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Torts -- Employer's Duty to Infant Independent Contractor

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As the matter now stands, courts seem too concerned with *absolutes*. Both opinions in the *Green* case arrived at "total" resolutions of the question of liability—each diametrically opposed to the other. Neither recognized that, if all parties are to be justly treated, the situation is one which demands compromise. It is submitted that the best solution lies in judicial acceptance of the logic implicit in Williston's statement regarding the award of consequential damages.[40] For out-of-pocket expenses occasioned by use of a product, unmerchantable due to some common class defect, the courts should allow virtually automatic recovery. The question of damages beyond this amount, however, should be treated as a matter for separate consideration. So treated, this recovery should either be denied outright, or at the very least be deemed subject to a counter-attack by the manufacturer utilizing the classic tort defenses of contributory negligence and assumption of the risk.[41]

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Torts—Employer's Duty to Infant Independent Contractor

In a recent Pennsylvania case,[1] the administratrix of the estate of a deceased thirteen year old boy brought a wrongful death and survival action against the boy's employer, a newspaper publisher. The administratrix charged that the defendant was negligent in "that it permitted and caused him to travel a dangerous route in close proximity to a busy highway with a newspaper bag over his shoulders containing approximately 75 newspapers . . . ."[2] In an effort to avoid the effect of the workmen's compensation statute it was alleged that the deceased had been employed as an independent contractor. The defendant filed a motion to dismiss on the ground that the complaint failed to state a claim for relief. It contended that the characterization of deceased as an independent contractor was an admission that defedant had no control over the means by which the deceased accomplished his work and therefore it owed him no duty. However, the United States District Court for the Eastern District

[40] See note 33 *supra*.

[41] See cases cited note 24 *supra*. See also 36 So. CAL. L. REV. 490 (1963) (reaching essentially the same conclusion).

[1] Swartz v. Eberly, 212 F. Supp. 32 (E.D. Pa. 1962).

[2] *Id.* at 33.

of Pennsylvania held that the duty owed the infant independent contractor is the same as that owed an infant employee and that a claim for relief was stated.[3]

In passing on the motion to dismiss the court was faced with the problem of determining the extent of the duty owed an independent contractor by his employer rather than the more familiar problem of the duty owed an employee.[4]

It is generally accepted that control is the basis for distinguishing between employees and independent contractors.[5] If the employer has the right to control the means of performing the contract the worker is an employee.[6] On the other hand, if his right to control is limited to requiring certain definite results pursuant to the contract then the worker is an independent contractor.[7] The reduced degree of control the employer may exercise in the case of the independent

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[3] *Id.* at 35.

[4] The employer of employees owes a duty to exercise due care to provide a reasonably safe place to work. *E.g.*, Cooley v. Walther, 226 Ark. 612, 291 S.W.2d 515 (1956); Sneed v. Lidman, 342 Mass. 228, 172 N.E.2d 836 (1961); Baumgartner v. Holslin, 236 Minn. 325, 52 N.W.2d 763 (1952); Riggs. v. Empire Mfg. Co., 190 N.C. 256, 129 S.W. 595 (1925).

He must also exercise due care to provide the employee with reasonably safe appliances. *E.g.*, Lewis v. Curran, 17 Cal. App. 2d 689, 62 P.2d 800 (1936); Cherry v. Hawkins, 243 Miss. 392, 137 So. 2d 815 (1962); Holt v. Oval Oak Mfg. Co., 177 N.C. 170, 98 S.E. 369 (1919).

The employer of an infant employee owes a further duty to warn and instruct the infant of any dangers he might encounter in his work but which because of his age and intelligence he would not appreciate. *E.g.*, Combs v. W. P. Sullivan & Co., 272 Ky. 522, 114 S.W.2d 754 (1958); Jenkins v. Jenkins, 220 Minn. 216, 19 N.W.2d 389 (1945); McLaughlin v. Black, 215 N.C. 85, 1 S.E.2d 130 (1939); Rummel v. Dilworth, Porter & Co., 131 Pa. 509, 19 Atl. 345 (1890).

