LIABILITY OF AN EMPLOYER FOR THE NEGLIGENCE OF AN INDEPENDENT CONTRACTOR IN MISSOURI

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INTRODUCTION

It may be stated as a general proposition that one employing a person exercising an independent employment to do work for him, according to the contractor's own methods, and without his being subject to control, except as to the results of his work, will not be answerable for the wrongs of such contractor, his subcontractors or his servants, committed in the prosecution of such work.[1] The cases are numerous in which the question was whether the status of the actor was that of a servant or an independent contractor. But with this problem we do not deal. In this study, our inquiry is concerned with the exceptions to the general proposition of nonliability as disclosed in the Missouri decisions.[2] Our inquiry seeks to discover in what instances the courts have denied to the employer the defense that the direct tort-feasor was an independent contractor.

The exceptions to the general principle of nonliability cluster about two types of situations: (1) where there is some personal fault on the part of the employer of the independent contractor; and (2) where the law has said that it is socially desirable to hold the employer responsible for the acts of the independent contractor, even though no personal fault can be found in the em-

[1] Baker v. Milling Co. (1929) 323 Mo. 1089, 20 S. W. (2d) 494; O'Hara v. Laclede Gas Light Co. (1912) 244 Mo. 395, 148 S. W. 884; Loth v. Columbia Theatre Co. (1905) 197 Mo. 328, 94 S. W. 847; Gayle v. Foundry Co. (1903) 177 Mo. 427, 76 S. W. 987; City of Independence v. Slack (1895) 134 Mo. 66, 34 S. W. 1094; Barry v. St. Louis (1852) 17 Mo. 121. See discussion of the general principle and the evolution of the doctrine in (1922) 18 A. L. R. 801. For a discussion of the nature of the relationship, see (1922) 19 A. L. R. 226; and for the circumstances under which the relationship is predictable, see (1922) 19 A. L. R. 1168, and (1931) 75 A. L. R. 725.

[2] The writer has annotated the chapter of the Restatement of the Law of Torts which deals with this subject, and in this paper has limited the situations to those covered by the Restatement. Only the exceptions applied in the Missouri decisions are discussed. For the cases in other jurisdictions, the exhaustive notes in A. L. R. have been cited.

ployer. The latter situations are designated as non-delegable duties.[3]

1. Liability based on the personal fault of employers of independent contractors

Every student of law knows that the law holds equally responsible one who directs another to act where an unreasonable risk of injury may be anticipated to others if due care is not exercised. A very common type of case is found where construction work is entrusted to an independent contractor under plans and specifications provided by the employer. Reasonable care must be used in supplying these plans and specifications, where the work to be done involves an unreasonable risk of injury to others.

In the early case of *Horner, Adm'r v. Nicholson,*[4] the plaintiff was injured as a result of the falling in of a floor and wall in the defendant's building which he was constructing. The agreement with the contractors specified that the latter were to make use of the old walls and other materials, the safety and propriety of which the defendant's architect was to judge. It was held by the court that "there can be no question of the liability of defendant, if the damage resulted from inherent defects in the old wall, which the contractors were directed to make use of in the new building, or if the removal of the floors and the construction of the new wall were accomplished under the directions of the defendant previous to the letting of the work to the contractors, and so unskillfully or negligently arranged as to have caused the injuries complained of. . . ."[5] The same principle applies in operations involving excavating where the employer directs or supervises the work.[6] In *Brannock v. Elmore,*[7] it was held that where a lot owner makes a contract for excavating for the pur-

[3] The reasons which justify such a classification in the law as non-delegable duties are discussed at the conclusion of this paper.

[4] (1874) 56 Mo. 220.

[5] Lancaster v. Conn. Mut. Life Ins. Co. (1887) 92 Mo. 460, 5 S. W. 23.

[6] Mallory v. Louisiana Pure Ice & Supply Co. (1928) 320 Mo. 95, 6 S. W. (2d) 617; Wiggin v. St. Louis (1896) 135 Mo. 558, 37 S. W. 528; Larson v. Metropolitan St. R. Co. (1892) 110 Mo. 234, 19 S. W. 416; Crenshaw v. Ullman (1892) 113 Mo. 633, 20 S. W. 1077 (*semble*); Walters v. Hamilton (1898) 75 Mo. App. 237; cf. Klaber v. Fidelity Bldg. Co. (Mo. App. 1929) 19 S. W. (2d) 758.

[7] (1893) 114 Mo. 55, 21 S. W. 455.

pose of erecting a building thereon by persons whom he knows to be in the habit of blasting in violation of an ordinance, he is answerable for damages caused by their blasting on his lot without covering the rock, even though he retains no control over them in the execution of their work, since his implied permission for them to blast as they had been blasting is equivalent to a direction to do so.[8] While no quarrel is to be found with the result, the reason given appears highly fictitious.

