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THE INDEPENDENT CONTRACTOR RULE AND ITS EXCEPTIONS—MAY A CONTRACTEE OWE DIFFERING DUTIES TO CERTAIN CLASSES OF PERSONS INJURED BY AN INDEPENDENT CONTRACTOR?

The general rule as developed at the common law is that a contractee is not liable for the torts of an independent contractor.¹ Although this rule of immunity has been subject to increasing criticism,² the greatest inroad into the contractee's immunity from liability for the acts of the independent contractor has been by judicially constructed real and apparent exceptions.³ Most American jurisdictions have recognized the various exceptions in one form or another, but the courts disagree as to whom these exceptions are to apply.

There are three classes of persons to whom the contractee may owe a duty under these exceptions: (1) the employees of the contractee, (2) the employees of the contractor, and (3) third parties. With the enactment of Workmen's Compensation Acts, the contractee's common law duties to his own employees under these exceptions are no longer relevant.⁴ Therefore, this note will only consider the question of whether the exceptions to the independent contractor rule of nonliability apply to employees of the contractor as well as to third parties injured by the independent contractor.

¹RESTATEMENT (SECOND) OF TORTS § 409 (1965) [hereinafter cited as TORTS]; PROSSER, LAW OF TORTS 480 (3rd ed. 1964); 2 HARPER & JAMES, LAW OF TORTS § 26.11 (1956); 57 C.J.S. *Master and Servant* § 584 (1948); AM. JUR. *Independent Contractor* § 27 (1940); *Neyman v. Pincus*, 82 Mont. 467, 267 P. 805 (1928). The usual justification for the general rule is that, "since the (contractee) has no power of control over the manner in which the work is to be done by the contractor, it is to be regarded as the contractor's own enterprise, and he, rather than the (contractee), is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it." TORTS § 409, comment b at 370.

²For accounts of the development and critical treatments of this general rule see; Douglas *Vicarious Liability and Administration of the Risk*, 38 YALE, L. J. 584, 594 Chapman, *Liability for the Negligence of Independent Contractors*, 50 L. Q. REV. 71 (1934), (English development); Morris, *Torts of an Independent Contractor*, 19 ILL. L. REV. 339 (1934); NEW YORK LAW REVISION COMMISSION, REPORT, RECOMMENDATIONS AND STUDIES, 419-421 (1939); Annot., 19 A.L.R. 226 (1922); Annot., 20 A.L.R. 684 (1922).

³The number of exceptions made by the English courts has reached the point that today the position of the ordinary independent contractor in England approaches that of a servant. The American courts have not gone so far, although the trend is definitely in that direction: "Now, obviously, we are moving ultimately in the direction of some liability for the torts of an independent contractor which will approach, if it doesn't quite reach, liability for the torts of an agent or servant." 38 ALI PROCEEDINGS 124 (1961).

⁴REVISED CODES OF MONTANA 1947 [hereinafter cited as R.C.M.1947] § 92-204 states: "Where both the employer and employee have elected to come under this act, the provisions of this act shall be exclusive, and such election shall be held to be a surrender by such employer and the servants, and employees of such employer and such employee, as among themselves, of their right to any other method, form or kind of compensation, or determination thereof, or to any other compensation, or kind of determination thereof, or cause of action, action at law, suit in equity, or statutory or common-law right or remedy...."

REAL AND APPARENT EXCEPTIONS

Before considering the case law on this question, it is necessary to consider what these exceptions are, particularly the distinction between the apparent and the real exceptions. The *Restatement* has recognized some twenty-three exceptional situations in which the contractee is found to be liable for the torts of the independent contractor.⁵ Because these exceptions have developed, and have tended to be stated, as particular detailed rules for particular situations, it is difficult to make any general statements concerning them. The exceptions can, however, be grouped into two broad categories.⁶

In the first category are the apparent exceptions, those involving the personal negligence of the contractee in selecting, instructing, or supervising the contractor. According to the *Restatement*:

In such a case, the employer's liability must be based upon his own personal negligence in failing to exercise reasonable care in giving the orders or directions in pursuance of which the work is to be done (see section 410); to exercise reasonable care to employ only contractors competent to do the work with reasonable assurance of safety to others (see section 411); to exercise reasonable care in inspecting the work after it is done or, in certain cases, during its progress, in order to see that the work is so done as to secure the safety of others (see section 412); to exercise reasonable care to provide for the taking of such precautions, either by the contractor whom he employs or otherwise, as in advance are recognizable as necessary to enable the work to be safely done (see section 413); to exercise with reasonable care such control over the doing of the work as he retains to himself (see section 414); to exercise reasonable care in supervising the equipment and methods of persons doing work or carrying on activities upon his land (see sections 414 A and 415).⁷

In the second category are the real exceptions, those involving non-delegable duties of the contractee, arising out of some relation toward the public or the particular plaintiff.⁸ In contrast to the apparent exceptions, the real exceptions do not rest upon any personal negligence of the contractee. "They are rules of vicarious liability, making the [contractee] liable for the negligence of the independent contractor, irrespective of whether the [contractee] has himself been at fault."⁹ The

⁵TORTS, Ch. 15. The number of exceptions has increased to the point that the rule can now be said to be "general" only in the sense that it is applied where no good reason is found for departing from it. TORTS § 409, comment b at 370. Indeed it would be proper to say that the rule is now primarily important as a preamble to the catalog of its exceptions. *Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co.*, 201 Minn. 500, 277 N. W. 226 (1937).

