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Negligence - Duty of Care - Liability of Builder and Architect to Third Party

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NEGLIGENCE—DUTY OF CARE—LIABILITY OF BUILDER AND ARCHITECT TO THIRD PARTY—The plaintiff, an infant, fell from the back porch of an apartment leased by his parents from a housing authority. The plaintiff brought actions for negligence against the architect who designed the dwelling, the builder who constructed it, and the housing authority which leased it, alleging that the back porch was so designed and constructed as to create a dangerous condition for the users thereof. The trial court dismissed the complaints against the builder and the architect. On appeal, *held,* reversed. Despite the lack of privity between the builder and the architect and the plaintiff, a good cause of action had been stated. *Inman v. Binghamton Housing Authority,* 1 App. Div. (2d) 559, 152 N.Y.S. (2d) 79 (1956).

As a general rule, a negligent builder upon real property is not liable to parties not in privity of contract with him for injuries caused by his defective work after the work is completed and has been accepted by his employer.[1] This broad principle of non-liability was formerly applied with equal force to manufacturers of chattels,[2] but as a result of the decision in *MacPherson v. Buick Motor Co.,*[3] a manufacturer or repairer of chattels is today liable for his negligence "if the nature of a thing is such that it is reasonably cer-

1 Curtin v. Somerset, 140 Pa. 70, 21 A. 244 (1891); Ford v. Sturgis, (D.C. Cir. 1926) 14 F. (2d) 253; 52 A.L.R. 619 at 623 (1928). See generally 13 A.L.R. (2d) 191 (1950).

2 See Huset v. J. I. Case Threshing Machine Co., (8th Cir. 1903) 120 F. 865.

3 217 N.Y. 382, 111 N.E. 1050 (1916). See also Carter v. Yardley and Co., 319 Mass. 92, 64 N.E. (2d) 693 (1946). See annotation in 164 A.L.R. 559 at 591 (1946).

tain to place life and limb in peril when negligently made."[4] There would seem to be no logical reason why the *MacPherson* doctrine should not be applicable to building contractors,[5] but the courts have been slow in making such an extension.[6] Recovery has been denied because of the intervening negligence of the owner who accepts the work,[7] on the grounds that no duty was owed,[8] and because of the vague feeling that imposing such a liability on a builder would drive reasonable persons from the construction business.[9] However, exceptions have been carved out of the general rule of non-liability. Some courts tend to hold contractors responsible if the structure was "imminently" or "inherently" dangerous,[10] if there was knowledge and concealment approaching fraud,[11] if there was an implied invitation to the third party,[12] or, similarly, if the third party was one who could have been expected to make use of the structure.[13] Some courts have continued to acknowledge the existence of a general principle of non-liability, but have found a broad exception to it in the rule of the *MacPherson* case.[14] The decision in the principal case is in line with this trend. No precedent existed in New York to support the extension of the *MacPherson* doctrine to builders on real property.[15] There would seem to be no good reason, however, for excusing the negligence of a builder when a manufacturer would be liable in an analogous situation.[16] To find liability,

4 MacPherson v. Buick Motor Co., note 3 supra, at 389.

5 Principal case at 562. See PROSSER, TORTS, 2d ed., 517 (1955), and 2 TORTS RESTATEMENT §§385, 395 (1934), which illustrate the modern trend towards a refusal to differentiate between liability of manufacturers and of builders.

6 See Travis v. Rochester Bridge Co., 188 Ind. 79, 122 N.E. 1 (1919), where the court distinguishes the liability of a builder whose work is generally done under the plans of, and subject to the inspection of, the employer, from that of a manufacturer where the work is under his complete control. But see PROSSER, TORTS, 2d ed., 517 (1955).

7 Wood v. Sloan, 20 N.M. 127, 148 P. 507 (1915); Mayor, etc. of the City of Albany, v. Cunliff, 2 N.Y. (2 Com.) 165 (1849). Inherent in this concept is the thought that once the structure has been accepted by the owner the negligent builder has lost all power and right to remedy the defect.

8 Howard v. Reinhart & Donovan Co., 196 Okla. 506, 166 P. (2d) 101 (1946).

9 See Curtin v. Somerset, note 1 supra, at 80.

10 Hunter v. Quality Homes, Inc., 45 Del. (6 Terry) 100, 68 A. (2d) 620 (1949). See Davis, "A Re-Examination of the Doctrine of MacPherson v. Buick and Its Application and Extension in the State of New York," 24 FORD. L. REV. 204 at 207 (1955), wherein the author states that Cardozo's language is often misinterpreted by the courts. He points out the difference between saying that liability should be imposed when manufacturers' negligence *causes* articles to be inherently or imminently dangerous, i.e., the rule of law proposed by Cardozo, and saying that liability should be imposed when articles, which are inherently or imminently dangerous when properly constructed, are caused to be defective by reason of the manufacturers' negligence.

11 Holland Furnace Co. v. Nauracaj, 105 Ind. App. 574, 14 N.E. (2d) 339 (1938); Murphy v. Barlow Realty Co., 206 Minn. 527, 289 N.W. 563 (1939).

12 Colbert v. Holland Furnace Co., 333 Ill. 78, 164 N.E. 162 (1928).

13 Grodstein v. McGivern, 303 Pa. 555, 154 A. 794 (1931).

14 Hale v. Depaoli, 33 Cal. (2d) 228, 201 P. (2d) 1 (1948); McCloud v. Leavitt Corp., (E.D. Ill. 1948) 79 F. Supp. 286. See 13 A.L.R. (2d) 183 (1950).

15 Principal case at 562.

16 Id. at 563.

the court in the principal case would require the plaintiff to show (1) that a dangerous structure was, in fact, created, and (2) that the builder knew it was to be used for human habitation.[17] The decision thereby even eliminates the necessity of paying lip-service to the general rule of non-liability and then grasping at an exception to avoid the rule.[18]

Raymond J. Dittrich

[17] Ibid.

[18] See also Hanna v. Fletcher, (D.C. Cir. 1955) 231 F. (2d) 469, cert. den. 351 U.S. 989 (1956); Foley v. The Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A. (2d) 517 (1949); Moran v. Pittsburgh-Des Moines Steel Co., (3d Cir. 1948) 166 F. (2d) 908. Since the builder can, however, usually rely on the plan of the architect, courts have found it necessary to extend liability even further, and to hold that the architect also owes a duty of care to the plaintiff, as the court found in the principal case. See Ryan v. Feeney & Sheehan Bldg. Co., 239 N.Y. 43, 145 N.E. 321 (1924); Lydecker v. Freeholders of Passaic, 91 N.J.L. 622, 103 A. 251 (1918). It would seem in the ordinary case that the owner would have exercised due care if he had hired a reputable builder and architect. See Hamblen v. Mohr, (Tex. Civ. App. 1943) 171 S.W. (2d) 168.