

NEGLIGENCE

BUILDING CONTRACTOR'S LIABILITY: AN EXTENSION OF MACPHERSON V. BUICK

Patrick Moran was killed in an explosion and fire resulting from the rupture of a large storage tank containing liquefied natural gas. The tank was built in Cleveland, Ohio, for the East Ohio Gas Company by the Pittsburgh-Des Moines Steel Company. Pittsburgh-Des Moines had finished work and relinquished control to East Ohio thirteen months before the accident. Moran, an office employee of East Ohio, was engaged in work within the area of the tank, but his employment was not directly related to the manufacture or storage of the natural gas. Moran's administratrix sued Pittsburgh-Des Moines in the United States District Court for Western Pennsylvania, alleging negligence in the design and construction of the tank.¹ The district court dismissed the action, holding that under Ohio law Pittsburgh-Des Moines was not liable. On appeal, the Court of Appeals for the Third Circuit reversed and remanded for submission to a jury, holding that as a matter of Ohio law an independent contractor can be liable to one injured as a result of negligent construction, even after the work has been completed and the structure has been turned over to the owner. *Moran v. Pittsburgh-Des Moines Steel Company*, 166 F.2d 908 (C. C. A. 3rd 1948); *cert. denied* 334 U. S. 847 (1948).²

1. See n. 33, *Moran v. Pittsburgh-Des Moines Steel Company*, 166 F.2d 908, 916 (C. C. A. 3rd 1948) for specific allegations of negligence. The tank was the fourth of a group of tanks built as storage facilities for what was then the only commercial natural gas liquefaction plant of its kind.
2. The *Moran* case was the first of 78 death cases arising out of the accident. The majority of these decedents were employed by Ohio Gas, and their dependents are receiving payments under the state workmen's compensation law. Ohio Gas had paid out over \$6,000,000 to other people who suffered damages as a result of the fire. The dependents of those people killed are seeking damages over and above that which they receive under workmen's compensation. The benefits under the Ohio law [OHIO GENERAL CODE § 1465-32 Page 1947] allow for a weekly payment of not more than \$21.00 per week, this payment to continue during the period between the date of death and eight years after the date of injury. However, the amount in any case is not to exceed \$7500. In the only one of these cases yet submitted to a jury, *Foley v. Pittsburgh-Des Moines Steel Co.*, (1949), judgment was rendered for defendant notwithstanding a \$50,000 verdict for plaintiff. The Court of Common Pleas of Allegheny Co., Pa., noted the result in the *Moran* case but held that Pennsylvania

A so-called "general rule," conceived early in the law of torts, long protected contractors and manufacturers from liability for negligence to persons with whom they had no contractual relations.³ Non-liability was rested principally on the absence of privity of contract.⁴ A secondary ground, of more importance in cases dealing with structures attached to realty than in cases involving chattels, was the fact that the contractor or manufacturer had no control over the offending structure or device at the time of plaintiff's injury.⁵ Exceptions to the rule have been increasingly asserted as the nation's industry has advanced in magnitude and complexity.⁶ Indeed, since the famous case of *MacPherson v. Buick*⁷ manufacturers of chattels have quite generally been held liable for negligent construction of goods which, falling into the hands of persons not in privity with the manufacturers, do some foreseeable injury.⁸ It is in the field of

law had not reached the point of imposing liability on such facts.

Cf. IND. STAT. ANN. (Burns 1933) § 40-1213. Under the Indiana Workmen's Compensation Law, when injury, or death is caused by a third person in such a manner as to subject that third person to liability, the injured employee, or his dependents in case of death, have an option to take under the terms of the compensation act or to recover in an action against the third person. Damages cannot be collected from both sources. If the injured employee elects to take under the compensation act, the employer who pays the compensation is subrogated to the rights of the employee against the third person. *Artificial Ice & Coal Storage Co. v. Ryan*, 99 Ind. App. 606, 193 N. E. 710 (1934); *Wabash Water & Light Co. v. Home Tel. Co.*, 79 Ind. App. 395, 138 N. E. 692 (1923); *Pittsburgh, C. C. & St. L. R. Co. v. Parker*, 191 Ind. 686, 134 N. E. 890 (1922).