But even in the employment of an independent contractor to whom no directions are given, the employer does not lay aside all responsibility. He is bound to use care to employ a competent man; and, if he would take shelter behind him, he must be prepared to show that the man employed was a competent person in that line of work. A competent person is one who not only has an occupation, but reasonable skill in performing the tasks pertaining to it.[9] If a person entrusts the performance of work, of a kind likely to result in harm to third persons unless cautiously and skillfully done, to a manifestly unfit person, as an independent contractor, the employer should be and is responsible for the consequence of such contractor's incompetency.[10] As the danger increases, the amount of care which should be used in investigating the skill and competence of the contractor will increase proportionately. This duty is owed even to the employees of the independent contractor.[11]

If the employer entrusts work to an independent contractor, but retains control over any part of the work, he is subject to liability to those for whose safety the employer owes a duty to exercise reasonable care and whose injury is caused by his failure so to exercise his control with reasonable care.[12] This is true even

[8] Ullman v. Hannibal & St. Joseph R. Co. (1877) 67 Mo. 118 (directing trespass); Williamson v. Fischer (1872) 50 Mo. 198.

[9] Mullich v. Brocker (1905) 119 Mo. App. 332, 97 S. W. 549. See note in (1924) 30 A. L. R. 1538.

[10] Baker v. Milling Co., supra note 1; Brannock v. Elmore, supra note 7; Mullich v. Brocker, supra note 9; dissenting opinions in Salmon v. Kansas City (1912) 241 Mo. 14, 145 S. W. 16, and Chrismer v. Bell Telephone Co. (1906) 194 Mo. 189, 92 S. W. 378.

[11] Baker v. Milling Co., supra note 1, overruling Salmon v. Kansas City, supra note 10.

[12] Brannock v. Elmore, supra note 7; Larson v. Metropolitan St. R. Co., supra note 6; Appel v. Eaton & Prince Co. (1902) 97 Mo. App. 428, 71 S. W.

if the control retained is less than that which is necessary to subject him to liability under principles of master and servant. In *Larson v. Metropolitan Street Ry. Co.*,[13] the agreement between the employer and the contractor declared that "the excavation shall be carried to such general depth as may be indicated by the engineer; excavations for the trenches and piers will be made as required from time to time in the progress of the work, and to such an extent as may be indicated by the engineer." The negligence complained of was the digging of the trench too long and too deep under the circumstances. The act was ordered by the defendant's representative on the spot and the work was done precisely as ordered.[14] The owner was held responsible.

Where the employer holds open his premises to the public, he owes a duty to supervise the equipment and methods of contractors who are employed to do work upon the land while it is held open to the public.[15] The same principle applies to a concessionaire who is permitted to carry on an activity in furtherance of the possessor's business use of the land.[16] In *Roark v. Electric Park Amusement Co.*,[17] the defendant had leased a certain tract of ground which was devoted to public park purposes and public amusements in Kansas City. Certain parts of this

741; Walters v. Hamilton, supra note 6 (dictum). There is a clear distinction between reserving control and reserving the right to superintend the work to see that the contract is complied with. Salmon v. Kansas City, supra note 10; Crenshaw v. Ullman, supra note 6; Blumb v. City of Kansas (1884) 84 Mo. 112; Ege v. Phoenix Brick & Construction Co. (1906) 118 Mo. App. 630, 94 S. W. 999. See exhaustive note in (1922) 20 A. L. R. 684, on the elements of the contract as affecting the character of one as an independent contractor.

[13] Supra note 6.

[14] In Brannock v. Elmore, supra note 7, the court said: "It will be observed that the vital question in this case is whether defendant retained control of the ways and means of making the excavation. If he retained the right to direct how the blasting should be done, or agreed that it might be done in a manner negligent in itself, then the act of those doing it would be his act, and for the manner in which it was done he would be responsible. Whether he had any control over the manner of doing the excavating is clearly a question of law to be deduced from the facts."

[15] Dagley v. National Cloak & Suit Co. (1929) 224 Mo. 61, 22 S. W. (2d) 892.

[16] Hollis v. Kansas City Retail Merchants' Ass'n (1907) 205 Mo. 508, 103 S. W. 32; Rourke v. Electric Park Amusement Co. (1922) 209 Mo. App. 638, 241 S. W. 651.

[17] Supra note 16; and see annotation in (1924) 29 A. L. R. 798.

leasehold were sublet to concessionaires who negligently maintained a certain amusement. The defendant contended in vain "that it did not own, maintain, or have anything to do with the maintenance and operation of such amusement, device, or instrumentality named in the petition; that the same was operated by a partnership, which said partnership did covenant and agree to indemnify and save harmless the defendant Electric Park Amusement Company from any and all claims for damages made against it, by any person, for injuries or damages due to negligence on the part of said partnership." In *Hollis v. Kansas City Retail Merchants' Association*,[18] the defendant, having charge and control of the grounds devoted to a carnival, permitted an amusement company to conduct certain forms of amusement. Through the negligence in the construction, operation and management of one of the appliances, the plaintiff suffered the injuries complained of. The trial court, at the close of plaintiff's evidence, told the jury that the plaintiff was not entitled to recover. In reversing that judgment the court said: "If the instruction in the nature of a demurrer was given in this case upon the theory that the defendants were engaged in a separate and distinct business and the fact that the show and amusements and the appliances connected therewith were provided and conducted by a corporation or persons independent of the Merchants' Association, and that the association was not the owner of appliances upon which the accident occurred, then we say that under the evidence which clearly indicates that the Merchants' Association were interested in the exhibitions and amusements furnished, had general charge of all the grounds, participated in the proceeds from the appliances upon which this accident occurred, took an active part in the distribution of posters advertising the amusements, which at least must be construed as an implied invitation to the plaintiff and others to visit the ground under the control of the Retail Merchants' Association, this instruction should not have been given." The court quoted with approval an instruction given in *Thompson v. Railroad*,[19] that "the defendant is not responsible unless the exhibition was in its nature such that it would necessarily or probably cause injury to some per-

