Washington Law Review

Volume 37
Issue 2 *Washington Case Law—1961*

7-1-1962

Torts—Landowner's Liability to Servants of Independent Contractors

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accepted, but the fact of marriage should not mean wholesale destruction of individual liberty and rights. There is no compelling reason why a wife should not be afforded the right to sue her husband for a malicious and wilful tort. The day has come when Cardozo's traveler must again arise and continue on his journey.

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Landowner's Liability to Servants of Independent Contractor. In *Murk v. Aronsen*[1] the Washington Supreme Court had occasion to consider a landowner's tort liability where work is placed under the control of an independent contractor. In a 5-to-4 decision the court held that an owner is not liable to a contractor's servant injured by the negligence of a contractor who has control of the premises. By its decision the court has reaffirmed its earlier position,[2] despite a trend toward expanding the exceptions to the rule of non-liability for torts of independent contractors.[3]

The Congregation Bikur Cholim had employed the Aronsens as caterers to prepare and serve a banquet at the synagogue. The Aronsens, during the course of the preparation, serving and clean-up were given complete control of the kitchen and were not supervised by the synagogue. The Aronsens also provided their own employees, one of whom was the plaintiff, Ebba Murk.

While dinner was being prepared Louis Aronsen spilled cooking grease on the floor. Although the slippery condition of the floor was called to his attention nothing was done about it. Later in the evening Murk walked past the stove, slipped on the grease and was injured. She brought suit against both the Congregation and the Aronsens. A judgment was directed against the Aronsens but the suit against the synagogue was dismissed.

In affirming the dismissal of the suit against the synagogue, the majority based its decision upon the factors of control and duty. It recognized that the principal employer owes a duty to the servants of his independent contractor not to injure them by his own negligence.[4] However, when the servant is injured solely through the negligence of

[1] 57 Wn.2d 785, 359 P.2d 816 (1961).
[2] Campbell v. Jones, 60 Wash. 265, 110 Pac. 1083 (1910).
[3] Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339, 345 (1934). "It is believed that the apparently expanding exceptions to the traditional rule of insulation indicate that the law is headed that direction."
[4] Construction company held liable to the employees of an independent contractor for injuries resulting from the company's negligence in providing a defective scaffold to be used by the employees. Bowen v. Smyth, 68 Wash. 513, 123 Pac. 1016 (1912).

the independent contractor in control of the premises, the principal employer owes no continuing duty to inspect or give warning.[5]

The court, on the facts presented did not apply any of the exceptions to the rule of non-liability for the owner. The kitchen and the job were not inherently dangerous.[6] The injuries were not caused by any concealed danger or trap.[7] Neither was there a showing that the premises were not in a fit state of repair when control was relinquished to the independent contractor. Thus, the majority opinion followed the position reached by most courts faced with similar factual situations.[8]

The policy considerations in favor of holding the principal employer liable, especially when the independent contractor has proved to be financially irresponsible, have led to proposals that the employer be a guarantor of the financial responsibility of his contractors.[9] This desire for a wider scope of liability is reflected in the dissenting opinion of Judge Foster.

His dissent is based, first, upon the proposition that there were sufficient facts from which a jury could have determined that the synagogue had not relinquished all of its rights of occupancy and control. Even assuming Aronsen's negligence, the possibility of the synagogue's concurring negligence could not be ruled out.

The second basis of the dissent focusses upon the fact that Mrs. Murk was an invitee on the premises and the synagogue owed her a duty of reasonable care. It is true, as a general rule, that employees of independent contractors are regarded as "invitees" of the owner.[10] A duty is owed to invitees to exercise reasonable care in making and keeping the premises safe, and the owner cannot relieve himself of that duty by delegating it to an independent contractor.[11]

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[5] Duty extends only to conditions existing when the premises are turned over to the contractor, and not to conditions arising out of changes caused by the progress of the contractor's work. United States Cast Iron Pipe & Foundry Co. v. Fuller, 212 Ala. 177, 102 So. 25 (1924).

[6] Person v. Cauldwell-Wingate Co., 176 F.2d 237 (2d Cir. 1949).

[7] Smith v. Southwest Missouri R. Co., 333 Mo. 314, 62 S.W.2d 761 (1933).

[8] Footnotes 12 and 13, *infra.*

[9] Morris, *The Torts of an Independent Contractor,* 29 ILL. L. REV. 339 (1934).

[10] Prosser, *Business Visitors and Invitees,* 26 MINN. L. REV. 573, 605 (1942). Referring to Indemaur v. Dames, L.R. 1 C.P. 274, 35 L.J.C.P. 184, *aff'd* L.R. 2 C.P. 311, 36 L.J.C.P. 181 (1866), Dean Prosser states, "Since this decision independent contractors and their servants doing work on the occupier's premises have been held without dissent to be 'invitees,' whether in business establishments or in private homes." Dobbie v. Pacific Gas & Elec. Co., 95 Cal. App. 78, 273 Pac. 630 (1928); Carr v. Wallace Laundry Co., 31 Idaho 266, 170 Pac. 107 (1918).

[11] Corrigan v. Elsinger, 81 Minn. 42, 83 N.W. 492 (1900); Gilmore v. Philadelphia & R.R., 154 Pa. St. 375, 25 Atl. 774 (1893). In these cases the premises were under at least the partial control of the employer.