3. The English case of *Winterbottom v. Wright*, 10 Mee. and W. 109, 152 Eng. Rep. 401 (Ex. 1842) is most frequently cited as establishing this rule. But an inspection of the facts and pleading indicate that such was not the holding of the court. The verdict for the contractor was on a demurrer to a declaration drawn on the contract between the defendants and the postmaster-general, and the plaintiff failed to establish privity between himself and the defendant. Only dicta indicated that the court believed no recovery could be had in an action founded in tort.
4. *Ford v. Sturgis*, 14 F.2d 253 (App. D.C. 1926); *Salliotte v. King Bridge Co.*, 122 F. 378 (C. C. A. 6th 1903); *First Presbyterian Congregational v. Smith*, 163 Pa. 561, 30 A. 279 (1894); *Curtin v. Somerset*, 140 Pa. St. 70, 21 A. 244 (1891).
5. *Travis v. Rochester Bridge Co.*, 188 Ind. 79, 122 N. E. 1 (1918); *Smith v. Claude Neon Lights*, 110 N. J. L. 326, 164 A. 423 (1932); *Mayor of Albany v. Cunliff*, 2 N. Y. 165 (1849).
6. *Devlin v. Smith*, 89 N. Y. 470 (1882); *Smith v. N. Y. & H. R. Co.*, 19 N. Y. 127 (1859); *Thomas v. Winchester*, 6 N. Y. 397 (1852).
7. 217 N. Y. 382, 111 N. E. 1050 (1916).
8. *Todd Shipyards Corp. v. U. S.*, 69 F. Supp. 609 (D. C. Me. 1947); *White Sewing Mach. v. Feisel*, 28 Ohio App. 152, 162 N. W. 637

structures affixed to realty that traditional law has been most reluctant to yield, for not until 1909 did an American court take cognizance of the changes that had occurred in the sizes and design of buildings and other structures and the attendant increased potentialities for injury to person and property.⁹ Privity of contract as the aegis of the slipshod builder was abolished, first in the case of bridges,¹⁰ and later in regard to such structures as steam boilers,¹¹ railroad tracks¹² and crossings,¹³ and public¹⁴ and private¹⁵ buildings.

Concomitantly, absence of control has waned in importance as an exculpatory factor. Many courts now say that a contractor continues liable where work is turned over by him in a condition *so* negligently defective as to be imminently dangerous to third persons.¹⁶ Although most courts have continued to use this language, more recently courts in

(1927); *Berg v. Otis Elevator Co.*, 64 Utah 518, 231 P. 832 (1924).

9. *Penn. Steel Co. v. Elmore & H. Contracting Co.*, 175 F. 176 (C. C. A. 3rd 1909).
10. *Penn. Steel Co. v. Elmore & H. Contracting Co.*, *supra* note 9; *O'Brien v. American Bridge Co.*, 110 Minn. 364, 125 N. W. 1012 (1910).
11. *Gildbride v. Leffel*, 47 N. E.2d 1015 (Ohio 1942).
12. *Bryson v. Hines*, 268 F. 290 (C. C. A. 4th 1920).
13. *Harriman v. N. Y., Chicago & St. L. Ry.*, 253 N. Y. 398, 171 N. E. 686 (1930).
14. *Murphy v. Barlow Realty Co.*, 206 Minn. 527, 289 N. W. 563 (1939).
15. *Kowalshy v. Corneco Co.*, 260 N. Y. S. 668 (1932).
16. *See Holland Furnace Co. v. Nauracaj*, 105 Ind. App. 574, 581, 14 N. E.2d 339, 342 (1938); *Berg v. Otis Elevator Co.*, 64 Utah 518, 231 P. 832, 835 (1924). From the continued use of the adverb "so," it would appear that something more than mere negligence is required to hold the contractor liable. However, no case appears to require a plaintiff to prove something more than ordinary negligence on the part of the defendant in performing his work, selecting his materials, or preparing the design of the structure. *But cf.* *Berg v. Otis Elevator Co.*, 64 Utah 518, 231 P. 832, 835, 838 (1924) where the court said, "to render an independent contractor liable for damages after the work has been accepted by the contractee, the contractor must be guilty of something more than mere negligence. In addition to negligence, the contractor must have knowledge of the imminence of the danger." This added element, it will be observed, does not go to increase the degree of negligence that must be proved, but rather it requires an awareness of the danger. The court qualified this requirement by saying that knowledge is sufficiently shown if the contractor knew, or under the particular circumstances should have known his work might prove dangerous. Negligence, therefore, remains mere negligence and knowledge is nothing more than that which is determined by the reasonable-man test.