[18] Supra note 16.
[19] (1898) 170 Mass. 577, 49 N. E. 913.

son present under the defendant's invitation, unless guarded against, and the defendant failed to exercise due care to prevent harm." The fact that the exhibition was provided and conducted by an independent contractor would not wholly relieve the defendant from responsibility, provided it was of such a kind that it would probably cause injury to a spectator, unless due precautions were taken to guard against harm.

The question is suggested as to the care which the defendant is bound to exercise in supervising the equipment and methods of these contractors or concessionaires who carry on an activity which is intended to attract the public to the possessor's land. Reasonable care under the circumstances to discover improper method or equipment used by the contractor would seem to suggest the extent of the duty.[20] The principle is even more clear where a proprietor of a place, to which the public is invited for business purposes of the possessor, employs a contractor to do work on the premises while it is held open to the public, and where the work involves an unreasonable risk of injury to these persons unless reasonable care is exercised to the extent as stated.[21]

2. Liability for negligent conduct of an independent contractor although no personal fault on the part of the employer (non-delegable duties)

No particular objection can be raised to the cases discussed in the previous section where the liability of the employer for the negligent acts of an independent contractor is predicated on the personal fault of the employer. The subject of non-delegable duties, however, raises an altogether different question. During the past half century, the courts have been gradually delimiting and defining the domain within which the general rule as to the nonliability of an employer for the negligence of an independent contractor is controlled and overridden by the principle that a person who is subject to an absolute duty cannot, by delegating it to another party, relieve himself from liability for injuries caused by its nonfulfillment. In attempting to apply the

[20] Hollis v. Kansas City Retail Merchants' Ass'n, supra note 16.

[21] Dagley v. Nat'l Cloak & Suit Co., supra note 15. See annotation in (1923) 23 A. L. R. 1009.

general doctrine of non-delegable duties, certain principles have been worked out in cases involving similar facts. These principles are not agreed upon by the various courts of this country, even in cases involving the same facts.[22] The Missouri cases have been sufficiently numerous that one can begin to gain some idea as to the extent to which our courts have gone in limiting the general doctrine of nonliability of an employer for the negligence of an independent contractor. Likewise, from the cases, one can begin to predict future developments. In many of these cases two or more of the principles have been applied to the same set of facts.

One of the most common limitations is found in those cases where one employs an independent contractor to do work which is dangerous in the absence of special precautions. The principle underlying this type of situation was enunciated in the English case of *Bower v. Peate*,[23] which is still regarded as the leading case both in England and in the United States. The doctrine is stated: "A man who orders a work to be executed, from which in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are

[22] See exhaustive note in (1923) 23 A. L. R. 1016 and 1084. It may well be that there is a distinction between inherently dangerous work and work which is dangerous in the absence of precautionary measures. But the cases seem to make no such distinction.

[23] (1876) L. R. 1 Q. B. Div. 321. The word "neighbor" is not restrictive. The facts of this case explain the use of the word in that the building contractor failed to provide support for a building on premises adjacent to those on which he was making an excavation. It is very clear from the numerous decisions based upon this authority that the principle enunciated is one of an entirely general scope quoad personas.

adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences, if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise."

This principle is applied in many different situations in the Missouri decisions. The principle is so broad that it is easier to define its scope by a classification of the cases according to the facts. In *Loth v. Columbia Theatre Co.*,[24] the contractor was lowering an electric sign which was suspended over a sidewalk for the purpose of changing the electric bulb lettering. As this was being done, the sign fell, through the negligence of the contractor, and caused injuries to a pedestrian. In *Press v. Penny and Gentles*,[25] the defendants, who were tenants in possession of a building abutting on a busy street, employed an independent contractor to take down a framed muslin sign tacked above the first story of the defendant's building. While drawing a nail, an employee of the contractor fell from a ladder resting upon the sidewalk and injured the plaintiff, a passer-by. It was held that the work was not of such a type as to be dangerous in the absence of special precautions. In *Privitt v. Jewett*,[26] it was held that "the erection of the building produced a situation of inherent danger to the public passing on the sidewalk, dangers that could be reasonably anticipated by defendants as being likely to result in injury, if proper precautions were not taken, either by erecting guards or barriers or building a covering over the

[24] Supra note 1.

[25] (1912) 242 Mo. 98, 145 S. W. 458.

