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Torts—Extension of MacPherson Doctrine to Contractors—Decline of Requirement of Privity.—Cosgriff Neon Co., Inc. v. Mattheus

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decisions and, perhaps, has cast some doubt on the significance of such authority. It will possibly take a decision by a Court of Appeals favoring the "minimum of eighty per cent" rule, before the issue will come before the Supreme Court again.

It is to be further noted that these problems of interpretation which arose under the ambiguity of the 1939 Code, would appear to be averted by the 1954 provision. The modifications in language in the 1954 Code appear to have greatly clarified congressional intent. A reading of section 368(a)(B)[20] and a comparison with the comparable 1939 provision [section 112(g)(1)(B)] point up a change of sentence structure which perhaps leaves little doubt that the solely for stock provision relates directly to the purchase of each share of stock of the acquired company, unmodified by any minimum percentage.[21]

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Torts—Extension of MacPherson Doctrine to Contractors—Decline of Requirement of Privity.—***Cosgriff Neon Co., Inc. v. Mattheus.***[1]—A conditional seller pursuant to a contract with a shopping center erected an electric neon sign on Mattheus' brick pylon which sign was totally destroyed one day later when the pylon collapsed due to faulty construction. The conditional seller intervened in a negligence suit by the owner against the contractor and sought to recover the value of the sign, joining both the owner of the brick pylon and the contractor. The lower court denied the intervenor relief because of his lack of privity with both the plaintiff and the defendant, stating that his action was against the shopping center on the conditional sales contract. In reversing the lower court, the Supreme Court of Nevada HELD: The contractor, who negligently constructed the brick pylon, was liable in tort to the conditional seller of the sign, though there was no contractual privity between the contractor and the seller, and though the owner of the brick pylon had accepted it from the contractor prior to its collapse. The owner of the brick pylon was not liable to the seller, where the defect in the brick pylon was latent so that the owner could not have discovered the defect on a reasonable inspection.

Where the buyer is in possession of the subject of the sale and in default on his payments under the conditional sales contract, as was the case in

[20] Internal Revenue Code of 1954, § 368:
(a) Reorganization
(1) Means . . . .
(B) The acquisition by one corporation in exchange solely for all or a part of its voting stock, of stock in another corporation if, immediately after the acquisition, the acquiring corporation has control of such other corporation (whether or not such acquiring corporation had control immediately before acquisition).

[21] In the 1954 Code definition, the removal of the phrase "at least 80 percentum" and the substitution of the word "control" leaves little doubt that the word "solely" refers to every share of stock acquired. Its removal would appear to preclude any cash from being exchanged in a type B reorganization.

[1] 371 P.2d 819 (Nev. 1962).

point, the conditional seller has a claim for relief against a third person who tortiously damages or destroys the property which is the subject matter of the sale.[2] Since the facts of the case dealt with the liability of a third person to the conditional seller when such third person is an independant contractor who had negligently erected a structure that subsequently caused damage, the Nevada court had to seek a broader basis for its decision. The court found it by extending the landmark case of *MacPherson v. Buick Motor Co.*[3] to determine the liability of a contractor for damage to a third person after completion of the work and acceptance thereof by the owners. This ruling accepts the long overdue "new" rule whereby the analogy of manufacturers employed in *MacPherson* is applied to building contractors.[4]

The illogical doctrine of nonliability without privity arose from a misunderstanding of an old English case. In *Winterbottom v. Wright*,[5] a contract action, it was held that the breach of a contract to keep a mail coach in repair after it was sold could give no cause of action to a passenger in the coach who was injured when it collapsed. From this developed a general rule that there is no liability of a contracting party to one with whom he was not in privity.[6]

Several exceptions[7] arose to the general rule of the *Winterbottom* case.[8] If a seller had knowledge that the chattel was dangerous in its intended use and failed to warn the buyer, he became liable to a third person injured by such use on the basis of "something like fraud" in intentional concealment.[9] The seller was also liable to a third person in the preparation or sale of an article "imminently" or "inherently" dangerous to human safety or "intended to preserve, destroy or affect human life."[10]

