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Londo H. Brown
West Virginia University College of Law

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LIABILITY FOR THE TORTS OF INDEPENDENT CONTRACTORS IN WEST VIRGINIA

LONDO H. BROWN*

There are many instances where a court has started out with a general rule which answered its purpose in relation to the particular set of facts and circumstances to which that rule was applied but was found to be too broad when a slightly different set of facts was subsequently presented to the court. The court was then confronted with the problem of applying the rule and reaching an unjust result or creating an exception to the rule, and the latter procedure has generally been followed. This course has been so generally followed in fact that a rule without exception is the exception rather than the rule.

In several instances there have been so many exceptions to a rule established that, as a practical matter, the original rule is in reality the exception and the exceptions now make up the rule. A good example of this is found in the case of the well-known hearsay rule which laid down the broad principle of law that hearsay evidence is not admissible. That rule was established many years ago and perhaps was suitable in the particular case in which it was applied. But today we find that such evidence is admissible if it is a dying declaration, an admission against interest, a spontaneous exclamation and in many more instances. In fact hearsay evidence is admissible in so many instances today that the rule would perhaps be easier to state and certainly easier to apply if it were stated conversely; that is, that hearsay evidence is admissible except in certain situations. The exceptions have so nearly eaten up the rule that what is left of it is merely an exception to what should be the rule.

Another example of the same idea is the rule that a tenant is estopped to deny his landlord's title. This broad rule was found to be unsatisfactory in cases where the landlord had conveyed the title, subsequent to the lease, to the tenant, or to a third person, or in cases where the landlord was attempting to do more than

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* Assistant Professor of Law, West Virginia University.
1 5 Wigmore, Evidence § 1430 (3d ed. 1940).
2 5 id. § 1455.
3 5 id. § 1426.
4 Wade v. South Penn Oil Co., 45 W. Va. 380, 32 S.E. 169 (1898); 1 Tiffany, Real Property § 134 (3d ed. 1933).
5 1 id. § 134.
regain possession or collect rent, and so many exceptions to the rule were created to prevent manifest injustice in these cases. The rule might now be better stated in the converse, that is, that the tenant is not estopped to deny his landlord's title except in cases where the landlord has not changed his position in reference to the leased premises since the lease was executed and the landlord is not trying to do more than regain possession or collect rent.

Other similar examples could be cited but the above will suffice since they are meant merely to serve as an introduction to the primary subject of this article. But such introduction would be incomplete without examples of rules which have been completely swallowed by exceptions. It will be seen that in the above examples the rules, though riddled by exceptions, are still in existence in their mutilated state. Presumably in cases where the exceptions have kept eating up the rules until nothing was left of them, the rules are gone and nothing but the exceptions, or the converse of the original rules, are left.

This is apparently just what has happened in some cases. One example of this is the case of the asserted general rule that a manufacturer or supplier of goods is never liable for negligence to a remote vendee or other person with whom he has no contractual relations. Almost as soon as that rule was laid down the requirements of justice in particular cases impelled the courts to make exceptions to it and find some ways to get around the lack of privity between the parties. After several exceptions to the rule were made by the courts the leading case of MacPherson v. Buick Motor Co. practically abrogated the rule. In the words of Judge Lummus, "The MacPherson case caused the exception to swallow the asserted general rule of nonliability, leaving nothing upon which that rule could operate. Wherever that case is accepted, that rule in truth is abolished, and ceases to be a part of the law." So it appears that in a majority of jurisdictions the rule now is that a manufacturer or supplier of goods can be liable for negligence to a remote vendee or other person even though there is no privity of contract between them.