[26] (Mo. App. 1920) 225 S. W. 127, with which compare Lancaster v. Conn. Mut. Life Ins. Co., supra note 5. Also compare City of Independence v. Slack, supra note 1. In that case the defendant had employed a contractor to construct a stone sidewalk in front of the defendant's building. Stones left in the street caused injury to one who had recovered in an action against the city. An excavation had been made in the street to connect an area under the walk with the cellar. The plaintiff in walking around the excavation fell over the stones. The passage was three or four feet between these stones and the excavation which was properly guarded. See Christman v. Meierhoffer (1906) 116 Mo. App. 46, 92 S. W. 14.

sidewalk." The employer was held liable in *Carson v. Blodgett Construction Co.*,[27] for personal injuries caused by rock and debris thrown up by explosives used in excavating for a building, which rocks and debris fell upon a traveller on an adjacent street. But where the blasting is done by a contractor for the city in sewer and street construction, it seems that the work is not inherently dangerous.[28] Neither is the storage of explosives in proper quantities for use in blasting.[29] To fail to take precautions to guard against the falling of a wall where a trench was to be dug against a brick wall thirty feet long, fourteen feet high, nine inches thick and extending in the ground to a depth of three feet, and where the trench was to be dug to a depth of two feet below the foundation of the wall and laterally six inches underneath its foundation, made the employer liable to an employee of the independent contractor having such work in charge.[30] Taking down the walls and chimney of a building which had been destroyed by fire was held in *Dillon v. Hunt*,[31] to constitute work dangerous in the absence of special precautions where the walls caused damage by falling during the course of the work on the house of the plaintiff, an adjoining proprietor. In *Johnson v. Case Threshing Machine Co.*,[32] it was held that to take a threshing machine outfit with a large hole in the spark arrester over the highways in dry seasons brought the case within this principle, as to the plaintiff whose ricks of hay had been destroyed by fire set by sparks emitted from the engine.

Where an excavation was to be made underneath a standing wall, it has been held to be "intrinsically dangerous, in that its performance would likely result in damage, unless proper precau-

[27] (1915) 189 Mo. App. 120, 174 S. W. 447 (failing to cite Blumb v. Kansas City, supra note 12).

[28] Blumb v. Kansas City, supra note 12; and see dicta in Gerber v. Kansas City (1924) 304 Mo. 157, 263 S. W. 432; Salmon v. Kansas City, supra note 10. Cf. Taylor v. Walsh (1916) 193 Mo. App. 516, 186 S. W. 527.

[29] Holman v. Clark (1917) 272 Mo. 266, 198 S. W. 868, but compare St. Mary's Mill Co. v. Illinois Oil Co. (Mo. App. 1923) 254 S. W. 735, and Buchholz v. Standard Oil Co. (1922) 211 Mo. App. 397, 244 S. W. 973.

[30] Mallory v. Louisiana Pure Ice & Supply Co., supra note 6.

[31] (1881) 11 Mo. App. 246, (1884) 82 Mo. 150, rev'd on other grounds in (1891) 105 Mo. 154, 16 S. W. 516, and compare Horner, Adm'r v. Nicholson, supra note 4.

[32] (1916) 193 Mo. App. 198, 182 S. W. 1089.

tionary measures were taken.[33]" Likewise, an excavation along the margin of the sidewalk was held to be inherently dangerous.[34] But an excavation within the premises negligently left unguarded is not inherently dangerous.[35]

Where one employs a contractor to do work in a public place which can only be done under a license from public authority, and where the work is of such a nature that it involves a risk of injury unless carefully done because of making the physical condition of the place dangerous to members of the public, another situation is presented involving a non-delegable duty. Such a situation is usually found in the digging of ditches or the placing of building materials upon a street under a license from the proper public authorities. Such privilege is regarded as personal and imposes full responsibility upon the holder of the privilege. In *Benjamin v. Metropolitan Street R. Co.*,[36] the plaintiff was injured through falling into a negligently covered scuttle hole in the sidewalk which was used by a contractor in delivering coal to the defendant's basement. In affirming a judgment rendered in favor of the plaintiff, the court said that the "defendant was permitted or licensed by the city to maintain these holes for its personal use, and owed the duty to the plaintiff and the public, who had the right to use the sidewalk, to exercise reasonable care to keep them in a safe condition. This was a personal duty from which it could not relieve itself by imposing it upon another." Contrasted with this type of case is the situation where a contractor, engaged in construction work on the defendant's premises, piles building materials in the street. In this situation the court has said: "But we know of no principle of law that imposes a legal obligation upon the owner of property adjacent to a public street to see that no obstructions to travel are placed or suffered to remain thereon, nor is there evidence of a contract with, or license from, the city which placed defendants under any peculiar obligation to keep the street secure while they were improving their property. Defendants were, of course,

[33] Mallory v. Louisiana Pure Ice & Supply Co., supra note 6, with which compare McGrath v. St. Louis (1908) 215 Mo. 191, 114 S. W. 611.

[34] Wiggin v. St. Louis, supra note 6.

[35] Wiese v. Remme (1897) 140 Mo. 289, 41 S. W. 797; Fink v. Missouri Furnace Co. (1884) 82 Mo. 276. See (1923) 26 Mo. L. BULL. 27.

