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**Independent Contractor–Liability of the Employer in West Virginia**

J. L. A.
*West Virginia University College of Law*

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exception to the general rule, relieving the defendant from the payment of interest where his conduct is innocent and without fault. J. N. C.

INDEPENDENT CONTRACTOR—LIABILITY OF THE EMPLOYER IN WEST VIRGINIA.—D employed A, an independent contractor under a contract for the erection of a building on property adjoining that of P. Excavation for the foundation of the new building extended below the level of P's adjoining building. Withdrawal of lateral support, together with A's negligent failure to shore up or otherwise support the adjoining building caused the injury complained of by P. Held, that the general rule with reference to the immunity from liability for the negligence of a competent independent contractor has no application. An employer who orders work to be done, from which in the natural course of things, injurious consequence must be expected to arise unless means are adopted by which such consequence may be prevented, is bound to see that necessary precautions are taken, and such person cannot, by employing some other person, relieve himself of liability for failure to do what is necessary to prevent injury to the person or property of others. Law v. Phillips, 68 S.E.2d 542 (W. Va. 1952).

It might be suggested that the holding is new to West Virginia, but an inspection of the West Virginia cases indicates that it is not. Only the language is new. From these cases, however, it has been difficult to determine what exceptions to the rule of non-liability are recognized by the West Virginia court.

It has been well established that where the activity in which an independent contractor engages is of an inherently dangerous nature the employer is not released from liability by delegating the performance of the activity to an independent contractor. Walton v. Cherokee Colliery, 70 W. Va. 48, 73 S.E. 63 (1911). In the Walton case, the court held: "If the work is intrinsically dangerous, and is of such character as will likely produce injury to third persons, if proper care should not be taken, the owner cannot avoid liability by delegating its preformance to an independent contractor." In this case, an independent contractor was hired to build a railway across the property of a third person, and damage resulted to the property from blasting rock for the construction of the railway. The court was dealing with a situation where the
activity was inherently dangerous, and no West Virginia authority is cited for the proposition that the employer is liable where the injury is the reasonably foreseeable consequence of the activity in which the independent contractor engages, if that activity is not inherently dangerous in nature.

Nevertheless, the Walton case is cited in Trump v. Bluefield Water Works, 99 W. Va. 425, 129 S.E. 309, 311 (1925), as authority for holding that the employer is liable, "where a resulting injury, instead of being collateral and flowing from the negligent act of the employee alone, is one that might have been anticipated as a direct or probable consequence of the work contracted for, if reasonable care is omitted in the course of its performance." This case involved the hiring of an independent contractor to construct a dam, the injury complained of resulting from water released by the collapse of the partly completed dam. The court might have predicted liability in the Trump case on the inherently dangerous nature of the activity because of the strict liability on the part of one who stores up water on his land. See Wigal v. Parkersburg, 74 W. Va. 25, 81 S.E. 544 (1914); Weaver Mercantile Co. v. Thurmond, 68 W. Va. 530, 70 S.E. 126 (1911).

In the principal case, the court quotes from the case of Walker v. Strosnider, 67 W. Va. 39, 67 S.E. 1087 (1910), to the effect that the doctrine of respondeat superior applies where the owner of property removes lateral support of the building of an adjoining owner because, "Where the injury results directly from the acts called for or rendered necessary by the contract and not from acts which are merely collateral to the contract, the employer is liable as though he himself performed such acts." At page 62 of the Walker case, however, the court states, "The duties a land owner owes to a neighbor in respect to his buildings, when making improvements on his adjoining property, . . . although not arising out of any right of property in the adjacent soil are non-assignable. Accordingly it has been held in Maryland that cases of this kind are exceptional, and that the employer is liable if the resulting injury was such as might have been anticipated as the consequence of the work directed to be done, whether he prescribed the mode of doing the work or not. Bonaparte v. Wiseman, 89 Md. 12. But, if cases of this class are not to be excepted from the general rule, on the ground suggested, the employer is nevertheless liable, when the contract prescribes, not only the thing to be done, but also the
manner in which the work is to be executed. . . But if cases of this class are not to be excepted from the general rule, on the ground suggested, the employer is nevertheless liable, when the contract prescribes, not only the thing to be done, but also the manner in which the work is to be executed. . . . As the case at hand falls within this principle, it is unnecessary to carry the inquiry further." Thus it is by dictum only that the court in the Walker case says the employer is liable where the manner in which the work is to be done is not prescribed by the employer and the holding of the case is that the employer is liable, not because of any exception or qualification of the rule excepting the employer of an independent contractor from liability, but because the control exercised by the employer over the manner in which the work was to be done makes the relationship that of employer and employee rather than employer and independent contractor.