In speaking of another asserted general rule which had become riddled with exceptions, Judge Cardozo stated:

6 Merchants & Farmers State Bank of Grove City v. Olson, 189 Minn. 528, 220 N.W. 360 (1923).
8 217 N.Y. 382, 111 N.E. 1050 (1916).
10 Id. at 104, 64 N.E.2d at 700.
% "If there ever was a rule that mutuality of remedy existing, not merely at the time of the decree, but at the time of the formation of the contract, is a condition of equitable relief, it has been so qualified with exceptions that, viewed as a precept of general validity, it has ceased to be a rule today."\textsuperscript{11} 

Apparently this is what has happened, or almost happened, to the independent contractor rule in West Virginia. In a sense this rule is an exception to the basic rule of agency. That rule is that the principal, or master, is liable to third persons for damages resulting from the conduct, or usually misconduct, of his agent, or servant, who is acting within the scope of his employment or authority.\textsuperscript{12} This of course includes the torts of the agent or servant.\textsuperscript{13} Although this has been an established rule of law for over 250 years\textsuperscript{14} and is accepted as a matter of course, it is a rule which should be made the subject of exceptions since it has the prima facie unjust result of making one man pay for another man's wrong. Mr. Justice Holmes stated that common sense is opposed to this unless the one held legally liable actually brought the wrong to pass according to the ordinary canons of legal responsibility.\textsuperscript{15} In an early West Virginia case the court stated:

"Ordinarily, no person other than the one immediately or actually guilty of the wrongful act is liable therefor, except upon the ground that the relation of principal and agent, or master and servant, existed between the person or corporation sought to be made liable and the person who did the act or was guilty of the negligence that caused the injury."\textsuperscript{16}

However, this rule, instead of being diminished by exceptions, has grown to include more situations. One of the basic reasons for the rule in the beginning, as well as for its growth, is apparently that the damages are taken from a deep pocket and from one who is in a position to spread the losses such liability causes.\textsuperscript{17}

One of the broadest departures from this doctrine of \textit{respondeat superior} is the principle of law that one who employs an independent contractor\textsuperscript{18} to perform services for him is not liable for the

\textsuperscript{11} Epstein v. Gluckin, 233 N.Y. 490, 493, 135 N.E. 861, 862 (1922).
\textsuperscript{12} MECHEM, OUTLINES OF AGENCY § 349 (4th ed. 1952).
\textsuperscript{13} Gregory v. Ohio River R.R., 37 W. Va. 606, 16 S.E. 819 (1893).
\textsuperscript{14} See Jones v. Hart, K.B. 642 (1698).
\textsuperscript{15} Holmes, Agency, 5 HARV. L. REV. 1, 14 (1891).
\textsuperscript{16} Wilson v. City of Wheeling, 19 W. Va. 323, 335 (1880).
\textsuperscript{17} See Morris, Torts of an Independent Contractor, 29 ILL. L. REV. 339 (1934).
\textsuperscript{18} An independent contractor is a person exercising an independent employment with whom one contracts to do work according to the contractor's own methods without his being subject to control in any important particular except as to the result of his work. See Waldron v. Garland Pocahontas Coal Co., 89 W. Va. 426, 109 S.E. 729 (1921).
torts of the contractor in the performance of such services.\textsuperscript{19} It should be pointed out that this principle of law is generally considered a general rule itself rather than an exception to the above general rule of agency inasmuch as the courts usually say that the independent contractor is not an agent or servant due to the lack of control by the employer. But it seems that it could be considered as an exception to the agency rule because if it were swallowed by exceptions the agency rule would spring up and take its place since the doctrine of \textit{respondeat superior}, meaning literally, "let the principal answer",\textsuperscript{20} appears to be the most logical theory upon which the liability of the employer for the acts of the independent contractor can be predicated. The rule in such case would be that the employer, or principal, would be liable for the acts of the one acting for him even if that one should be an independent contractor, and the reason behind the rule would be the same as one of the reasons behind the aforementioned agency rule, that is, that he who acts through another is himself the actor.\textsuperscript{21}

The rule exempting the employer from liability for the torts of an independent contractor was established because, while the independent contractor admittedly performs services for the one who employs him, he is only subject to the control of his employer in so far as the result desired is concerned and is not subject to his control in so far as the manner of achieving that result is concerned.\textsuperscript{22} Apparently it was considered that it was going sufficiently far to make one person pay for another person's wrong when that other person was performing a service for him and was fully subject to his control. Our supreme court has stated that neither reason nor justice requires that an employer should be held responsible for the manner of doing an act when he had no right or power to direct or control that manner.\textsuperscript{23}

But in spite of the reason behind the rule the ever expanding theory of \textit{respondeat superior} began catching up with this rule soon after it was first applied in most jurisdictions. As a result the rule was very soon limited in its scope by exceptions.

