Indiana Law Journal

Volume 14 | Issue 3 Article 10

2-1939

Tort Liability Without Privity-Installation of Imminently Dangerous Instrumentality

TORT LIABILITY WITHOUT PRIVITY—INSTALLATION OF IMMINENTLY DANGEROUS INSTRUMENTALITY.—The defendant negligently installed a furnace in the plaintiff's dance hall under a contract with the tenant in possession. The installation was completed and the work was accepted by the tenant. Some time later when the first fire was built in the furnace the building caught fire and considerable damage was sustained. For the negligent installation the landlord sued the defendant who contended there was no liability without privity. Held, the furnace was so negligently installed as to be imminently dangerous to third persons and thus the defendant is liable for the damage to the plaintiff's property. *Nauracaj v. Holland Furnace Co.* (Ind. 1938), 14 N. E. (2d) 339.

---

15 Weiss v. Wiener (1928), 279 U. S. 333, 337, 49 S. Ct. 337.

16 Burk-Waggoner Oil Assoc. v. Hopkins (1925), 269 U. S. 110, 46 S. Ct. 48.

17 (1932), 287 U. S. 103, 53 S. Ct. 74.

18 See cases cited in note 11, *supra.*

19 See Paul, Selected Studies in Federal Taxation (1938) Ch. 1. Also Barton, Effect of State Laws on Federal Tax Laws (1931), 10 Tax Mag. 11.

Those rules of law concerning the liability of manufacturers or vendors of chattels to persons not in privity of contract are analogous but not identical with those concerning the liability of independent contractors constructing or installing something on realty. Practically speaking, both rules originally limited the liability of the vendor or the contractor to the party with whom he contracted. Traditionally, a manufacturer or vendor of chattels was not liable to anyone not in privity of contract for negligence, save in a few exceptional situations.[1] Similarly where an independent contractor was employed to construct or install any given work or instrumentality and had completed the work and obtained a discharge from his employer, he was not liable to third persons for injuries sustained as a result of defective construction or installation.[2] Patently, if this were still the law, the plaintiff could not recover in this case. Both traditional rules, however, have been greatly modified.

The first "assault upon the citadel of privity"[3] was made by the inherent danger doctrine. Some things such as poisons and explosives are by their very natures likely to cause serious harm if negligently manufactured, labeled, or controlled, and liability upon manufacturers and vendors was first imposed here without privity of contract.[4] Gradually the courts extended this doctrine to allow recovery despite lack of privity for the manufacture or sale of chattels not inherently dangerous but which became imminently dangerous when negligently manufactured.[5] The final development of the encroachment upon the privity rule was reached in the modern cases. In *McPherson v. Buick Auto Co.* it was held that the duty of the manufacturer was the same toward subsequent vendees, the ultimate user, or persons in the vicinity of the chattel as toward the immediate vendee.[6] Subsequent cases following this holding state that the negligence of the intermediate vendee in failing to inspect, although relieving the original vendor from liability toward the one failing to inspect, would not relieve the vendor from liability toward an innocent third person.[7] This development has destroyed for all practical purposes the privity of contract rule in cases involving manufacturers.

Similarly, a breach in the rule discharging an independent contractor upon acceptance by his contractee was made by the exception that where an independent contractor turns over the thing constructed or installed in a manner so negligent as to make it imminently dangerous to third persons he

---

[1] Winterbottom v. Wright (1842), 10 M. & W. 109; National Savings Bank v. Ward (1880), 100 U. S. 195, 25 L. Ed. 621; Losee v. Clute (1873), 51 N. Y. 494, 10 Am. Rep. 138.

[2] Curtain v. Somerset (1891), 140 Pa. St. 70, 23 Am. St. Rep. 220, 10 L. R. A. 322; Wharton, Negligence, sec. 368; Moll, Independent Contractors, sec. 177.

[3] Ultramares Corp. v. Touche (1931), 255 N. Y. 170, 174 N. E. 441.