⁶Some authorities include a third category for the exception to the rule of immunity involving work which is inherently dangerous (See TORTS § 409, comment b at 370). Since this exception may be rationalized in terms of non-delegable duty (which many courts do), it is included in the second category for purposes of this note.

⁷TORTS § 410-415.

⁸*Id.* § 416-429.

⁹*Id.* Ch. 15, Topic 2, Introductory Note.

real exceptions are considered as non-delegable duties because they arise in situations in which, for reasons of policy, the contractee is not permitted to shift the responsibility for the proper conduct of the work to the contractor.

THE STATE OF THE LAW

The case law pertaining to the question of whether these exceptions apply to the employees of the independent contractor as well as to third parties is in irreconcilable conflict. Some jurisdictions reject any duty at all on the part of the contractee to employees of the independent contractor;¹⁰ other jurisdictions hold that some exceptions extend to employees of the independent contractor, but other exceptions do not;¹¹ still other jurisdictions find that the duties of the contractee owed to employees of the independent contractor are the same as those owed to third parties.¹²

Corpus Juris Secundum states that the general rule on this question is that the contractee, ordinarily, is not liable to the employees of the independent contractor for injuries caused by the independent contractor.¹³ But there are exceptions to this general rule; the contractee is liable where his direct negligence is the cause of the injuries to the employees of the independent contractor.¹⁴ As pointed out above, these exceptions, stated by *Corpus Juris Secundum* in sections 601 to 606, are apparent exceptions; the real exceptions, while applicable to third parties, do not extend to employees of the independent contractor. There is no liability of the contractee to employees of the independent contractor on the basis of respondeat superior. Thus *Corpus Juris Secundum* can state that the contractee does not owe the same duties to employees of an independent contractor as to third parties.

¹⁰Tenn.: *Richardson v. U.S.*, 251 F. Supp. 107 (1966); Utah: *Eutsler v. U.S.*, 376 F.2d 634 (1967); Wash.: *Epperly v. City of Seattle*, 65 Wash.2d 777, 399 P.2d 591 (1965).

¹¹Ariz.: *Welker v. Kennecott Copper Co.*, 1 Ariz. App. 395, 403 P.2d 330 (1965); S. Dakota: *Hagberg v. City of Sioux Falls*, 281 F.Supp. 460 (1968).

¹²Cal.: *Woolen v. Aerofet General Corp.*, 369 P.2d 708 (1962); *Van Arsdale v. Hollinger*, 437 P.2d 508 (1968).

¹³57 C.J.S. *Master and Servant* § 600.

¹⁴"While the contractee is not absolutely exempt in all cases from liability for injuries to a servant of the contractor or subcontractor, there being exceptions, discussed infra sections 601-606, to the general rule of nonliability, nevertheless he is not liable unless he owed some duty to the employee, he failed to perform that duty, and such non-performance was the proximate cause of the injury." *Id.*

With this lack of uniformity in the case law,¹⁵ it is impossible to state what the weight of authority is. Some courts, in attempting to avoid this confusion and conflict in the case law, have sought refuge in the *Restatement*.¹⁶ These courts have found particular comfort in the Special Note to Chapter 15 of Tentative Draft No. 7 of the *Restatement*.¹⁷ This Special Note states that the exceptions to the general rule of non-liability on the part of the contractee for the torts of the independent contractor¹⁸ do not extend to the employees of either the contractor or the contractee.¹⁹ However, in the 39th Annual Meeting of the American Law Institute in 1962 which considered this portion of the *Restatement*, this Special Note was specifically rejected upon the recommendation of the Reporter, Dean William L. Prosser. The American Law Institute determined that it would take a neutral position on the question of the liability of the contractee to the employees of the independent contractor.²⁰ This neutral position is reflected in the *Restatement*, as adopted, which makes no mention of the problem.

The primarily reason for this lack of uniformity, which persuaded the American Law Institute to adopt a neutral position, is the Workmen's Compensation Acts of the particular jurisdictions and the third party provisions under those acts. The pertinent section of Montana's Workmen's Compensation Act is R.C.M. 1947, section 92-204:

Where both the employer and employee have elected to come under this act,²¹ the provisions of this act shall be exclusive, and such election shall be held to be a surrender by such employer and the servants, and employees of such employer and such employee, as among themselves, of their right to any other method, form, or kind of compensation. . . ."