In one of the earlier cases applying the rule in West Virginia,

\textsuperscript{19} Carrico v. West Virginia C. & P. Ry., 39 W. Va. 86, 19 S.E. 571 (1894); Walton v. Cherokee Colliery Co., 70 W. Va. 48, 73 S.E. 63 (1911).


it was recognized that the employer of an independent contractor might be liable for the negligent conduct of such contractor if the employer was negligent in the selection of the contractor.\textsuperscript{24} To further limit the scope of the rule it was also held that an employer seeking to bring himself within the rule excusing him from liability on the ground that the work was being done by an independent contractor had the burden of proving the relationship of employer and independent contractor.\textsuperscript{25}

As a matter of fact the rule was adopted with an exception in West Virginia. In the earliest case applying the rule in this state, the court said that the rule did not apply where the contract directly requires the performance of work intrinsically dangerous however skilfully performed. The court stated:

"In such case the party authorizing the work is justly regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract."\textsuperscript{26}

But the court then made the exception far broader than the above statement would indicate by holding that where work on streets was let to an independent contractor which necessarily involved the making of an obstruction or defect in the street of such nature as to render it unsafe or dangerous for the purposes of public travel, unless properly guarded or protected, the employer would be liable to a person injured thereby. In that case the unsafe or dangerous obstruction for which the employer was held liable, even though the work was let to an independent contractor, was an excavation in the street to put in a sewer.

Such a broad application of this exception, even at that early date, might be said to have about eaten up the rule since almost any work may well create an unsafe condition if proper precautions are not taken. Nevertheless the court has continued to assert the rule as being the law in West Virginia, but in many cases has found a fitting exception to the rule so as to hold the employer liable. This is consistent with the aforementioned trend in the field of agency to enlarge the scope of the employer's liability. Thus, in a later case, the employer was held liable where the work let to a contractor was the grading of a railroad right-of-way on the

\textsuperscript{24} See Carrico v. West Virginia C. & P. Ry., 39 W. Va. 86, 19 S.E. 571 (1894), where the court limited the employer's nonliability to cases where he contracted with a fit and proper person exercising an independent calling. See also Anderson v. Tug River C. & C. Co., 59 W. Va. 301, 53 S.E. 713 (1906).

\textsuperscript{25} Kirkhart v. United Fuel Gas Co., 86 W. Va. 79, 102 S.E. 806 (1920).

\textsuperscript{26} Wilson v. City of Wheeling, 19 W. Va. 323, 336 (1880).
ground that the rule did not apply because the work was intrinsically dangerous.27

Another exception to the rule, and one which is similar to the preceding exception, is that in order for the rule to apply, the work contracted to be done must not be of such a nature that it is likely to become a nuisance,28 and still another exception is that the work to be done must not be unlawful.29

A further exception to the rule, and one more comprehensive than the last two mentioned, is that the doctrine of nonliability of an employer because the act complained of was the act of an independent contractor does not apply where the thing which the contractor does, and does negligently, is something which the law, in defense of public interest, requires the employer to do carefully and properly.30 This applies in situations where the employer owes a duty to the public which cannot be delegated—a non-delegable duty. In addition to the cases falling under this exception are those where there is an absolute common law duty such as the duty to give one's neighbor lateral support.31

These exceptions took a big bite out of the rule but, taken by themselves, they still leave the rule subject to exceptions in spite of the broad interpretation given intrinsically dangerous activities by the court. There are still left many situations where an employer has used due care in selecting an independent contractor to do work which is not intrinsically dangerous, which is not unlawful nor does not constitute a nuisance and where the law does not impose a special duty. A common example is the hiring of a competent contractor to haul one's products.

