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Master and Servant - Independent Contractor - Inherent Danger Exception

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MASTER AND SERVANT—INDEPENDENT CONTRACTOR—INHERENT DANGER EXCEPTION—Defendant was a home-owner whose home was fumigated by an independent contractor. Plaintiff was the administrator of the estate of a water softener service man, who entered the home and was overcome by the cyanide gas used in the operation. It was agreed by the parties that the contractor was negligent in failing to lock all entrances to the home, and in not posting warnings at all entrances. Plaintiff's request to charge the jury that the work was inherently dangerous was refused. The court instructed the jury to determine whether or not the defendant had used due care in selecting a contractor, and, if he had, whether as a reasonable man he should have perceived unusual danger in the work if all due precautions were taken. The jury found for the defendant.[1] On appeal, *held,* affirmed, two justices dissenting.[2] Where due diligence has been exercised in selecting a competent contractor, and the thing contracted to be done is not in itself a nuisance, or will necessarily result in a nuisance if proper precautionary measures are used, the contractee is not liable.[3] *Cary v. Thomas,* (Mich. 1956) 76 N. W. (2d) 817.

An exception to the general rule that an employer is not liable for the negligence of an independent contractor has been recognized when the work contracted for is "inherently dangerous."[4] If the work contracted for involves "such danger as would have put a man of ordinary prudence on notice that the work could not be safely done, even with due care in the details, unless distinct and definite precautions were taken to guard against injury,"[5] the courts recognizing this exception will hold the employer liable

[1] Plaintiff had requested an instruction that there was a presumption of due care on the part of the deceased. This was also refused. The jury, therefore, may have decided on the basis that the deceased was contributorily negligent.

[2] The dissent was based on the issue of a presumption of due care by the deceased.

[3] The opinion of the court did not refer to the inherent danger exception, apparently viewing the case as one governed by the law of nuisance. For the distinction between nuisance doctrines and the inherent danger exception, see 23 A.L.R. 1016 at 1030 (1923). Compare also 2 TORTS RESTATEMENT, Introductory Note to Topic 1, c. 15, p. 1101 (1934).

[4] See generally, PROSSER, TORTS, 2d ed., §64 (1955); 23 A.L.R. 1016 (1923); 2 TORTS RESTATEMENT, §§413 and 416 (1934).

[5] Swift & Co. v. Bowling, (4th Cir. 1923) 293 F. 279 at 282.

to any third party injured as the result of a negligent failure to take such precautions.[6] It is apparent that in the principal case the locking of all entrances, and the posting of warning signs, were special precautions not essential to the performance of the details of the work itself, but necessary if the work was to be safely done. This would appear to place the case squarely within the terms of the inherent danger doctrine, especially in view of the fact that it was agreed by all parties to the suit that the contractor was negligent in failing to lock one of the doors and this negligence was the proximate cause of decedent's death.[7] The trial judge, however, instructed the jury that the defendant-employer was not liable for the negligence of the contractor unless as a reasonably prudent man he should have perceived unusual danger in the work in spite of all precautions.[8] This is essentially the standard employed by the courts when imposing strict liability on employers for ultra-hazardous activities.[9] By its affirmance of the instruction given by the trial judge, the Michigan court apparently refused to recognize the inherent danger exception as a rule distinct from that relating to ultra-hazardous activities.[10] If this were a true case of first impression, this decision would not be too unusual, for some other courts have reached this result.[11] In a case decided thirty years before, however, the Michigan court had allowed recovery against a contractee by the administrator of a person injured as a result of the contractor's failure to safeguard an ordinary building excavation.[12] The present status of the inherent danger exception in Michigan is, therefore, somewhat clouded by the decision in the principal case. It is submitted that a rule imposing liability on employers of independent contractors for injuries resulting from a failure to take necessary precautions in cases of this type has much to commend it. The employer retains the right to be indemnified for any damages recovered of him by third parties, and in the rare case when the contractor is insolvent the loss caused by his negligence will be placed not on innocent third parties, but on the person who by con-

6 The extent to which liability will attach to the employer for injuries resulting from negligence in the performance of the details of the work, apart from a failure to take necessary precautions, is not clear. For an excellent discussion of this point, written by one of the dissenting justices in the principal case, see Smith, "Collateral Negligence," 25 MINN. L. REV. 399 (1941).

7 Principal case at 822.

8 Principal case at 823.

9 PROSSER, TORTS, 2d ed., §64 (1955) and cases there cited.

10 Although the "nuisance" terminology employed in the court's opinion is confusing, it is clear that they were unwilling to predicate liability on the employer in the absence of a showing that the work involved unusual danger in spite of all proper precautions.

11 While almost all courts recognize an "inherent danger" exception, there is much confusion in the cases purporting to apply it, and results like that of the principal case are quite common. See 33 A.L.R. (2d) 49 (1954). This confusion is no doubt due to the difficulty of categorizing an infinite variety of fact situations as either "dangerous, unless special precautions are taken," or as "dangerous, in spite of all precautions."

12 Olah v. Katz, 234 Mich. 112, 207 N.W. 892 (1926). Cf. also, Watkins v. Gabriel Steel Co., 268 Mich. 264, 256 N.W. 333 (1934).

tracting to have the work done created the risk which resulted in the injury. In addition, from the standpoint of prevention of risk, such a rule would serve to make employers engaging in dangerous activities more careful to see that proper precautions are taken by their contractors.

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