The interpretation and application of these exceptions further confused the law until the problem fell into the hands of Judge Cardozo in *MacPherson v. Buick Motor Co.* This case involved the liability of a manufacturer of a defective wheel in an automobile, which automobile was purchased from a dealer by a consumer who was later injured by the collapse of the

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[2] Universal Credit Co. v. Collier, 108 Ind. App. 685, 31 N.E.2d 646 (1941); Harris v. Seaboard Airline Ry. Co., 190 N.C. 489, 130 S.E. 319 (1925); Commercial Credit Corp. v. Satterthwaite, 107 N.J.L. 17, 150 Atl. 235 (1930); See Annot., 67 A.L.R.2d 582 (1959).

[3] 217 N.Y. 382, 111 N.E. 1050 (1916).

[4] The "new" or "modern" rule is that a building contractor is liable for injuries to third persons occurring after the completion of his work and its acceptance by the owner, where the work is reasonably certain to endanger third persons if negligently constructed. The duty owed by a building contractor to third persons, after he has completed and turned over his work to the owner, is the same as that owed by the manufacturer or vendor of chattels to persons not in privity of contract with him, as that duty was expressed in the *MacPherson* case, infra note 11.

[5] 10 M.&W. 109, 152 Eng. Rep. 402 [Ex. 1942].

[6] Bohlen, Fifty Years of Torts, 50 Harv. L. Rev. 1225, 1232 (1937).

[7] Prosser, Torts 498, 499 (2d ed. 1955).

[8] Supra note 5.

[9] See Huset v. J. I. Case Threshing Mach. Co., 120 Fed. 865 (8th Cir. 1903); Lewis v. Terry, 111 Cal. 39, 43 Pac. 398 (1896); Schubert v. J. R. Clark Co., 49 Minn. 331, 51 N.W. 1103 (1892).

[10] Huset v. J. I. Case Threshing Mach. Co., ibid.

wheel. The manufacturer was held liable for negligence despite a lack of privity.[11]

The *MacPherson* doctrine has forged the modern rule for liability of suppliers of chattels that is universally accepted. "It is undisputed that a manufacturer of chattels owes a duty of ordinary care to remote but foreseeable users of his manufactured products, and is liable to such users for harm proximately caused by the manufacturer's negligence."[12] The *MacPherson* doctrine has also been extended to include rebuilders[13] and repairers.[14]

However, the liability of building contractors as distinguished from that of manufacturers of chattels has tended to lag behind that of suppliers of chattels for several decades. Until quite recently the regressive prevailing rule, manifestly out of line with normal and basic principles of negligence law, was that the negligent performance of a contract did not render the building contractor liable even for foreseeable harm to third persons occurring after acceptance of the work by the owner.[15] Many fallacious reasons have been stated for this anachronism in negligence law.[16] An example is the theory that acceptance by the owner is an intervening agency which breaks the chain of causality, thereby making the contractor only a remote cause.[17] But, as a question of fact, is not the negligent conduct of the contractor the proximate cause of the injury? The acceptance of the work by the owner is a foreseeable event and not such an intervening cause, absent any negligence on the part of the owner, as to relieve the contractor of liability.

A preferable basis of decision would be predicated on the duty which the contractor owes to foreseeable third persons to conform to a standard of conduct. "It appears, however, that the analogy of *MacPherson v. Buick Motor Co.* is at last being accepted. Several recent decisions have placed

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11 "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully." MacPherson v. Buick Motor Co., supra note 3, at 389.

12 Lambert, Personal Injury (Tort) Law, 18 NACCA L.J. 272, 278 (1956).

13 Kalinowski v. Truck Equip. Co., 237 App. Div. 472, 261 N.Y. Supp. 657 (1933).

14 Central & So. Truck Lines, Inc. v. Westfall GMC Truck, Inc., 317 S.W.2d 841 (Mo. App. 1958).

15 Supra note 12.

16 See 26 Fordham L. Rev. 689 (1958):

(1) No privity between the contractor and the injured third person; Ford v. Sturgis, 14 F.2d 253 (D.C. Cir. 1926); Galbraith v. Ill. Steel Co., 133 Fed. 485 (7th Cir. 1904); Salliote v. King Bridge Co., 122 Fed. 378 (6th Cir. 1903).