27 Walton v. Cherokee Colliery Co., 70 W. Va. 48, 73 S.E. 63 (1911).
29 Ibid.
30 See Carrico v. West Virginia C. & P. Ry., 39 W. Va. 86, 19 S.E. 571 (1894), where the court held that the duty of a railroad to keep its tracks clear so that its cars can pass safely is non-assignable and the fact that an independent contractor was employed to do work on such tracks and negligently obstructed the track is no defense if a passenger is injured thereby; and Vickers v. Kanawha & W. Va. R.R., 64 W. Va. 474, 63 S.E. 367 (1908), where the court reached the same result where an employee was injured because of contractor's negligent performance of employer's non-assignable duty to provide employee with a safe place to work.
31 See Walker v. Strosnider, 67 W. Va. 39, 67 S.E. 1087 (1910), where the court intimated that this duty would be non-assignable after stating, "A person or corporation on whom positive duties are imposed by law cannot avoid liabilities for injuries resulting from failure to perform such duties, by employing a contractor for the purpose; ..." (But the court relied upon the fact that the contractor was under the control of the employer as to manner of accomplishing the result, as well as to the result, for its holding in the case.)
But the exceptions cut much deeper and the cited example might conceivably fit into another exception which appears broader than any yet mentioned.

Perhaps the majority of modern cases holding the employer responsible for the acts of an independent contractor are based on the exception that where the damage results directly from the acts of the contractor which the employer expressly authorizes or which are necessary to perform the contract, the employer is liable. This exception was adopted in West Virginia at a very early date in the case of Walton v. Cherokee Colliery Co., where the court stated the rule in the syllabus in this language:

"Generally, if one let work, lawful within itself, to a contractor and retain no control over the manner of its performance, he is not liable on account of negligence of the contractor or his servants. But if the work is intrinsically dangerous, or is of such character that injury to third persons, or their property, might reasonably be expected to result directly from its performance, if reasonable care should be omitted, the employer is not relieved from liability by delegating the performance of the work to an independent contractor."32

And in the body of the opinion the court quoted with approval the following excerpt from the syllabus of an Ohio case:33

"One who causes work to be done is not liable, ordinarily, for injuries that result from carelessness in its performance by the employes of an independent contractor to whom he has let the work, without reserving to himself any control over the execution of it. But this principle has no application where a resulting injury, instead of being collateral and flowing from the negligent act of the employe alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance."

Under a strict application of this exception the employer in the example cited above could be held liable for the negligence of the independent contractor or his employees resulting from the hauling of the employer's products since injury to third persons or their property might reasonably be expected to result directly from the performance of the work if reasonable care should be omitted. Indeed there are few human activities where injury to others might not be anticipated if reasonable care is omitted in the course of the performance of the activity. In fact, it might be said that there would be few situations where the defense of independent contractor would be of benefit to an employer if

32 70 W. Va. 48, 73 S.E. 63 (1911).
33 Railroad Co. v. Morey, 47 Ohio St. 207, 24 N.E. 269 (1890).
damage to a third person resulted from the performance of the work contemplated by the contract if this exception were strictly applied. But before such a conclusion can be reached, it is necessary to ascertain if possible just what the court means when it speaks of "resulting directly".

In the Walton case the court said that if the work contracted necessitated blasting which would in reasonable contemplation subject adjacent buildings to risk of danger the employer could not escape liability by employing a contractor to do the work. This apparently because damage resulting to those buildings by such blasting would be a direct result of the work contracted to be done. That type of work would also fit into the inherently dangerous activity exception, but other cases show that the "direct result" exception is not limited to activities covered by the other exceptions. In the case of Walker v. Strosnider, where the work let to the contractor was excavating to build a new building which took away the lateral support of an adjacent landowner, the court stated:

"If 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 if he himself performed such acts."35

However, the court in that case did not rely upon any exception to the independent contractor rule for its holding since it found that the contractor was following the orders and specifications of the employer and therefore the employer had control of the manner of accomplishing the result as well as the result and there was no employer-independent contractor relationship.36 But the court has twice since cited the case as authority for this exception to the independent contractor rule.

