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TORTS - LIABILITY OF SUPPLIER OF CHATTELS TO THIRD PERSONS

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TORTS — LIABILITY OF SUPPLIER OF CHATTELS TO THIRD PERSONS — Defendant leased trucks to plaintiff's employer for road construction purposes, contracting to keep them "in good working order" during the term of the lease. Plaintiff, while working alongside the road, was injured by one of the trucks driven by a fellow employee. Defective horn and brakes were responsible for the injury. *Held*, defendant is liable to plaintiff for breach of duty on any of three theories: (1) that defendant retained control of the trucks through his covenant to repair, the retention of control creating a duty of reasonable care to the lessee and his employees in making repairs; (2) that the lease was a joint undertaking, and lessor and lessee each owed a duty to the other and his employees to discharge his obligation properly; or, (3) that the truck was a chattel which, if negligently repaired, would be imminently dangerous when applied to its intended use. *Hudson v. Moonier*, (C. C. A. 8th, 1939) 102 F. (2d) 96.[1]

[1] For a more complete statement of facts, see the first opinion, 94 F. (2d) 132. The case is interesting from another standpoint. It was decided Feb. 3, 1938. On

For almost a hundred years courts have said that a contractor, manufacturer, or vendor is not liable to third parties[2] who have no contractual relations with him for negligence in the construction, manufacture, or sale of the article he handles,[3] though four well-established exceptions have been engrafted on this general rule.[4] Where the article (1) is inherently dangerous,[5] (2) contains a concealed defect known to the supplier but not to the user,[6] (3) will be dangerous if negligently made,[7] or, (4) has been supplied by an invitor for use on his premises,[8] the supplier is held liable to third persons for negligence in the construction, manufacture, or sale of the article he handles.[9] One difficulty in these cases, particularly where there is only a contract to repair, has been that plaintiff is not in privity[10] of contract with defendant.[11] And some courts have said that injuries to third persons are not reasonably foreseeable.[12] Moreover,

April 25, 1938, Erie R. R. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, was decided. Defendants in the instant case then brought certiorari (304 U. S. 397, 58 S. Ct. 954) and the case was reversed and remanded with directions to apply Missouri law instead of general law. The case noted here is the second opinion.

[2] The term "third parties" includes those other than the immediate parties to the sale, contract, or lease, and is so used in this note.

[3] Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (1842); Huset v. Case Threshing Machine Co., (C. C. A. 8th, 1903) 120 F. 865; McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S. W. (2d) 122 (1927); Roddy v. Missouri Pacific Ry., 104 Mo. 234, 15 S. W. 1112 (1891); 3 COOLEY, TORTS, 4th ed., § 498 (1932).

[4] See HARPER, TORTS 243 (1933), indicating that perhaps the exceptions have destroyed the rule.

[5] See, for example, Thomas v. Winchester, 6 N. Y. 397 (1852); Norton v. Sewall, 106 Mass. 143 (1870).

[6] See Huset v. Case Threshing Machine Co., (C. C. A. 8th, 1903) 120 F. 865; Lewis v. Terry, 111 Cal. 39, 43 P. 398 (1896).

[7] See MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1915); Flies v. Fox Brothers Buick Co., 196 Wis. 196, 218 N. W. 855 (1928).

[8] See Heaven v. Pender, L. R. 11 Q. B. 503 (1883).

[9] See generally, MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1915); Huset v. Case Threshing Machine Co., (C. C. A. 8th, 1903) 120 F. 865; HARPER, TORTS 238-250 (1933); 3 COOLEY, TORTS, 4th ed., § 498 (1932); Feezer, "Tort Liability of Manufacturers and Vendors," 10 MINN. L. REV. 1 (1925); BOHLEN, STUDIES IN THE LAW OF TORTS 67-155 (1926).

[10] The cases that require privity of contract do not indicate just what "privity" means as used in this connection. It is clear that if the only injury claimed is a breach of contract no one may sue except the parties, assignees, and perhaps beneficiaries.

[11] This objection first seems to have been raised in Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (1842). The court offered no citation in support of its statement, and Tollit v. Sherstone, 5 M. & W. 283, 151 Eng. Rep. 120 (1839), cited by counsel, proves no more than the statement in note 10, supra. See also Hanson v. Blackwell Motor Co., 143 Wash. 547, 255 P. 939, 52 A. L. R. 851 at 857 (1927); Earl v. Lubbock, [1905] 1 K. B. 253, 1 Ann. Cas. 753 at 755.