[4] Walton v. Booth (1882), 34 La. Ann. 913, 41 La. Rep. 606; Calahan v. Waine (1867), 40 Mo. 131; Norton v. Sewal (1870), 106 Mass. 143, 8 Am. Dec. 455; Thomas v. Winchester (1852), 6 N. Y. 397, 57 Am. Dec. 455.

[5] Jaroniic v. Hasselborth (1928), 223 App .Div. 182, 228 N. Y. S. 302; Kuelling v. Roderick Lean Mfg. Co. (1903), 88 App. Div. 309, 84 N. Y. S. 622; Statler v. Roy Mfg. Co. (1909), 195 N. Y. 478, 88 N. E. 1064; Laudeman v. Russel & Co (1910), 46 Ind. App. 32, 91 N. E. 822; Prince v. Bidwell Thresher Co. (1909), 158 Mich. 356, 122 N. W. 628.

[6] McPherson v. Buick Motor Co. (1916), 217 N. Y. 382, 111 N. E. 1050.

[7] Flies v. Fox Bros. Buick Co. (1928), 196 Wis. 196, 218 N. W. 855.

is still subject to liability to them despite his discharge by his employer.[8] The term "imminently dangerous" developed in both types of cases from a few exceptions to a multitude, and thus became an important qualification to both rules, and in the case of manufacturers actually destroyed the rule.

The cases in Indiana show a development in conformity. In *Daugherty v. Herzog,* plaintiff was injured when a building fell two years after remodelling due to the negligence of the defendant in fastening the beams and ironwork; however, the court held this building was not imminently dangerous to third persons.[9] More recently in *Peru Heating Co. v. Lenhart* the doctrine was greatly extended; it was held here that negligently shutting off steam in one apartment so that the pipes froze and leaked water through the floor damaging the goods of the tenant below was an act "imminently dangerous" to third persons.[10] Evidently this case and the present one have so greatly extended the meaning of "imminently dangerous" as almost to destroy the rule. While there are some dicta in both cases for basing liability alone on negligence toward the injured party irrespective of contractual relation, the courts as a whole have so far failed to extend the rule to that point.

Judging from the present rule concerning privity of contract as relating to negligence of manufacturers and the close similarity in the development of the rule as relating to independent contractors, we may expect that in the near future the courts will drop the distinction between things "imminently dangerous" and things not "imminently dangerous." Constructing or installing structures or equipment in such a manner as to constitute an unreasonable danger to property interests or the safety of third persons will alone be enough to subject the contractor to liability. The discharge rule would then operate only as a discharge toward the employer himself and would not discharge the duty of an independent contractor toward third persons.

W. E. B.

UNAUTHORIZED PRACTICE OF LAW—RIGHT TO RECOVER COMPENSATION.—An employee of the Pennsylvania Railroad Company was killed under circumstances that gave rise to a claim against the railroad company. Plaintiff, a retired railroad claim agent, undertook to negotiate a settlement with the railroad company upon the behalf of the widow and minor children pursuant to an understanding that he was to be paid a reasonable sum for services rendered. Through his negotiations a settlement was finally effected. On distribution of the amount received the widow as administratrix refused to pay the plaintiff. In the lower court the plaintiff recovered for services rendered. On appeal, reversed: the court holding that the settling of a claim constituted the practice of law and that any unlicensed person engaged in the practice of law cannot recover for services rendered. *Fink v. Peden* (Ind. 1938), 17 N. E. (2d) 95.

---

[8] Peru Heating Co. v. Lenhart (1911), 48 Ind. App. 319, 95 N. E. 680; Colbert v. Holland Furnace Co. (1928), 331 Ill. 78, 164 N. E. 162.

[9] Daugherty v. Herzog (1896), 145 Ind. 255, 44 N. E. 457; Travix v. Rochester Bridge Co. (1919), 188 Ind. 79, 122 N. E. 1.

[10] Peru Heating Co. v. Lenhart (1911), 48 Ind. App. 319, 95 N. E. 680; Casey v. Hoover et al. (1905), 114 Mo. App. 47, 89 S. W. 330.