[36] (1896) 133 Mo. 274, 34 S. W. 590. See annotation in (1923) 25 A. L. R. 481.

responsible for what they did themselves or directed others to do, but the contract in question did not necessarily, or, probably, involve the commission of a nuisance, and cannot, therefore, be construed as a direction by defendants to commit the negligent acts of which complaint is made. They had the right to make the contract, and to believe that the work would be done carefully in all respects, and after they had committed it to Stewart, duty did not require them to interpose, and see that the methods adopted were careful and proper."[37]

Where a municipality or other corporation in charge entrusts the construction or repair of a highway to an independent contractor, the courts are quite agreed that the municipality or corporation remains liable to those using the highway while it is held open for travel where the injuries result from a negligent failure by the contractor to make the highway reasonably safe for travel. The liability is the same as though the municipality or corporation had retained the construction or repair of the highway in its own hands. In the earliest Missouri case of *Barry v. City of St. Louis*,[38] the court refused to hold the city liable for damages caused by the negligence of a contractor in failing to put up sufficient barriers to warn and guard persons passing down the street. Although on an identical set of facts, the *Barry* case was disapproved in *Welsh v. City of St. Louis*,[39] and is no longer

[37] City of Independence v. Slack, supra note 26. Cf. Christman v. Meierhoffer, supra note 26; O'Hara v. Laclede Gas Light Co. (1908) 131 Mo. App. 428, 110 S. W. 642, rev'd in (1912) 244 Mo. 395, 148 S. W. 884.

[38] Supra note 1.

[39] (1880) 73 Mo. 71. In this case the court directly disapproved of Barry v. St. Louis, supra note 1: "As sustaining the view that the petition does not state a cause of action against the city, we are referred to the case of Barry v. St. Louis. The precise point in judgment on that case was this, and this only, that the city was not responsible for damages resulting from the negligence of a contractor in failing to put up sufficient barriers to warn or guard persons passing down the street. The question presented by this record is not whether the city is responsible for the negligence of the contractor, Eyerman, but whether it is responsible for its own negligence, in failing to discharge that duty which it owes to its citizens and to the public, of maintaining its streets in a proper condition, so that they will be reasonably safe for travel. That such a duty, such an obligation, belongs to the city, and is a continuing obligation, which cannot be shirked or shifted to the shoulders of another, is well settled in this state; and if the language in Barry v. St. Louis, supra, denies such liability, it should be disapproved."

law in this state, the reasons given by the court are interesting, though specious in the light of unanimous holdings of subsequent decisions. The court said: "The contractor is to furnish everything—the street in which the sewer is to be built is given up to him, the city retaining the right and power to suspend work, to watch over its execution, etc. It was the duty of the contractor to have put up the necessary barriers to warn persons of the danger. During the progress of this work, the possession of the sewer was necessarily in the contractor, and not in the city, and for this reason the city could not have maintained trespass for any injury to the sewer during its construction. For an injury resulting from his negligence, the contractor was clearly responsible, and even admitting that the city might be liable for his negligence he ought to respond for whatever the city would be compelled to pay, by reason of his negligence, and to avoid circuity of action, it would be better to make the contractor liable in the first place. In actions of this character against corporations, the prejudices of jurors may be easily excited, and men are apt to be not very scrupulous when they are giving away other people's money. In our opinion, however, sound policy indicates that the contractor alone should be held responsible, and that he should realize his responsibility. In making sewers and other improvements in the streets, he has the immediate charge of the work, and the temporary occupancy of the street in which the work is progressing. He is upon the ground with his materials and servants, and can more securely and conveniently than any other officer of the city, protect his work from injuring others. The public would be better protected from injuries of the character here complained of, by holding the contractor liable, and teaching him that he alone is responsible and that the city does not stand between him and the person injured by his negligence."

Other applications of this doctrine are found in cases where no warning was given as to a barricade at a bridge which was being built by a subcontractor,[40] where an unguarded excavation in a street in which a street car line was under construction,[41] where a

[40] Wilkey v. Rouse Construction Co. (1930) 224 Mo. App. 495, 28 S. W. (2d) 674. See annotation on liability of municipal corporations for the torts of an independent contractor in (1923) 25 A. L. R. 426.

[41] Haniford v. City of Kansas (1890) 103 Mo. 172, 15 S. W. 753.

portion of a footwalk on a bridge was removed to lay water pipes for the city without placing barriers or warning lights,[42] where a paving contractor was negligent in not placing warning lights on obstructions in the street.[43] The principle does not apply to protect an adjoining proprietor who was injured by the negligence of a paving contractor in causing water to overflow the land, but is confined to injuries to the traveling public.[44] The space between the curbing and the sidewalk, however, has been held to be a sufficient part of the street for the application of this principle.[45]

Where the relationship between the plaintiff and the employer is that of landlord and tenant, situations are numerous out of which the question of non-delegability of duties may arise. There seems to be no general principle to the effect that the obligations which a landlord assumes by reason of his having demised the premises to a tenant are non-delegable, so as to render him liable for injuries caused to the tenant by the act of an independent contractor which involves a breach of one of those obligations. But there are certain types of situations occurring with more or less frequency which have been held to be or not to be instances falling under the exception to the general principle that an employer is not liable for the negligent conduct of an independent contractor.

The Missouri courts have not passed squarely upon the application of the principle in cases where the landlord, who has contracted to make repairs, employs an independent contractor to make the repairs. The question was directly presented in the case of *Eberson v. Continental Investment Co.*[46] When the case was first presented to the St. Louis Court of Appeals, that court held that the covenant in the lease was a personal one and could not be delegated. The trial court had instructed the jury to the effect that the question for the jury was whether the persons performing the work were independent contractors or not. In reversing judgment for the defendant, the court said: "These

[42] Ray v. Poplar Bluff (1897) 70 Mo. App. 252.