Nevertheless, in Sun Sand Co. v. County Court of Fayette County, 96 W. Va. 213, 122 S.E. 586 (1924), in which the court deemed it neither necessary nor important to determine whether the relationship of employer and independent contractor or that of employer and employee existed, because control over the acts of the contractor would make the employer liable in either event, the court cites the Walker case as authority for the proposition that the employer is liable where the resultant damages are such as might have been reasonably contemplated as a consequence of the work directed to be done. At page 217 in the Sun case, the court, in speaking of the Walker case, stated, "The owner was responsible, although he let the work to a contractor, over whom he exercised no direction or control." It would seem, then, that the Sun case misconstrues the Walker case as adopting the Maryland rule as stated in the Bonaparte case, which it does not do except by dicta. The Sun case does, however, lay down the rule that where the injury is the reasonable foreseeable consequence of the work directed to be done, the rule of nonliability of the employer of an independent contractor is inapplicable. The court stated, "The county court cannot absolve itself from liability for damages which necessarily or reasonably flow from the construction of a road through the lands or property of another simply by letting the construction to contractors." The court cites, inter alia, the Bonaparte and the Walker cases as authority for this rule.

The principal case adds nothing to the law in West Virginia as established by the cases above. Together, they indicate that it is
uncertain whether the court will determine liability of the employer because the injury is a direct result of the work contracted to be done, or because the work contracted to be done is intrinsically dangerous. Either appears to be sufficient. It is difficult to determine which of these grounds the court relied upon for its holding in the principal case, for both are given treatment. It seems probable that the court relied upon both. Where a decision rests upon more than one ground, none of those grounds can be relegated to a category of obiter dictum. Mutual Health & Accident Corp. v. Cohen, 194 F.2d 232 (1952).

J. L. A.

INFANTS—CHILD LABOR LAW—CONTRIBUTORY NEGLIGENCE.—P brought an action against D for damages suffered by P in the course of his employment with D. At the time of employment P was about 13 years 7 months old, and his action was grounded on illegal employment in violation of W. Va. Code c. 21, art. 6, §§ 1, 3 (Michie, 1949). D sought to prove that P was guilty of contributory negligence. Verdict and judgment was for P in the lower court. Held, that the contributory negligence of a child employed in violation of the child labor law is not available as a defense to the employer in an action based upon such violation. Judgment affirmed. Pitzer v. M. D. Tomkies & Sons, 67 S.E.2d 437 (W. Va. 1951).

This decision expressly overruled the prior holdings of the West Virginia court to the effect that the employer was entitled to this defense if he could show that the child contributing to his injury had extraordinary wisdom and full appreciation of the danger. Norman v. Virginia-Pocahontas Coal Co., 68 W. Va. 405, 69 S.E. 857 (1910). That rule was also applied in Honaker v. New River Pocahontas Consolidated Coal Co., 71 W. Va. 177, 76 S.E. 177 (1910), and Griffith v. American Coal Co., 75 W. Va. 686, 84 S.E. 621 (1915).

The court reasoned in the instant case that the application of the principle of contributory negligence virtually emasculates the provisions of the statute and that such application is directly contrary to the intent of the statute as defined by the legislature.

The holding in the instant case places West Virginia in line with the weight of authority. Terry Dairy Co. v. Nalley, 146 Ark.