The basic difficulty in reasoning from this general proposition to the particular facts here is that most courts do not apply this rule when they meet the specific situation where the owner has given up the right to direct, inspect, and control the manner of doing the work. These courts have either refused to regard the employees of this contractor as invitees of the owner,[12] or have held that the usual duties incident to the relationship are not involved.[13]

It would seem that basically there is a misinterpretation by the dissent of the majority's position. *E.g.*, "The court declares that the employee of an independent contractor is not an invitee of the occupier of the premises".[14] What the majority did state was that Mrs. Murk was not the *kind* of business invitee to whom an owner owes a non-delegable duty, because of the owner's lack of control.[15] If the owner had been in control then the invitee argument clearly would be applicable, and on this both the majority and dissenting opinions agree.[16]

The cases relied upon by the dissent in *Murk* all involve instances where the principal employer has either retained control of the premises during the time of the work or else has been negligent in leaving them unsafe in the first place.[17]

Prior Washington decisions may, at first glance, seem contradictory to the majority's position. In *Blancher v. Bank of California*,[18] a bank contracted to have the mezzanine of the bank's lobby cleaned and redecorated. The plaintiff, a customer, was leaving the bank and fell over a stepladder left on the floor by the contractor. The responsibility for keeping the floor clear of obstruction was under the personal supervision of the contractor. The court affirmed a jury verdict against the

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[12] Butler v. Lewman, 115 Ga. 752, 42 S.E. 98, 100 (1902). In this case the owner of the building turned it over to a sub-contractor to be reconstructed. The court stated, "Accordingly, it cannot be fairly said that the plaintiff occupied the position of one who was by implication, at least invited by the owners to enter... for it is clear that, having for the time being relinquished all control over it, they had no right, so long as the contractors remained in lawful possession thereof, to extend to anyone an invitation to go upon the premises . . . ."

[13] Aluminum Ore Co. v. George, 186 S.W.2d 656 (Ark. 1945).

[14] Murk v. Aronsen, 57 Wn.2d 785, 790, 359 P.2d 816, 819 (1961).

[15] *Id.* at 787, 359 P.2d 817.

[16] For a recent extension of the "invitee" concept by the Washington Court see Ward v. Thompson, 57 Wn.2d 655, 359 P.2d 143 (1961) noted in this issue at p.250 *infra*.

[17] Dobbie v. Pacific Gas & Elec. Co., 95 Cal. App. 781, 273 Pac. 630 (1928); Carr v. Wallace Laundry Co., 31 Idaho 266, 170 Pac. 107 (1918); Sears, Roebuck & Co. v. Wallace, 172 F.2d 802 (4th Cir. 1949); Gagnon v. St. Maries Light & Power Co., 26 Idaho 87, 141 Pac. 88 (1914); *In re* Wimmer's Estate, 111 Utah 444, 182 P.2d 119 (1947). In Davis Bakery v. Dozier, 139 Va. 628, 124 S.E. 411 (1924), the employer gave up control to the independent contractor, was not negligent in selecting him, and was not liable to the contractor's employee.

[18] 47 Wn.2d 1, 286 P.2d 92 (1955).

bank on the "invitee" theory and held that the bank could not be relieved of its duty by its contract with the independent contractor.

In *Bowen v. Smyth*,[19] and in a federal decision, *Katalla Co. v. Johnson*,[20] the courts held the principal employer liable for injuries to the employees of independent contractors. In the *Bowen* and *Katalla* cases, the occupier committed affirmative acts of negligence himself. In *Blancher*, the bank carried on its banking business during the time the renovation of the lobby was being effected. It was still in control of the premises and while it retained some control it could not escape its duty.

Closer to the point is *Campbell v. Jones*.[21] The plaintiff, a sub-contractor's employee, brought an action against both the sub-contractor and the railroad company. His injuries were received when the sub-contractor's foreman kicked a stump loose above the working place, causing a rock to roll down the hill and strike him. The court held that as to the railroad company, the plaintiff was not an employee, as the company had given up control over the details of the work to the sub-contractor. The latter, on the other hand, did owe a duty to oversee the work and to see that its performance did not result in injury to his servants.

It would seem that the *Campbell* case provides a background into which the decision in the principal case can be fitted. Given the concurring factors of the occupier's surrender of control and the independent contractor's supervening negligence, the Washington court has held that the occupier should not be liable. The invitee argument has not succeeded simply because the court has not accepted it where the occupier no longer has control of the area in which the harm occurred, even though he owns it and the employee is there for his benefit. The expansion of the exceptions to the rule of non-liability of the occupier has not yet progressed this far, and future findings of liability will probably depend upon a showing by the plaintiff that the occupier has retained some measure of control.

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Liability of Charitable Institutions — Immunity. In *Pierce v. Yakima Valley Memorial Hosp. Ass'n*,[1] with a clear and comprehensive

[19] 68 Wash. 513, 123 Pac. 1016 (1912).
[20] 202 Fed. 353 (9th Cir. 1913).
[21] 60 Wash. 265, 110 Pac. 1083 (1910). See also Larson v. American Bridge Co., 40 Wash. 224, 82 Pac. 294 (1905), reaching a similar result but based upon a lack of privity between the original employer and those engaged in the work as employees of the independent contractor.

[1] 43 Wn.2d 162, 260 P.2d 765 (1953).