should have known, that a dangerous condition existed, and that the worker might reasonably rely upon such assurance to disregard a perilous situation.

statement of an owner made to his employers, and overheard by plaintiff employee that a particular marquee on the premises was safe for use, was a mere statement of opinion upon which plaintiff was not entitled to rely.

[42] See in this connection, International Products Co. v. Erie R.R. Co., 244 N. Y. 331, 155 N. E. 662 (1927).

[43] 301 N. Y. 182, 93 N. E. 2d 629, where the general contractor's superintendent called to the sub-contractor's employee: "There are no shores going in there. Go ahead it is all right." The Court held that the general contractor's employee was negligent in giving to plaintiff (the sub-contractor's employee) an assurance of safety when the former knew, or should have known, that a dangerous condition existed.

[44] Duncan v. Twin Leasing Corporation, 283 App. Div. 1080, 131 N. Y. S. 2d 423 (2d Dep't 1954).

[45] Basciano v. Fuller Company, 4 Misc. 2d 322, 150 N. Y. S. 2d 312 (Sup. Ct. Bronx Co. 1956), *mod.*, 3 App. Div 2d 14, 157 N. Y. S. 2d 534 (1st Dep't 1956).

II. THE RIGHT OF INDEMNIFICATION IN THE CONTRACTORSHIP RELATION

THE area within which a person charged with negligence is permitted to pass liability on to another allegedly negligent party is closely circumscribed in New York, both by statutory and case law. It encompasses a group of special situations and relationships where it has seemed reasonable to impose an ultimate responsibility upon a party who has played an active role in a negligent situation in favor of one who is made answerable to the injured person, but whose part in the event is merely passive, or arises from the sanction of public policy, contract, or status.[46] Hence, despite the fact that under the present New York law the right to bring in or implead a third party in an action brought against a defendant is no longer limited to cases where the claim of the defendant against the third party is identical to, or emanates from the claim which is asserted by the plaintiff in the original controversy, and is proper as long as the two controversies involve substantial questions of law or fact common to both, the basic historical requirement of "liability over" persists.[47] And the problem posed by the comparative or relative culpability of joint tort-feasors is not resolved simply by a facile declaration of the "active-passive" participation cliche, since the fault of omission, as well as the fault of commission, may constitute *active* negligence sufficient to bar impleader.[48] These general observations are equally applicable to the owner-contractor-subcontractor relations under discussion. These relations, in reference to the New York law of impleader, will now be considered.

III. THE INDEMNITY CONCEPT IN THE OWNER-CONTRACTOR RELATION

THE right of an owner of property under construction or repair to indemnification from the general contractor, when the owner is sued by one injured or killed on the premises as a result of the alleged

[46] Anderson v. Liberty Fast Freight Company, Inc., 285 App. Div. 44, 135 N. Y. S. 2d 559 (3rd Dep't 1954).

[47] Coffey v. Flower City Carting & Excavating Co., Inc., 2 App. Div. 2d 191, 153 N. Y. S. 2d 763 (4th Dep't 1956); *aff'd*, 2 N. Y. 2d 898, 141 N. E. 2d 632 (1957). Further consultative reference on the general topic of impleader in New York may be made to the author's article *Modern Third-Party Practice—Substantive or Procedural?*, 3 N. Y. L F. 159 (1957).

[48] Ebbe v. Harry M. Stevens, Inc., 1 N. Y. 2d 846, 135 N. E. 2d 728 (1956); Burke v. Wegman's Food Markets, Inc., 1 Misc. 2d 130, 146 N. Y. S. 2d 556 (Sup. Ct. Monroe Co. 1955).

negligence of the general contractor, has been upheld in New York where the owner's liability is based on the sole fact of his ownership interest in the property. In such cases, the courts consider the owner as merely a passive tort-feasor, not in pari-delicto with the actively negligent contractor.[49] Thus, where the danger on the property arises merely because of the negligence of the independent contractor or his employees, which negligence is collateral to the work, and which is not reasonably to be expected, the owner cannot be held liable to a third party injured by such negligence.[50] The rule is otherwise, however, where from the nature of the work the duty of care on the part of the owner in its performance is non-delegable, and the owner is put on either *actual or constructive* notice of the existence of such dangerous condition,[51] or, where there is a breach of an absolute, non-delegable statutory duty by the owner in connection with the work.[52] In such cases, the right of indemnification is denied, and consequently the right of impleader is disallowed. This appears to be so even where there is an agreement indemnifying the owner against liability for accidental injuries occasioned by the contractor.[53] And an owner may be barred from seeking indemnity against a negligent contractor if, after *actual* notice of the dangerous condition created by the contractor, he acquiesces in the continuation of such condition.[54] He is then said to be in pari-delicto with the original wrongdoer.[55] And in