a few jurisdictions¹⁷ have found support in the rule adopted by the Restatement of Torts. Section 385 of the Restatement,¹⁸ without bothering to give lipservice to the fast-fading general rule, places the contractor whose negligent work has been accepted by the possessor of the land under the same liability as is the manufacturer of a chattel for the use of others. The *Moran* case, the first case resting on this section of the Restatement of Torts,¹⁹ represents the complete overthrow of the language and the reasoning of the old general rule with respect to negligent contractors.

In jurisdictions which adopt the rule of the *Moran* case the liability of a contractor will be restricted only by the customary limitations of negligence: risk and duty, and legal cause.²⁰ In holding that Pittsburgh-Des Moines might

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17. See *Law v. Railway Express Agency*, 111 F.2d 427 (C. C. A. 1st 1940); *Murphy v. Barlow Realty Co.*, 206 Minn. 527, 289 N. W. 563 (1939).
 18. See also, RESTATEMENT, TORTS §§ 394-398, 403, 404 (1939).
 19. "We have not found any Ohio case which presents this question on its facts unless *Gilbride v. Leffel*, 47 N. E.2d 1015 (Ohio 1942), is such a one. In that case the article alleged to have been defective was a boiler and we do not know from reading the decision whether the boiler was affixed to the realty or not. It might have been and probably was, but it is not so expressly stated. The Ohio decisions cited and discussed in this opinion cite, quote, and follow fully the analysis of the problem of liability as it is set out in the Restatement of Torts. We have no doubt than an Ohio court confronted with the question would . . . extend the liability . . . even though the structure was affixed on another's land." *Moran v. Pittsburgh-Des Moines Steel Co.*, 166 F.2d 908, 916 (C. C. A. 3rd 1948).
 20. That the courts of Indiana has shown a tendency to adopt a similar view was determined in the case of *McCloud v. Leavitt*, 79 F. Supp. 286 (1948). In that case the plaintiff had been injured in the collapse of negligently made bleacher seats which were manufactured by the Leavett Corporation for Purdue University. The court analyzed the cases of *Holland Furnace Co. v. Nauracaj*, 105 Ind. App. 574, 14 N. E.2d 339 (1938) and *Coca Cola Bottling Works of Evansville v. Williams*, 111 Ind. App. 502, 37 N. E.2d 702 (1941), and found that in both of these cases the Indiana Appellate Court had recognized exceptions to the general rule of non-liability where the article is so negligently constructed as to be imminently dangerous. In *Coca Cola v. Williams*, *supra*, the court cited *MacPherson v. Buick*, 217 N. Y. 382, 111 N. E. 1050 (1916), with apparent approval, as having greatly restricted the general rule. In both of these cases the Supreme Court of Indiana denied transfer. While admitting that these cases had not expressly repudiated the rule of non-liability, the federal judge concluded that a reasonable inference to be drawn from the language used, and the fact that transfer was denied, was that Indiana had, in effect accepted the exceptions stemming from *MacPherson v. Buick*, *supra*. This being so, the court concluded that in a tort action there is no necessity of proving privity between the parties. Further, since liability is based on negligence and

be liable for Moran's wrongful death, the court did not limit the duty of the negligent builder to those persons who must work on the defective structure and whose injury might be especially foreseen. In relation to the builder, Moran stood in the same position as any member of the public who might foreseeably live or come within the orbit of risk created by the negligent construction. The builder owes a duty of due care to all persons within that orbit.²¹