In Sun Sand Co. v. County Court,37 the court, citing the Walker case as authority, held that if the damages be such as would naturally flow from the work let to be done, and may have been reasonably expected as a consequence if the work be done in accordance with the plans and specifications, the employer cannot escape liability therefor because he has let the work to an independent contractor; and in Law v. Phillips,38 a recent case in which the facts were almost identical to those in the Walker case, the court, again citing that case as authority, used the exception

34 70 W. Va. at 51, 73 S.E. at 64.
35 67 W. Va. at 62, 67 S.E. at 1098.
36 Id. at 63, 67 S.E. at 1098.
37 96 W. Va. 213, 122 S.E. 536 (1924).
38 68 S.E.2d 452 (W. Va. 1952).
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as one of the grounds for its decision. In that case the court used the following language:

"The employer of an independent contractor is liable if the resulting injury to a structure on the land of an adjoining owner is such as might have been anticipated as the probable consequence of the negligent performance by the independent contractor of the work directed to be done."\(^{39}\)

Thus it would seem that an injury "results directly" from the work contracted to be performed if it results from an act called for by the contract or rendered necessary thereby. But the court in all of the three last cited cases stated that the injury resulting from the act of a contractor must be the direct result of the work provided for in the contract as opposed to a collateral result before the employer is liable. So it seems that to understand clearly what the court means by direct result, it is necessary to understand what it means by collateral result.

Exactly what the court does mean when it speaks of a collateral result is not entirely clear since no case has been decided upon that point,\(^{40}\) but the court has used language at various times from which some idea may be garnered as to the meaning they intend to give the phrase.

In the Wilson case the court stated:

"Where the obstruction or defect caused or erected in the street is purely collateral to the work contracted to be done and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect, which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person, who employs the contractor and authorizes him to do these acts, is equally liable to the injured party."\(^{41}\)

In the Anderson case the court used this same language with the further observation that "if one employs a contractor to do an act which may be done in a lawful manner, and the contractor in doing it unneccessarily commits a nuisance, whereby injury results to a third person, the employer will not be liable."\(^{42}\)

In the Sun Sand Co. case, the court stated:

"... Or should the contractor, should he be an independent contractor, deviate from the plans and specifications and do some collateral act incidental to but not reasonably necessary in the performance of the work, perhaps the county court...

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\(^{39}\) Id. at 460.

\(^{40}\) This lack of clearness is not limited to our own court. See PROSSER, LAW OF TORTS 488-490 (1941).

\(^{41}\) 19 W. Va. at 397.

\(^{42}\) 59 W. Va. at 311, 53 S.E. at 717.
would not be liable. 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 by simply letting the construction to contractors.”

And in the Law case the court stated:

“Though an employer is not liable for the injury caused by the negligence of an independent contractor or his servants which is collateral to and not reasonably to be expected from the work contracted for, such employer is liable for the negligence of the independent contractor where, from the nature of the work, danger of such injury is readily foreseeable.”

In one sense it might be said that the court, in determining whether the result is direct or collateral to the work to be done, has borrowed a test from the negligence field of tort law. The test there generally used is that the actor is liable for results reasonably foreseeable or to be anticipated.