49 Tipaldi v. Riverside Memorial Chapel, Inc, 298 N.Y. 686, 82 N.E. 2d 585 (1948). Thus the law will strive to give indemnity against the principal wrongdoer to one less culpable, though both are equally liable to the person injured. See, Meltzer v. Temple Estates, 203 Misc. 602, 116 N. Y. S. 2d 546 (City Ct., N. Y. 1952).

50 Schwartz v. Merola Brothers Construction Corp., 290 N. Y. 145, 48 N. E. 2d 299 (1943); Lockowitz v. Melnyk, 1 App. Div. 2d 138, 148 N. Y. S. 2d 232 (1st Dep't 1956).

51 Harrington v. 615 West Corp., 2 N. Y. 2d 476, 141 N. E. 2d 602 (1957).

52 Semanchuck v. Fifth Avenue & 37th Street Corp., 290 N. Y. 412, 49 N. E. 2d 507 (1943). Hence in construction and demolition projects, N. Y. LABOR LAW § 241 imposes a positive non-delegable statutory duty on the owner and contractor alike, by rejecting the common law doctrine of the "active-passive" concept. Rufo v. Orlando, 309 N. Y. 345, 130 N. E. 2d 887 (1955). Breach of other statutory provisions, however, such as N. Y. LABOR LAW § 200, does not preclude inquiry into the question of merely passive negligent conduct. Soderman v. Stone Bar Associates, Inc., 208 Misc. 864, 146 N. Y. S. 2d 233 (Sup. Ct. Kings Co. 1955). See also the recent case of Glasgow v. Mabel Drakes, *et al.*, 6 Misc. 2d 830, 161 N. Y. S. 2d 635 (Sup. Ct. Kings Co. 1957).

53 Bobbey v. Turner Construction Corp., 308 N. Y. 890, 126 N. E. 2d 566 (1955). And such contract of indemnity might prove ineffective on other grounds, for example when it is not sufficiently broad to effectuate the intention of the parties. Good Neighbor Federation v. Pathe Industries Inc., 202 Misc. 951, 114 N. Y. S. 2d 365 (Sup. Ct. N. Y. Co. 1952); where the indemnity agreement was construed to indemnify the owner merely against the negligent acts of the contractor, and not against the owner's own negligent conduct.

54 RESTATEMENT, RESTITUTION § 95.

55 Stabile v. Vitullo, 280 App. Div. 191, 112 N. Y. S. 2d 693 (4th Dep't 1952).

cases of building construction, repair, or demolition, the New York courts have broadened the liability of a property owner in negligence, both to tenants in the building and to outsiders, even where such owner is out of possession and control of the premises, provided there is some statute or ordinance imposing a positive, non-delegable duty upon the owner to keep the property in safe condition and in proper maintenance.[56] Furthermore, negligent maintenance may result from improper repairs as well as from the failure to make any repairs in such cases, thereby barring the owner from the right to cross-claim against the party actually causing the negligent condition through impleader.[57]

There seems no doubt, under New York law, that a landowner can implead an elevator or escalator service company where the service maintenance contract between them reserves to the company the exclusive possession and control of the safety and protective devices installed by the company on the owner's property.[58] And it would appear that an express agreement of indemnification is not always necessary to charge the service company, as their obligation, in favor of the owner, can likewise arise from the status of the parties,[59] provided the owner has not been guilty of active wrongdoing.[60]

The fact that a building owner is rendered liable by statute, and in New York City by ordinance, for the safe operation and maintenance of an elevator on his property,[61] does not defeat the owner's otherwise valid claim of indemnification over against the service repair company under a defense raised by the latter that both parties are in pari-delicto as joint tort-feasors, unless the statute[62] clearly imposes upon the owner a positive duty of maintenance or repair in conjunction with the service contractor.[63] A service company is not negligent, however, merely upon a showing that an accident happened in a self-

[56] See note 52, *supra*. The decision is restricted, however, to violation of the New York Labor Law in relation to construction and demolition work.