[43] Schlinski v. City of St. Joseph (1913) 170 Mo. App. 380, 156 S. W. 823; and see Hunt v. St. Louis (1919) 278 Mo. 213, 211 S. W. 673.

[44] Sappington v. City of Centralia (1912) 162 Mo. App. 418, 144 S. W. 1112 (1912); and compare Blumb v. City of Kansas, supra note 12.

[45] Gerber v. Kansas City, supra note 28.

[46] (1906) 118 Mo. App. 67, 93 S. W. 297.

declarations of law are palpably erroneous. The covenant of the defendant, in the lease, to repair is a personal one, the performance of which it could not delegate to another so as to absolve it from liability for damages resulting from the negligent performance of the duty. By its contract with Hogg & Reed to make the repairs, plaintiff substituted them in its stead and made them its agent for the performance of the work or restoration; in such cases, the rule of responsibility is thus stated by Professor Wharton: 'The rule that the principal is not liable for the contractor's torts is inapplicable to cases where the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfillment, whereby an injury is occasioned. . . .' The principle is universally recognized that where a duty is incumbent upon one to do a particular work, he cannot escape liability for its negligent performance by committing its execution to an independent contractor." In the second trial a verdict was found for the plaintiff and the defendant appealed. On this appeal in the same court the defendant was held responsible on the ground that the repairs were inherently dangerous unless precautions, which were omitted, were taken.[47] But the opinion contains a dictum to the effect that the landlord may escape lia-

[47] (1908) 130 Mo. App. 296, 109 S. W. 62. The court said: "If a covenant by the lessor is looked to as ground for his liability for injury due to an independent contractor's fault, the question occurs whether a simple covenant to repair without more, can be interpreted to render the proprietor liable if he employs a competent contractor and the work requires no unusual precautions to prevent injury to the tenant. Of course the covenant may be in terms broad enough to place responsibility on the lessor by explicit words or clear inference—may bind him to answer for all damage occurring in the course of the work. When the covenant is not so broad, it can be argued the tenant takes a risk of injury from the contractor's negligence, just as he would if he, and not the lessor, let out the work. Ordinarily a proprietor, a tenant, or any one else who engages a contractor to repair a building, does no more to secure safety in the performance of the work than to let it to a competent person, and is not expected to do more. But when the work is dangerous to a tenant, unless unusual precautions are observed, the lessor can be held liable—a doctrine consistent with the general principles of the law of torts; and under the facts of this case we need not rest our decision on any less stable basis, even though a bare covenant to repair may be enough to make the covenantor liable for the default of the contractor." Cf. Harvey v. O'Connor (Mo. App. 1926) 284 S. W. 71 (Mo. App. 1926). See annotations on the conflict in the authorities in (1924) 29 A. L. R. 966, and (1921) 15 A. L. R. 975.

bility by employing a contractor to make repairs which he had covenanted with his tenant to make.

On the question as to repairs gratuitously undertaken by the lessor through an independent contractor, the cases in Missouri show some disagreement as to whether the landlord who employs an independent contractor is subject to liability for injuries caused by the contractor's negligence. The Kansas City Court of Appeals in the case of *Vollrath v. Stevens*,[48] held that the landlord was liable, while the same court in *Noggle Wholesale & M. Co. v. Sellers & Marquis R. Co.*,[49] decided two years earlier, seemed to reach the opposite conclusion. The St. Louis Court of Appeals in *Burns v. McDonald*,[50] held the landlord not liable.[51]

The question of the liability of a possessor of land who has leased a part thereof, who is under a duty to maintain in a reasonably safe condition the part retained by him, and who entrusts the repair of such part to an independent contractor, has not been presented clearly in any case. In the case of *Harvey v. O'Connor*,[52] the facts are not clear as to whether the steps repaired were a part of the premises leased or whether they were a part of the premises retained in the control of the landlord. It seems that this is still an open question in Missouri.

Where a possessor of land entrusts the repair of a building to an independent contractor, the Missouri authorities are not clear as to whether the employer may relieve himself from liability to persons other than tenants and employees who are injured within or outside the land by the contractor's negligence in putting the building in a reasonably safe condition.[53] Where walls are left

[48] (1918) 199 Mo. App. 5, 202 S. W. 283. The defense was that the negligence was that of the contractor. The court said: "This contention of the defendant is not well taken. If the lessor undertakes to have repairs made when he has not covenanted to do so, a duty is cast upon him to see that the repairs are made so as not to injure the tenant and the rule concerning independent contractors has no application."

[49] (Mo. App. 1916) 183 S. W. 659.

[50] (1894) 57 Mo. App. 599. Cf. Finer v. Nichols (1911) 158 Mo. App. 539, 138 S. W. 889.

[51] Cf. Galber v. Grossberg (1930) 324 Mo. 742, 25 S. W. (2d) 96; Wiese v. Remme, supra note 35. See annotations in (1924) 29 A. L. R. 966, and (1921) 15 A. L. R. 975.

[52] Supra note 47. See annotations cited in note 51, supra.