¹⁵While there is this lack of uniformity in respect to the generally recognized exceptions as stated in sections 410-429 of the *Restatement*, there is substantial authority holding that where work is done upon the contractee's premises, of which the employer is in possession and control, the employees of the contractor are invitees or business visitors of the contractee, and consequently he has a duty to use reasonable care to see that the premises are safe for the work. This instance of contractee liability to employees of the independent contractor is stated in section 343 of the *Restatement*.

¹⁶*Richardson v. U.S.*, 251 F. Supp. 107 (1966); *Welker v. Kennecott Copper Co.*, 1 Ariz. App. 395, 403 P.2d 330 (1965); *Eutslar v. U.S.*, 376 F.2d 634 (1967); *Hagberg v. City of Sioux Falls*, 281 F. Supp. 460 (1968).

¹⁷TORTS at 17 (Tent. Draft No. 7).

¹⁸*Id.* §§ 410-429.

¹⁹"Again, when the Sections in this Chapter speak of liability to 'another' or 'other' or to 'third persons' it is to be understood that the employees of the contractor, as well as those of the defendant himself (the contractee), are not included." *Supra*, note 17.

²⁰"I think, therefore, that the paragraph at the bottom of page 17 should be rewritten, an ask you to recommit it to me in order to take a strictly neutral position, point out why the Restatement does not deal with employees at all, and say that, specifically, we do not express any opinion whatever upon the matter one way or the other." 39 ALI PROCEEDINGS 246 (1962).

²¹In 1963 the Montana Legislature eliminated the right of election by employees except in the case of officers of private corporations. See LAWS OF 1963, Chapter 95. So at the present time, as between employer and employee, the employee's remedy is exclusively under Workmen's Compensation.

This section goes on to provide for third party liability where injury is caused to the employee by the act or omission of some persons or corporations other than his employer, or the servants or employees of his employer. This third party liability is to be in addition to and independent of Workmen's Compensation.

As noted *supra*, under the apparent exceptions to the independent contractor rule, the contractee is liable for his own, direct negligence and not on the basis of *respondeat superior*. Clearly, these exceptions are available to the employee of the independent contractor under the third party liability provision of section 92-204. In respect to the independent contractor and his employee, the contractee is a third party whose "act or omission" has injured the employee. There are no Montana cases, however, which deal with the recovery of the employee of an independent contractor under the apparent exceptions to the independent contractor rule.²²

Whether the real exceptions (contractee's liability based upon *respondeat superior*) to the independent contractor rule are available to the employee of the independent contractor under section 92-204 is somewhat ambiguous. The statute states that Workmen's Compensation is exclusive only as among the employer and his employees and the employee seeking recovery. This language would not exclude recovery by the employee of an independent contractor against the contractee, a third party to the employment relationship. If, however, the provision of section 92-204 for third party liability is construed as limiting liability outside the employment relationship to only the situation where the third party has committed the "act or omission" injurious to the employee of the independent contractor, the real exceptions would not be available to that employee. Under the real exceptions, the contractee has committed no "act or omission"; rather, he is vicariously liable for the "act or omission" of the independent contractor.

Montana case law does not appear to follow this narrow construction of section 92-204. In *Wells v. Stanley J. Thill and Associates, Inc.*,²³ employees of an independent contractor were injured in a trench cave-in caused by the failure of the contractor to comply with minimum safety standards and sued the contractee under the real exception to the independent contractor rule involving inherently dangerous work.²⁴ The Montana Supreme Court noted that the employees were covered by Workmen's Compensation but were allowed to bring the action under

²²There is, however, dicta in *O'Leary v. James & Wunderlich*, 192 F.Supp. 462, 473 (1960), which appears to support the liability of the contractee to the employees of the independent contractor under the apparent exceptions.

²³26 St. Rep. 152, 452 P.2d 1015 (1969).

²⁴TORTS sections 416, 427, 427A.

section 92-204. Thus it can be concluded that section 92-204 does not prevent an employee of an independent contractor from seeking recovery from the contractee under the real exceptions to the independent contractor rule.