But it is suggested that it might not be necessary to go outside the field of agency to find an applicable rule which would give the same result. Since it appears that now the employer is liable for the acts of an independent contractor if the employer authorized those acts, expressly or impliedly, it seems that the general rule that the employer is liable for the acts of his servant or agent which are within the scope of his employment is applicable here as well as in the usual master and servant, or principal and agent, relationship. Under this rule where the agent acts beyond the scope of his employment or, as some courts put it is on a frolic of his own, the principal or employer is not liable. Analogous to the frolic situation is the unforeseeable collateral act of the independent contractor for which the employer is not liable since it is not an act within the scope of the enterprise. Since the employer’s liability depends upon the normal and foreseeable manner of performance of the work to be done, there will be no liability on the part of the employer if the contractor voluntarily adopts some unusual or unexpected method of performing the work such as unanticipated or unnecessary blasting. In such case the situation would be analogous to the agency cases where the agent performed the work in an unauthorized and unexpected manner; for example, using a car to do work authorized and expected to be done on foot. In such cases it is generally recognized that the employer is not

43 96 W. Va. at 217, 122 S.E. at 538.
44 68 S.E.2d at 460.
liable for injuries occasioned by the unauthorized and unexpected manner of performance.\textsuperscript{46} The theory behind this rule, like the theory behind the rule that the employer is not liable for the collateral results in case of a contractor, is that it is unfair to hold the employer for results which he could not reasonably foresee and guard against. Nor would there be liability on the part of an employer of an independent contractor if an injury was caused to a third person by the act of the contractor in doing something unrelated to the performance of the work. Here again there would be no liability if the relationship of principal and agent existed since it would be an act outside the scope of the agent's employment or authority.

Therefore it seems possible to have one general rule where one person is performing services for another rather than two rules, one of which, with its exceptions, arrives at the same results as the other. That rule could be that the employer is liable for the acts of his agent, even though that agent be an independent contractor, if the agent is acting within the scope of his employment.

To determine what acts are within the scope of an agent's employment so as to determine the extent of the employer's liability, it is necessary to look to what the agent is employed, or authorized, to do. If the act of the agent which caused the injury to the third person was one which he was authorized to do, it was within the scope of his employment and the employer is liable. It seems that the same test is now used to determine whether the employer of an independent contractor is liable for the acts of the contractor. This is borne out by the language of the court when it indicates that the employer is liable if the contractor was directed or authorized to do the act which resulted in the injury to the third person, or if that act was called for or rendered necessary by the contract.\textsuperscript{47} In such case, in the language of the court in the Walker case,\textsuperscript{48} "... the employer is liable as if he himself performed such acts." This is borrowing a phrase from the agency field where it is often

\textsuperscript{46} See Lambert v. Salsky Trucking Co., 118 N.J.L. 485, 193 Atl. 702 (1937) (where agent used own car to deliver goods supposed to be delivered in company truck (probably insured)); Miller v. Western Union Tel. Co., 63 Ohio App. 125, 25 N.E.2d 466 (1939) (where messenger boy hired as bicycle messenger, used automobile); and St. Louis, I.M. & S. Ry. v. Robinson, 117 Ark. 37, 173 S.W. 822 (1915) (where boy sent to call employees unnecessarily and unauthorizedly used a bicycle).


\textsuperscript{48} 67 W. Va. at 62, 67 S.E. at 1098.
stated that one who acts through another acts himself.

The main justification for the independent contractor rule in the first place was that where one employs such a contractor, he does not have sufficient control to justify his being held liable for the acts of the contractor. It was said that since the employer has control only as to the results to be attained and not as to the manner or means of accomplishing these results, it would work an injustice to hold the employer liable for the acts of the contractor in accomplishing such results. But as a practical matter in cases where the one performing services is not an independent contractor, there are many cases where the employer’s right of control is of little avail since he is not often with the employee to exercise that right, and the fact that the employee fails or refuses to obey instructions as to manner of performance does not absolve the employer of liability. The contention that it is unjust to hold the employer liable when he has no control as to the manner of performance is further met with the argument that when he expressly authorizes the reaching of a result, he impliedly authorizes a reasonable manner of accomplishing that result and it is only for acts within such reasonable manner of performance that he is held liable. This, too, is like the agency rule that the employer is liable for the acts of the agent which are within the scope of his implied authority. So in a case where the court found that the employer impliedly authorized the act of the contractor, the lack of his control over the contractor as to manner of reaching the result desired did not bother the court. When the reason for a rule disappears, the rule generally disappears and it seems that this reason for this rule has lost its force.