[53] See Eberson v. Continental Investment Co., supra note 47, and Jackson v. Butler (1913) 249 Mo. 342, 155 S. W. 1071.

standing after the building has been destroyed by fire, the court has said that the possessor is liable for damage caused by the walls falling upon the premises of the adjoining proprietor as they were being taken down.[54] In the case of injuries received during the construction of a building, one court has held that the duty was a non-delegable one as owed to a pedestrian who was injured by the falling of a newly constructed wall close to the street.[55] There are *dicta* to the opposite effect.[56]

The law seems to be very definitely settled that one who is under a statutory duty to provide certain safeguards or to take certain precautions for the safety of others cannot delegate that duty to an independent contractor as to those for whose protection the duty is imposed. In *Ward v. Ely-Walker Dry Goods Building Co.*,[57] a city ordinance required the placing of a temporary shed over streets during building operations on buildings of a certain height. This was held to be for the protection of all persons lawfully on the sidewalk, including in this group an employee of a sub-contractor engaged on the same building. In *McGolderick v. Wabash R. Co.*,[58] a statute requiring railroads to keep down the undergrowth along the right of way of the railroad was held to create a non-delegable duty as to injuries resulting from plaintiff's horse taking fright at a grindstone placed within the right of way by an independent contractor having charge of this section. An employee injured as a result of explosives having been set off negligently by a contractor in a mine, before the employee had left the mine, in violation of the statute recovered from the employer in *Gray v. Grand River Coal & Coke Co.*[59] Likewise,

[54] Dillon v. Hunt, supra note 31.

[55] Privitt v. Jewett, supra note 26 (the court also holding such to be an inherent danger unless precautionary measures were taken).

[56] Lancaster v. Conn. Mut. Life Ins. Co., supra note 5; Horner, Adm'r v. Nicholson, supra note 4. Both of these cases are based upon the fact that the contractor was following plans and specifications furnished by the employer. See Neumann v. Greenleaf Real Estate Co. (1898) 73 Mo. App. 326; Long v. Moon (1891) 107 Mo. 334, 17 S. W. 810 (installation of an elevator resulting in injuries off the premises).

[57] (1913) 248 Mo. 348, 154 S. W. 478.

[58] (1918) 200 Mo. App. 436, 200 S. W. 74. The question might be raised whether the protection against such injuries was within the purpose of such a statute.

[59] (1914) 175 Mo. App. 421, 161 S. W. 633.

the employer was held liable for cleaning refuse from a railroad car in violation of a statute confining such operations to a designated time and place.[60]

Where the activity carried on is one which can be carried on lawfully only under a franchise and which involves an unreasonable risk of injury to others, the holder of the franchise is liable for injuries resulting from the negligent conduct of an independent contractor employed to do work in carrying on this activity. This principle is particularly applicable to public service corporations since, under their franchises, they are permitted to use instrumentalities which are dangerous unless carefully operated. Special statutory provisions cover this principle in the cases of leases or licenses of railroads.[61] In *Speed v. Atlantic & Pacific R. Co.*,[62] the defendant had contracted with another who was, under contract, to take entire charge and control of the defendant's freight business at the St. Louis station, consisting of loading and unloading cars, switching them back and forth in the yard, making up freight trains, and doing all other yard service necessary in the transaction of the defendant's freight business. In an action for personal injuries received by plaintiff caused by the alleged negligence of the other, the court found that, although there was no employer-independent contractor relationship, there was another ground for its decision: "Besides, he was transacting a part of the business of the company, a common carrier, not as a lessee of the road or rolling stock, or either, but simply in loading and unloading freight which the company transported as a common carrier. As a common carrier, the law imposes certain obligations and liabilities upon the defendant, of which it is extremely doubtful whether it can relieve itself while it continues to be a common carrier, by any agreement with a third person. The doctrine might well apply that, where the law imposes a liability upon a company, in which it vests a franchise

[60] Pike v. Eddy & Cross, Receivers (1893) 53 Mo. App. 505. Cf. Brannock v. Elmore, supra note 7 (independent contractor blasting without taking the precautions imposed by ordinance). See note in (1923) 23 A. L. R. 989.

[61] R. S. Mo. (1929) secs. 4689, 4690, and cases annotated thereunder. Also, see exhaustive note in (1924) 28 A. L. R. 122, in respect to injuries caused by breaches of positive duties correlative to corporate franchises.

[62] (1879) 71 Mo. 303.

with exclusive privileges, it cannot escape responsibility by delegating to others the power to transact a portion of the business in which it is engaged, if the business to be transacted by the employees be a part of the general business in which the company is engaged." Likewise, where a carrier contracted with an independent contractor to transfer grain from its cars, it was held that the duty of keeping its road, tracks and yards in a reasonably safe condition was a personal duty and could not be delegated, nor could it avoid liability by letting out a part of its duties as a common carrier to an independent contractor.[63] Neither could an express company, being a common carrier under statute, contend that the owner of a truck contracting to haul and deliver goods shipped and received by the express company was an independent contractor.[64] Transferring poles from one car to another because of defects in the first car has been held to be a nondelegable activity.[65]

Where the danger arises from the manner of performing the task and is not a danger inherent in the task itself, the work can be assigned to an independent contractor; and if such independent contractor so negligently performs the task as to inflict injury upon another, the contractor is liable and not the principal. In *O'Hara v. Laclede Gas Light Co.*,[66] the defendant had contracted with a contractor to haul iron gas pipe to streets or lots designated by the defendant and to distribute such pipe along the street as required. The defendant was laying mains in the street. The manner of placing the pipes along the street was left solely to the contractor. Whether they should be blocked to prevent them from rolling was a matter relating to the unloading of the pipes in the street which was under the control of the contractor. The placing of the pipes in the street was not of itself hazardous, or one threatening injury to others.