While the Montana case law allows recovery by third parties from the contractee under the real exceptions to the independent contractor rule,²⁵ the result is different where recovery is sought by employees of the independent contractor. In *Wells v. Stanley J. Thill and Associates, Inc.*, *supra*, the plaintiffs were denied recovery on the ground that the real exception involving inherently dangerous work does not apply to employees of an independent contractor.²⁶ Although the holding of this case is confined to the real exception involving inherently dangerous work, much of the dicta in the opinion indicates that the same rule would apply to the other real exceptions. This dicta quotes at length *Corpus Juris Secundum* concerning the duties of the contractee owed to employees of the independent contractor and to third persons.²⁷ The opinion makes no distinction between real and apparent exceptions, but presumably the Montana Supreme Court would find, as *Corpus Juris Secundum* does, that the apparent exceptions do apply to employees of the independent contractor.²⁸

In *West v. Morrison-Knudsen Co.*,²⁹ the Federal District Court, Montana Division, Great Falls Division, seemingly applied a contra rule in respect to the same real exception that was involved in *Wells*. An employee of a sub-contractor sued the general contractor for injuries sustained when the employee slipped on oil which had leaked onto a trailer bed from which the employee was unloading cylinders for welding. (The relationship of general contractor and employee of sub-contractor is the same as contractee and employee of independent contractor.) The court denied recovery on the ground that the work was not inherently dangerous. Impliedly, however, if the work had been inherently dangerous, the employee would have recovered. Thus the real exception involving inherently dangerous work would apply to the employee of an independent contractor.

²⁵*Neyman v. Pincus*, 82 Mont. 467, 267 P. 805 (1928); *A.M. Holter Hardware Co. v. Western Mfg. Co.*, 51 Mont. 94, 149 P. 489 (1915); *Fagan v. Silver* 57 Mont. 427, 188 P. 900 (1920); *Fegles Const. Co. v. McLaughlin Const. Co.*, 205 F.2d 637 (1953); *Ulmen v. Schwieger*, 92 Mont. 331, 12 P.2d 856 (1932). For a summary of Montana case law see *Hamman v. U.S.*, 267 F.Supp. 411 (1967).

²⁶A second ground for denying recovery was that the contractee had not retained control of the premises and therefore did not have a duty to the plaintiffs as invitees to use reasonable care to see that the premises were safe for the work. See note 15, *supra*; *accord*, *Hackley v. Waldorf-Hoerner Paper Co.*, 149 Mont. 286, 425 P.2d 712 (1967).

²⁷57 C.J.S. *Master and Servant* section 600.

²⁸As noted *supra*, there are no Montana cases which consider whether the apparent exceptions apply to employees of the independent contractor. See note 22, *supra*.

²⁹904 F.Supp. 1336 (1969).

Considering that this conclusion is drawn by implication and that *Wells* is the later of the two cases, it is reasonable to conclude that *Wells* reflects the present state of the law in Montana: the contractee may be liable to the employees of the independent contractor under the apparent exceptions to the independent contractor rule, but not under the real exceptions thereto.

CONCLUSION

As noted *supra*, the trend in the law is that the courts are constructing more and more exceptions to the independent contractor rule. That the Montana Supreme Court is responsive to this trend is illustrated by Mr. Justice Bonner's dissent in *Wells*. Mr. Justice Bonner acknowledged that the majority opinion "is founded on the present Montana case law relating to the 'independent contractor,'" but he noted that "this rule is founded on legal fiction born in days gone by which should not know apply under modern conditions." The "modern conditions" referred to are embodied in various provisions of the Workmen's Compensation Act which reflect the public policy that working men are to be protected from death or injury. This public policy is frustrated where compliance with safety standards, promulgated to further that public policy, is avoided by an independent contractor and contractee. The contractee avoids compliance by employing the independent contractor, contracting to that contractor the responsibility for compliance with the safety standards, then finding immunity from liability for noncompliance under the independent contractor rule. The independent contractor fails to comply because he realizes that his employee's exclusive remedy, as far as he is concerned, is under the Workmen's Compensation Act, and it is more economical for him not to comply.

Mr. Justice Bonner concluded that if the contractee were denied the immunity from liability provided by the independent contractor rule, the public policy of Montana that workmen be protected would be served:

It is now time for this Court to make another exception to the rule relieving the contractee from liability. That exception should be that where the legislature has set forth the public policy of the state to protect workers; has decreed that certain occupations are inherently hazardous; has authorized some board to formulate safety standards to protect workers in those occupations, which standards have been validly formulated, then a contractee may not by hiring an independent contractor relieve himself of seeing that those standards are met. Such a rule would be another very narrow exception to the general rule that a contractee is not liable for the torts of his independent contractor and would at the same time promote the public policy of this state to protect the life and limb of a working man.³⁰

Undoubtedly, the contractee will face increasing liability to employees of the independent contractor, as well as to third parties, as the courts, for reasons of public policy or otherwise, frame additional exceptions to the independent contractor rule. It is not unreasonable to conclude that ultimately the "general rule" will be that the contractee is liable for the negligence of an independent contractor, and that he will be excused only in a limited group of cases where he is not in a position to select a responsible contractor, or the risk of any harm to others from the enterprise is obviously slight.³¹

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