[12] For example, Huset v. Case Threshing Machine Co., (C. C. A. 8th, 1903) 120 F. 865. It is doubtful if the injuries are unforeseeable in the normal case. It might be better to say that liability is limited as a matter of policy.

the liability of suppliers of chattels has been limited as a matter of policy.[13] But to require privity of contract as a condition to plaintiff's right to recover is to ignore the fact that a duty of reasonable care is imposed by law apart from duties arising by virtue of a consensual transaction.[14] The extent of the supplier's duty, however, necessarily must remain indefinite.[15] The court in the instant case finds retention of control of the trucks by defendant in his covenant to repair, and imposes a duty of reasonable care in making repairs coextensive with that control to third persons as well as to the lessee.[16] The analogy to the liability of lessors of realty who have covenanted to repair is close, and in those cases numerous courts have imposed liability on the lessor-covenantor.[17] Furthermore, the case can rest on the third exception noted above,[18] though the inclusion of repairmen within this exception is of recent origin,[19] and the elements of policy and foreseeability noted above [20] have occasioned some dissent.[21] It is difficult to tell what is the theory of the second basis for recovery stated in the instant case—that the lease is a joint undertaking creating a duty of reasonable care to the lessee and his employees.[22] Perhaps the court means that the lessor and lessee contemplated the manner and circumstances in which the trucks would be used, thus bringing plaintiff's injuries within the

[13] Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (1842); Hanson v. Blackwell Motor Co., 143 Wash. 547, 255 P. 939 (1927). In the Winterbottom case, Alderson, B., said (10 M. & W. at 115): "The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty." And Lord Abinger said (p. 113): "[it would let] in upon us an infinity of actions."

[14] See BOHLEN, STUDIES IN THE LAW OF TORTS 86-88, 121 (1926). The court in the instant case said the contract was evidence only of the legal relations of the parties. 102 F. (2d) at 99. It is conceivable that one could have his choice of a contract or tort action, as where a bailee promises in a bailment contract to keep the article safely and then negligently loses it.

[15] The current foreseeability test appears useful here. It would seem that the usual tests for negligence should apply unless the policy factors require further limits on liability. See GREEN, JUDGE AND JURY, c. 4 (1930), and Kalinowski v. Truck Equipment Co., 237 App. Div. 472, 261 N. Y. S. 657 (1933), where the court used the foreseeability test.

[16] 102 F. (2d) at 99.

[17] Flood v. Pabst Brewing Co., 158 Wis. 626, 149 N. W. 489 (1914); Robinson v. Heil, 128 Md. 645, 98 A. 195 (1916); 2 TORTS RESTATEMENT, § 357 (1934). But see Rich v. Swalm, 161 Miss. 505, 137 So. 325 (1932).

[18] That is, the supplier will be liable where the article will be dangerous if negligently made. This must be interpreted here as including liability where the article is negligently *repaired*. The court uses some broad language, 102 F. (2d) at 99, but this seems to be its analysis.

[19] Kalinowski v. Truck Equipment Co., 237 App. Div. 472, 261 N. Y. S. 657 (1933).

[20] Supra, notes 12, 13.

[21] Earl v. Lubbock, [1905] 1 K. B. 253; Hanson v. Blackwell Motor Co., 143 Wash. 547, 255 P. 939 (1927).

[22] The court says: "Each of these contracting parties owed to the other and his employees the duty of properly discharging his part of the joint undertaking." 102 F. (2d) at 99.

scope of reasonable foreseeability.[23] The instant case appears irreconcilable with *Winterbottom v. Wright*[24] in which the general rule originated, but the court found at least two sound bases for recovery[25] and the result is consistent with the modern view regarding the liability of suppliers of chattels to third persons.[26]

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[23] Unless it means this it would seem that the court merely assumes the result.

[24] Supra, note 3. The case has been criticized—MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1915); BOHLEN, STUDIES IN THE LAW OF TORTS 76 (1926)— and has been limited to its facts in Donoghue v. Stevenson, [1932] A. C. 562, and Grant v. Australian Knitting Mills, Ltd., [1936] A. C. 85. The distinction the last two cases make between the liability of contractors and that of vendors and manufacturers seems to be refused in the instant case. On this point, see 2 TORTS RESTATEMENT, § 404 (1934).

[25] That is, the first and third grounds of decision noted in the summary of facts. Plaintiff's employee's lack of contact with the trucks and the fact that they were to be used in public suggest a third basis for liability. See Oxford v. Leathe, 165 Mass. 254 at 255, 43 N. E. 92 (1896), where Holmes, J., says "the short and interrupted character of the occupation allowed to [the lessee] made it obvious that the safety of the building must be left mainly to defendant." See also Bohlen, "Fifty Years of Torts," 50 HARV. L. REV. 725 at 741 (1937).

[26] 2 TORTS RESTATEMENT, § 404 (1934).