[5] *E.g.*, MacMillan v. Montecito Country Club, Inc., 65 F. Supp. 240 (S.D. Cal. 1946); Turner v. Lewis, 282 S.W.2d 624 (Ky. 1955); Cooper v. Asheville Citizen Times Publishing Co., 258 N.C. 578, 129 S.E.2d 107 (1963); Tennessee Valley Appliances, Inc. v. Rowden, 24 Tenn. App. 487, 146 S.W.2d 845 (1940). See generally Steffen, *Independent Contractor and the Good Life*, 2 U. CHI. L. REV. 501 (1935); 25 MARQ. L. REV. 109 (1941).

[6] *E.g.*, MacMillan v. Montecito Country Club, Inc., 65 F. Supp. 240 (S.D. Cal. 1946); Jack & Jill, Inc. v. Tone, 126 Conn. 114, 9 A.2d 497 (1939); Pearson v. Peerless Flooring Co., 247 N.C. 434, 101 S.E.2d 301 (1958); Feller v. New Amsterdam Cas. Co., 363 Pa. 483, 70 A.2d 299 (1950). MECHEM, AGENCY § 13 (4th ed. 1952); RESTATEMENT (SECOND), AGENCY §§ 2(2), 220 (1958).

[7] *E.g.*, Cawthon v. Phillips Petroleum Co., 124 So. 2d 517 (Fla. Dist. Ct. App. 1960); Allen v. Kraft Food Co., 118 Ind. App. 467, 76 N.E.2d 845 (1948); Income Life Ins. Co. v. Mitchell, 168 Tenn. 471, 79 S.W.2d 572 (1935). MECHEM, AGENCY § 14 (4th ed. 1952); RESTATEMENT (SECOND), AGENCY § 2(3) (1958). See generally MECHEM, AGENCY §§ 427-31 (4th ed. 1952); Annot., 19 A.L.R. 226 (1922).

contractor has led courts to immunize employers from liability to a third party who is injured by the independent contractor in the course of his work.[8] It is this same difference in the extent of control that has served as a basis for the idea that the employer of an independent contractor owes him no duty while the independent contractor is performing the contract.[9] Despite the existence of this idea courts have recognized a duty to independent contractors[10] but at the same time have clung to the idea that a difference in the extent

[8] Batt v. San Diego Sun Pub. Co., 21 Cal. App. 2d 429, 69 P.2d 216 (1937); Morris v. Constitution Publishing Co., 84 Ga. App. 816, 67 S.E.2d 407 (1951); Brownrigg v. Allvine Dairy Co., 137 Kan. 209, 19 P.2d 474 (1933); Skidmore v. Haggard, 341 Mo. 837, 110 S.W.2d 726 (1937).

[9] *E.g.*, Arizona Binghamton Copper Co. v. Dickson, 22 Ariz. 163, 195 Pac. 538 (1921). "The general rule is that a contractor cannot recover damages from his employer for injuries he may sustain in the performance of his contract, and it is predicated upon the fact that the contractor has control and is bound, as every principal is to provide for his own safety and protection." *Id.* at 170, 195 Pac. at 540.

[10] Dingman v. A. F. Mattock Co., 15 Cal. 2d 622, 104 P.2d 26 (1940); Reardon v. Exchange Furniture Store, Inc., 37 Del. 321, 183 Atl. 330 (1936); Hall v. Holland, 47 So. 2d 889 (Fla. 1950); Gowing v. Henry Field Co., 225 Iowa 729, 281 N.W. 281 (1938); Edwards v. Johnson, 306 S.W.2d 845 (Ky. 1957); Resnikoff v. Friedman, 124 Minn. 343, 144 N.W. 1095 (1914); McLaughlin v. Creamery Package & Mfg. Co., 130 S.W.2d 656 (Mo. Ct. App. 1939); Magnolia Petroleum Co. v. Barnes, 198 Okla. 406, 179 P.2d 132 (1946); Stepp v. Renn, 184 Pa. Super. 634, 135 A.2d 794 (1957).