Another way of expressing the same principle is to designate as a collateral act the improper manner in which the contractor does the detail of the work but which is not necessarily involved

[63] Burnes v. K. C., Ft. S. & M. R. Co. (1895) 129 Mo. 41, 31 S. W. 347.

[64] Whitmore v. American Express Co. (1925) 219 Mo. App. 294, 269 S. W. 654.

[65] Peters v. St. L. & S. F. R. Co. (1910) 150 Mo. App. 721, 131 S. W. 917.

[66] Supra note 1, rev'g (1912) 131 Mo. App. 428, 110 S. W. 642.

in attaining the result itself. In *Gerber v. Kansas City,*[67] a small boy found, in a pile of earth which had been excavated from a trench in which a sewer was to be laid, a piece of fuse to which was attached an unexploded dynamite cap. This did not occur while the work of excavation was going on, but several weeks later, and after work on the sewer construction had been suspended on account of freezing weather. Although the city was held liable on other grounds, the court held that injury resulted from an act of the contractor collateral to the performance of the work itself. It did not result from the act of performance of the contract with the city but from the contractor's failure to discover the unexploded cap and from his negligent leaving it at a place accessible to children. In *City of Independence v. Slack,*[68] the contractor had negligently left materials used in constructing a sidewalk in the street. Excavations for the sidewalk had been made and were properly guarded. The person injured was passing along the street in the nighttime, and in order to avoid the excavations, went out in the street and fell over these stones. The court said: "The contract called for a completed sidewalk, the construction of which was lawful in itself and did not necessarily involve the commission of a public nuisance, or danger to other persons, if carefully done. No directions were given or control retained by defendant in respect to the means to be used or the methods to be adopted in accomplishing the result. It was not necessary to making the sidewalk that the stones should have been deposited in the streets, and doing so by the contractor was negligence in the execution of the work, and did not necessarily result from the character of the work contemplated by the contract." This principle has been applied where the contractor, standing on a ladder which rested on the sidewalk, was taking down a muslin sign, and in extracting a nail misjudged the amount of force necessary for that purpose, causing him to lose his balance and to fall upon the plaintiff, who was then passing along the sidewalk.[69] Likewise, in a case where, through the negligence of the contractor in constructing an elevator, a board

[67] Supra note 28.

[68] Supra note 1.

[69] Press v. Penny & Gentles, supra note 25, with which compare Loth v. Columbia Theatre Co., supra note 1.

was so placed as to be thrown out of the window of the building causing injuries to the plaintiff who was sitting in her yard immediately adjoining the premises of the defendant.[70]

3. Conclusions

Just as considerations of expediency constitute the foundation of the rule which declares that a master is liable for the torts of his servant, so the same considerations are deemed to be inoperative or deemed to be overbalanced by other considerations of expediency in the cases where the person employed is exercising an independent business. But how far this doctrine of nonliability will be encroached upon remains to be seen. These encroachments appear to be centering about certain situations in which there does not seem to be adequate protection to the individual suffering injuries at the hands of a negligent contractor unless the employer is also held responsible. Out of these situations has resulted the formation of several groups of precedents which, today, seem to have evolved into a considerable body of law. An examination of the cases discloses that these encroachments have developed principally in the last forty years, and it seems safe to predict that the immunity of the employer will continue to be more and more abridged.

But there are reasons which make such an extension socially desirable. As specialization has increased, it has become more and more necessary to have others perform work which, in earlier periods, was performed by the employer himself or his servants. Frequently, these contractors are financially irresponsible so that a remedy against them is worthless as affording protection from their negligent conduct. Their main concern is often to make as much profit as possible. Furthermore, if the principle of nonliability is not limited, the principle becomes a splendid means of escape from liability for the person having the work performed. The burden on the employer is no greater than in the relationship of master and servant and he can adequately protect himself

[70] Long v. Moon, supra note 56. For other cases directly or indirectly supporting this principle, see Salmon v. Kansas City, supra note 10; McGrath v. St. Louis, supra note 33; Wiese v. Remme, supra note 35; Carson v. Blodgett Construction Co., supra note 27; Sappington v. City of Centralia, supra note 44; Dillon v. Hunt, supra note 31.

through liability insurance, or, if the contractor is solvent, through his right to indemnity.[71]

[71] As to the personal liability of the contractor with respect to injuries sustained by persons other than the contractee during the progress of stipulated work, see annotation in 38 A. L. R. 403. There are many special situations not discussed in this paper in which the question whether an employer cannot, by delegating the performance of work to a contractor, divest himself of responsibility for injuries resulting from the contractor's negligent performance: the duty owed by a master to his servant to furnish a safe place to work; lateral support; trespasses; nuisances; and other possible groupings of situations. These may usually be found under the more general situations already discussed.