[57] Trager v. Farragut Gardens, No. 1, Inc., 201 Misc. 18, 21, 107 N. Y. S. 2d 525, 529 (Sup. Ct. Kings Co. 1951). See also, note 52 *supra*. For other breaches of statutory duty, the owner's right of indemnity over is preserved. Wischnie v. Dorsch, 296 N. Y. 257, 72 N. E. 2d 700 (1947).

[58] Beinhocker v. Barnes Development Corp., 296 N. Y. 925, 73 N. E. 2d 41 (1947).

[59] Dunn v. Uvalde Asphalt Paving Company, 175 N. Y. 214, 67 N. E. 439 (1903); Robinson v. Binghamton Construction Co., 277 App. Div. 468, 470, 100 N. Y. S. 2d 900, 902 (3rd Dep't 1950).

[60] See note 19, *supra*.

[61] N. Y. LABOR LAW, §§ 255, 316; N. Y. MULTIPLE DWELLING LAW, § 78; N. Y. C. ADMINISTRATIVE CODE, § C26-1171.0.

[62] N. Y. LABOR LAW, § 241. See also, note 52, *supra*.

[63] Wischnie v. Dorsch, 296 N. Y. 257, 72 N. E. 2d 700 (1947).

service elevator which it had inspected and approved only several days before, where there is no proof that its inspection was inadequate or wrongfully performed, and that this inadequacy or wrong was the proximate cause of the passenger's injury.[64]

Regarding the right of a building owner to implead a third party defendant who has provided Workmen's Compensation coverage for his employees, one of whom was injured in the building, and who subsequently sues the owner for damages, it has been held that compliance with the Workmen's Compensation Law is no defense to such action, and that the landowner may properly implead,[65] despite the fact that the result of this procedure may be to make the third party defendant indirectly liable to the employee despite compliance with this statute.

IV. The Indemnity Concept in the Contractor-Sub-Contractor Relation

Following the general rule in indemnity cases applicable to the owner-general contractor relation,[66] it has been held that where an employee of a sub-contractor is injured by a defective appliance used in the sub-contractor's work, the general contractor who knew of the defective condition, and who remained in charge of the work forfeits his right of recovery against the owner of the appliance on the ground that the general contractor is in pari-delicto with such owner.[67] And the right of indemnification of the general contractor against the sub-contractor in such case seems likewise barred,[68] although a contrary

[64] Kelly v. Watson Elevator Company, 284 App. Div. 901, 134 N. Y. S. 2d 409 (2d Dep't 1954).

[65] Westchester Lighting Company v. Westchester County Small Estates Corp., 278 N. Y. 175, 15 N. E. 2d 567 (1938). In such situation a defendant is responsible by reason of the breach of an independent duty owed the third party plaintiff, quite distinct from his limited duty to his own employee under the N.Y. Workmen's Compensation Law. The rationale of the rule of recovery over is thus not founded on subrogation, or on any theory of vicarious liability, but rather on an independent and direct duty owed by the employer to the third party. Robinson v. Binghamton Construction Co., 277 App. Div. 468, 100 N. Y. S. 2d 900 (3d Dep't 1950).

Where the fault is joint, no right of indemnification exists if the parties are in equal wrong, and the third party defendant is relieved of liability to the building owner; not, however, because of the N. Y. Workmen's Compensation Law, but because there is no right of indemnification between joint tort-feasors in pari delicto. Hughes v. DeSimone Stevedores, Inc., 277 App. Div. 371, 100 N. Y. S. 2d 241 (1st Dep't 1950).

[66] See notes 51, 52, *supra.*

[67] Adler v. Tully & DiNapoli, Inc., 300 N. Y. 662, 91 N. E. 2d 323 (1950). See also, in this connection, Duncan v. Twin Leasing Corporation, 283 App. Div. 1080, 131 N. Y. S. 2d 423 (2d Dep't 1954).