The factors to be weighed in considering the question of causation in structure cases are indicated by the present decision. Under the old rule of non-liability, after the contractor or builder had turned over the completed work to the owner the chain of causation between the contractor's negligence and the injury was considered broken.²² Courts have supported this rule either by pointing to positive acts of the owner in altering the structure, or by saying that "the negligence of the owner in maintaining the defective building, and not that of the builder in constructing it, is the true proximate cause of the third person's injury."²³ As regards positive acts of alteration by the owner, the *Moran* rule does not constitute a departure from the rule of non-liability; it is a question of fact in each case whether or not the owner's positive acts operated as an intervening cause.²⁴ But the case does indicate that a builder cannot excuse himself for injuries caused by his defective work simply by invoking the additional negligence of the owner in accepting the work prepared by the builder. General principles of causation have never recognized such an excuse as exonerating a negligent actor of responsibility for his torts.²⁵ If some

foreseeability, the fact that the contractee has accepted the performance is immaterial. On this interpretation of the Indiana law, the defendant's motion to dismiss was denied.

21. See *Murphy v. Barlow Realty Co.*, 206 Minn. 527, 533, 289 N. W. 563, 565 (1935); *Gilbride v. Leffel*, 47 N. E.2d 1015, 1017 (Ohio 1942).
22. See *Ford v. Sturgis*, 14 F.2d 253, 254 (App. D. C. 1926); *Travis v. Rochester Bridge Co.*, 188 Ind. 79, 82, 122 N. E. 1, 2 (1918).
23. See *Ford v. Sturgis*, *supra*, note 22.
24. See PROSSER, TORTS § 50 (1941), ". . . the duties of the court in any case where proximate cause is involved are as follows: . . . (2) The determination of causation in fact, in any case where reasonable men could not differ. . . . In cases where reasonable men might differ—which will include all but a few of the cases in which the issue is in dispute at all—the question is one for the jury."
25. See HARPER, TORTS § 115 (1933); PROSSER, TORTS § 46 (1941).

irrational exception has existed to protect contractors,²⁶ it will no longer be adhered to in jurisdictions where the *Moran* rule becomes law. The rule is simple: the contractor will be held to answer for conduct which creates a foreseeable risk of a structural accident.

The result of the case seems commendable. Quite possibly the *Moran* rule will supply a coercive incentive to the contractor to avoid negligent construction; if it does the rule will afford the public a measure of preventive protection. It clearly provides redress for the injured plaintiff in the form of an additional solvent defendant. Nor is it likely that increased liability upon contractors will have deleterious effects on the industrial economy. Predictions of injurious effects caused by extending the liability of industry were made as early as *Winterbottom v. Wright*,²⁷ and have been frequently repeated thereafter. At the least, it cannot be proved that these dire prophecies have been fulfilled; indications are to the contrary. The automotive industry, in its infancy when the decision in *MacPherson v. Buick* was handed down, has since grown to be one of the largest in the nation.²⁸ There seems to be no reason why the contractor engaged in the erection of structures on land is not equally able to bear increased risks and yet prosper.

Obviously the contractor can protect himself by using his utmost skill to avoid building defective structures or following defective designs and plans. There is, in addition, the familiar fact that he can procure liability insurance to shift his losses caused by accidents that do occur. It is a truism to repeat that the cost of this greater degree of care and of liability insurance can be included in the expense of operation and thereby be absorbed by the public.

26. See note 22 *supra*.

27. "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences to which I can see no limit, would ensue." 10 Mee. & W. 109, 114, 152 Eng. Rep. 402, 405 (Ex. 1842).

28. The net sales of General Motors Corporation, of which Buick Motor Company is a division, rose from \$96,295,741 in 1917 to \$3,815,159,163 in 1947. Moody, MANUAL OF INVESTMENTS 2215 (1948).