In dictum in Deaton v. Board of Trustees, 226 N.C. 433, 38 S.E.2d 561 (1946), the North Carolina Supreme Court stated the employer's liability as follows: "[I]t is generally held that one who is having work done on his premises by an independent contractor is under the obligation to exercise ordinary care to furnish reasonable protection against the consequence of hidden dangers known, or which ought to be known, to the proprietor and not to the contractor or his servants." *Id.* at 438, 38 S.E.2d at 564. This was recognized as the law of North Carolina in Brooks v. United States, 194 F.2d 185 (4th Cir. 1952).

In Henry v. White, 259 N.C. 282, 130 S.E.2d 412 (1963), the deceased, an electrician, was killed on defendant's premises while attempting to repair refrigeration machinery which he had installed earlier. Finding the deceased an independent contractor, the court stated: "The duty imposed on an employer to exercise care to provide a reasonably safe place for his employees to work... does not extend to non-employee "trouble-shooters," specialists in their field who respond to owner's call to service and repair a machine.... The owner must warn of hidden dangers known to the owner but unknown to the other." *Id.* at 284, 130 S.E.2d at 413.

This case was decided on the ground that deceased assumed the risk of a danger which he was in a better position to assess than the owner, rather than on the ground of a particular relationship between the deceased and the owner. Nevertheless, it further illustrates that North Carolina requires a less rigid standard of employers of independent contractors than of those engaging employees.

of control should result in a difference in the duties owed to the two classes.[11]

The principal case is a departure from this idea.[12] It not only holds there is a duty owed the infant independent contractor but bases it on the duty owed an infant employee in Pennsylvania. That duty is to warn and instruct the infant of any dangers he might encounter in his work but which because of his age and intelligence he would not appreciate.[13] This writer believes the decision of the court was correct. The duty to warn and instruct, to be effective, must be performed prior to commencement of the work. Thus, control of the means of performing the work is not a prerequisite to the effective performance of such duty and should not be grounds for lessening the duty owed an infant because he is employed as an independent contractor rather than an employee.

The soundness of the principal case, which subjects the employer to the same liability in certain instances whether he utilizes an independent contractor or an employee, should be recognized by those employers such as newspaper publishers, who have traditionally employed infants. The characterization of the worker as an independent contractor may continue to prevent liability from being imputed to the employer in tort situations involving third parties[14] but if the holding of the principal case is followed in other jurisdictions such employers will find their liability for injuries suffered by the infant independent contractor himself greater than if the same party had come under workmen's compensation.

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[11] Cases cited note 10 *supra.*

[12] In Missouri the employer owes an independent contractor working on his premises the same duty he owes an invitee. Stein v. Battenfeld Oil & Grease Co., 327 Mo. 804, 39 S.W.2d 345 (1931). In an earlier case, Cummings v. Union Quarry & Constr. Co., 231 Mo. App. 1224, 87 S.W.2d 1039 (1935), it was held that the duty owed an independent contractor was substantially the same owed an employee where the employer furnished and retained control of the premises. Roach v. Herz-Oakes Candy Co., 357 Mo. 1236, 212 S.W.2d 758 (1948), reiterated the requirement that the employer furnish and retain control before the same duty could be imposed. The facts indicate the premises were furnished in all three cases. This leaves control as the real distinguishing factor.

[13] Fisher v. Delaware & Hudson Canal Co., 153 Pa. 379, 26 Atl. 18 (1893); Rummel v. Dilworth, Porter & Co., 131 Pa. 509, 19 Atl. 345 (1890).

[14] Cases cited note 8 *supra.*