[68] Adler v. Tully & DiNapoli, Inc., 274 App. Div. 1001, 84 N. Y. S. 2d 305 (2d Dep't 1948), *aff'd,* 300 N. Y. 662, 91 N. E. 2d 323 (1950).

determination has been made in a situation where the general contractor had only constructive notice of the dangerous condition, and the duty not actively to create the dangerous condition was violated by the sub-contractor, thereby casting the general contractor in damages to the injured employee and to the owner of the property.[69]

A general contractor, therefore, may be liable to an employee of a sub-contractor for failure to provide a safe place to work.[70] Nevertheless, the sub-contractor may be liable to the general contractor for failing to inspect the allegedly defective appliance claimed to have caused the accident. Under these circumstances, the sub-contractor may be entitled to further recovery over against the supplier of the defective material, the primary wrongdoer.[71] Hence in the chain of events, the sub-contractor may be guilty of primary negligence with respect to the general contractor, by reason of his duty to inspect and failure to perform such duty. This results from the fact that as between a general contractor who has a non-delegable duty to provide a safe place to work, and the non-inspecting sub-contractor, the latter is charged with a greater fault in failing to prevent a prior condition which caused the accident, and is therefore actively negligent and primarily liable. However, if the supplier provided defective material, and the sub-contractor had a right to rely upon the supplier, as between the two, the sub-contractor was merely guilty of failure to inspect, while the supplier is responsible for providing the producing cause of the accident which resulted in the employee's injuries. In that situation it is the supplier who is actively negligent, and it is the sub-contractor who becomes a mere passive tort-feasor. Involved in the basic co-relationship of the parties is always their mutual legal responsibility to each other, and the degree of wrongfulness indicated by the commission or omission which resulted in the damage.[72]

In contract actions, a general contractor is allowed to implead the owner of the property on which work was performed by a sub-contrac-

[69] Soderman v. Stone Bar Associates, Inc., 208 Misc. 864, 146 N. Y. S. 2d 233 (Sup. Ct. King's Co. 1955). See also, Basciano v. George A. Fuller Company, 3 App. Div. 2d 14, 157 N. Y. S. 2d 534 (1st Dep't 1956).

Hence, where the general contractor does not direct the use of the defective appliance, but merely has knowledge of its use, he is not liable to the sub-contractor's injured employee. Gambella v. John A. Johnson & Sons, Inc., 285 App. Div. 580, 140 N. Y. S. 2d 208 (2d Dep't 1955). See also, notes 8, 10, *supra.*

[70] See note 5, *supra.*

[71] See, McFall v. Compagnie Maritime Belge, 304 N. Y. 314, 328, 107 N. E. 2d 463, 471 (1952).

[72] Crawford v. Blitman Construction Corp., 1 App. Div. 2d 398, 150 N. Y. S. 2d 387 (1st Dep't 1956). See also, note 48, *supra.*

tor, because if the latter's work were satisfactory the general contractor would be liable therefor, and in turn the owner would be liable to the general contractor. The claim of the general contractor against the owner cannot, however, exceed the amount claimed against the general contractor by the sub-contractor. But, here again, the general contractor's right of impleader may be sacrificed where it violated some statutory provision imputing negligence *per se* in construction or demolition work, since here the statutory violation renders the general contractor in pari delicto with the sub-contractor who created the danger, unless there is a clearly phrased agreement of indemnification between them.[73]

CONCLUSION

THE correlative rights and obligations of a property owner, a general contractor, and a sub-contractor among themselves and as to third parties within the contractual relation, are generally premised upon the common law responsibility of due care on the part of those who engender a situation in which others are brought under protective control and supervision, either voluntarily sanctioned by consensual agreement, or involuntarily imposed by legislative fiat. Whenever any one of these parties creates a condition which invites injury, forseeable in the light of ordinary prudence, he may expect legal liability to ensue. This is particularly true where the invitation becomes a snare or an enticement to the unwary.

The caveat of responsibility is not, in most cases, absolute, but rather, it is founded upon the reasonableness of human action within the setting of forseeable events, sometimes made more urgently contemplative by the rigor of legal rules born of the experience with human failures of the past. But such liability, even when it exists, may often be shifted to another who stands under a more onerous duty to see to it that injury or harm to others is avoided, under the broad doctrine of indemnification, provided the wrong is apportionable.

[73] Gambella v. Johnson & Sons, Inc., 285 App. Div. 580, 140 N. Y. S. 2d 208 (2d Dep't 1955).