(2) The contractor was not in control of the offending structure at the time of injury: Travis v. Rochester Bridge Co., 188 Ind. App. 79, 122 N.E. 1 (1919); Cunningham v. T.A. Gillespie Co., 241 Mass. 280, 135 N.E. 105 (1922).

There are, in addition, the suggested public policy reasons:

(3) that no one would become a contractor if such broad liability were imposed; Ford v. Sturgis, supra (1);

(4) and that to hold otherwise would subject the courts to a flood of litigation; Berg v. Otis Elevator Co., 64 Utah 518, 231 Pac. 832 (1924).

17 Travis v. Rochester Bridge Co., 188 Ind. App. 79, 122 N.E. 1 (1919); Goar v. Village of Stephen, 157 Minn. 228, 196 N.W. 171 (1923).

building contractors on the same footing as sellers of goods, and have held them to the general standard of reasonable care for the protection of anyone who may foreseeably be endangered by the negligence, even after the acceptance of the work."[18] There is indeed a desirable trend of cases that adopts this position. At this time sixteen jurisdictions have adopted the "new" rule.[19] It is unfortunate that this favorable trend is rejected in a few areas. A recent Texas case[20] refused to follow the modern approach, and held that an independent contractor is not liable for injuries sustained by third parties after the contractor has completed the work and turned it over to the owner.

There are a few exemplary decisions adopting the "new" or "modern" view which deserve attention. In *Inman v. Binghamton Housing Authority*[21] the New York court rejected the rule of non-liability and, notwithstanding the lack of privity, held an architect and a builder liable for injuries to an infant who fell from an improperly designed and constructed porch.[22] A District of Columbia case held that an independent contractor who negligently repaired a structure (porch railing) making it a thing of inherent danger, was liable to third parties not in privity of contract with him for injuries caused by such negligence despite the fact that it was in use for seven years.[23] Recently an Oklahoma court, in following the modern trend,

[18] Supra note 1, at 822, quoting Prosser, Torts 519 (2d ed. 1955).

[19] California: Stewart v. Cox, 55 Cal. 2d 857, 362 P.2d 345 (1961); Hale v. Depaoli, 33 Cal. 2d 228, 201 P.2d 1 (1948); Tomchik v. Julian, 340 P.2d 72 (Cal. App. 1958).
Delaware: Hunter v. Quality Homes, 45 Del. (6 Terry) 100, 68 A.2d 620 (1949).
District of Columbia: Hanna v. Fletcher, 97 App. D.C. 310, 231 F.2d 469 (D.C. Cir. 1956), cert. denied sub. nom., Gichmer Iron Works v. Hanna, 351 U.S. 989 (1956).
Illinois: Colbert v. Holland Furnace Co., 333 Ill. 78, 164 N.E. 162 (1928).
Iowa: Thompson v. Burke Eng'r. Sales Co., 252 Iowa 146, 106 N.W.2d 351 (1960).
Kansas: Robinson v. Nightingale, 188 Kan. 377, 362 P.2d 345 (1961).
Louisiana: Marine Ins. Co. v. Strecher, 234 La. 522, 100 So. 2d 493 (1957); King v. Mason, 95 So. 2d 705 (La. App. 1957).
Minnesota: Wright v. Holland Furnace Co., 186 Minn. 265, 243 N.W. 387 (1932).
Nebraska: McDonnell v. Wasenmiller, 74 F.2d 320 (8th Cir. 1934).
New Hampshire: Russell v. Whitcomb, Inc., 100 N.H. 171, 121 A.2d 781 (1956).
New Mexico: Tipton v. Clower, 67 N.M. 388, 356 P.2d 46 (1960).
New York: Person v. Cauldwell-Wingate Co., 176 F.2d 237 (2d Cir. 1949), cert. denied, 338 U.S. 886 (1949); Inman v. Binghampton Housing Authority, 3 N.Y.2d 137, 164 N.Y.S.2d 699, 143 N.E.2d 895 (1957); Adams v. White Constr. Co., 299 N.Y. 641, 87 N.E.2d 52 (1949).
Ohio: Moran v. Pittsburgh-Des Moines Steel Co., 166 F.2d 908 (3d Cir. 1948), cert. denied, 334 U.S. 846 (1948) (applying Ohio law); Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949) (applying Ohio law).
Oklahoma: Leigh v. Wadsworth, 361 P.2d 849 (Okla. 1961).
Rhode Island: Pastorelli v. Assoc. Eng'rs. Inc., 176 F. Supp. 159 (D. R.I. 1959).
Wisconsin: Fisher v. Simon, 15 Wis.2d 207, 112 N.W.2d 705 (1961); Cotton v. Foulkes, 259 Wis. 142, 47 N.W.2d 901 (1951).

[20] Hartford v. Coolidge-Locker Co., 314 S.W.2d 445 (Tex. Civ. App. 1958); criticized in 37 Texas L. Rev. 354 (1958).

[21] 3 N.Y.2d 137, 164 N.Y.S.2d 699, 143 N.E.2d 895 (1957).

[22] See 2 Vill. L. Rev. 275 (1957).

[23] Hanna v. Fletcher, 231 F.2d 469 (D.C. Cir. 1956), cert. denied, 351 U.S. 989 (1956). The federal court explicitly overruled the authority on this subject, Ford v. Sturgis, supra note 16, which had exempted contractors from liability where the injured party was not in privity with the contractor. Case criticized in 1957 Ins. L.J. 286.

held a building contractor liable for injuries sustained when a porch fell on the tenant of the grantee two years after construction of the house.[24] One factor present in all the cases representing the "new" or "modern" view of liability without privity is that the defect was latent and not patent. Observation of a defect upon reasonable inspection would seem to be sufficient basis for shifting the liability from the contractor to the owner of the structure.

The overwhelming majority of cases of the type under discussion have involved personal injury. However, in the instant case the injury complained of is property damage, and the court properly ruled that the principle of law should be the same as it is for personal injury. In *Central & So. Truck Lines v. Westfall GMC Truck, Inc.*,[25] liability for property damage was imposed for negligent repairs to plaintiff's trailer, despite lack of privity, and a New Jersey court[26] recently imposed liability upon a negligent repairman for both personal injuries and property damage. The sound view calls for the extension of liability to cases involving property damage as has been done in the area of manufacturer's liability.[27]

It is submitted that this case represents the sound view of negligence liability for building contractors. There is no logical reason for applying one rule of law to building contractors and another rule with a broader liability to manufacturers, suppliers of chattels, and repairers and rebuilders. Building contractors should be subject to the duty of reasonable care for the protection of anyone who may foreseeably be endangered by their negligence, even after acceptance of the work by the owner.

THOMAS J. GALLAGHER, JR.

Trade Regulations—Restraint of Trade—Boycott of Doctor Excluded from County Medical Bureau.—*Hubbard v. Medical Service Corporation of Spokane County*.[1]—Appellant doctor was a member of The Medical Service Bureau of Spokane County, an unincorporated association of which 275 of the 300 doctors licensed to practice in the county were members. The sole function of the bureau was to make medical and surgical services available to The Medical Service Corporation of Spokane County, a nonprofit organization, by means of individual contracts executed by members of the bureau and the corporation. In turn, the corporation had agreements with various employee groups to supply these services in return for prepaid premiums. Like all other bureau members, appellant doctor entered into a contract with the corporation when he became a bureau member, whereby he agreed to treat all subscribers to the prepaid medical plan, to accept as payment in full the fees established by the bureau and approved by the

[24] Leigh v. Wadsworth, 361 P.2d 849 (Okla. 1961).

[25] 317 S.W.2d 841 (Mo. App. 1958).

[26] Zierer v. Daniels, 40 N.J. Super. 130, 122 A.2d 377 (1956).

[27] Prosser, Torts 501 (2d ed. 1955), citing International Harvester Co. v. Sharoff, 202 F.2d 52 (10th Cir. 1953); Quackenbush v. Ford Motor Co., 167 App. Div. 433, 153 N.Y. Supp. 131 (1915).

[1] — Wash. 2d —, 367 P.2d 1003 (1962).