Whether or not it is unjust to hold the employer liable if the party whose act caused the injury is an independent contractor, the court is continually doing so. Further, the same thing has often been said in regard to holding the principal liable for the acts of his agent. Admitting that it is prima facie unjust to make one man pay for another man’s wrong, much of the same reasoning used to support the well-established agency rule can be used to support a rule holding an employer liable for the acts of an independent contractor who is performing services for him.

49 See note 23 supra.
50 Merrill v. Marietta Torpedo Co., 79 W. Va. 669, 92 S.E. 112 (1917).
52 See quotation from Wilson v. City of Wheeling, 19 W. Va. at 336.
These reasons were set out in considerable detail in Cochran v. Michaels where the court, speaking of the agency rule, stated:

"Many different foundations for the rule have been suggested. A very common one among judges and writers is the maxim, *qui facit per alium facit per se.* ('He who acts through another acts by himself.') 1 Blackstone, Com. 429, 430; 18 R. C. L., subject, Master and Servant, sec. 247; Wood, Master and Servant, sec. 277. This maxim, however, as pointed out by Pollock, 'states the effect of the rule, not any reason for it.' One reason offered by this author is that whoever 'exposes others to risk (*per alium*) should abide the consequences if the risk ripens into actual harm.' Essays in Jurisprudence, p. 122. And then again, 'I am answerable for the wrongs of my servant or agent, not because he is authorized by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others.' Pollock, Torts, p. 81. The earlier decisions attributed the rule to such principles as: 'Whenever one of two innocent persons must suffer by the acts of a third, he who has enabled said third persons to occasion the loss must sustain it,' (*Lickbarrow v. Mason*, 1787, 2 T. R. 70); and 'he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it,' (*Hall v. Smith*, 1824, 2 Bing. 145). The first principle above was adopted by Bishop in sec. 608, Non-Contract Law. The second principle seemed sufficient to the present savant of our own Court, JUDGE LIVELY, in *Wills v. Gas Co.*, 104 W. Va. 12, 17. 'The rule is founded on the principles of justice between man and man,' declared Caldwell, J., in *R. R. Co. v. Stevens*, 20 Ohio 415, 432, (Lawrence). Many other judges have taken this view. The law writers generally, however, have based the rule entirely on consideration of public policy. 'The rule making the master liable does not depend upon foundations of natural justice, but is defended upon consideration of expediency.'"

But in spite of all this, to say that the independent contractor rule has been repudiated in West Virginia at this time would be to refuse to face facts. There are too many cases, one a very recent case, where the employer was absolved of liability

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54 110 W. Va. at 130-131, 157 S.E. at 174.
on the ground that the negligent party was an independent contractor, to be ignored.55

But most of these cases can possibly be distinguished on the ground that they turned upon the issue of whether the one performing the services was an independent contractor and the court did not consider the possibility of their fitting into any of the exceptions to the independent contractor rule. Thus in the Anderson case56 the work let to the contractor was cutting mine props for the employer's mine and the court held that the employer was not liable because the one performing the service was an independent contractor. But the plaintiff's injury was sustained when the contractor negligently (it was alleged) allowed one of the props or logs to roll down a hill upon the plaintiff. There the injury might well have been said to have resulted as a direct consequence of the work directed to be done by the contract and since the work was being done in the manner usual to such work that the employer had impliedly authorized this manner of performing the work and therefore he was liable. This would seem consistent with the above quoted language of the court in the Law case,57 its latest expression on the subject, inasmuch as the resulting injury was such as might have been anticipated as the probable consequence of the negligent performance by the independent contractor of the work directed to be done.

The court in the Greaser case58 had a substantially different situation before it in that the one held to be the independent contractor was bringing action against the employer. Hence it is not on all fours with other cases in this field where it is usually a third party bringing action against the employer for injuries resulting from the negligence of the independent contractor.

In the Rogers case59 the employer had called a car laundry, asked that his car be called for, serviced and returned to his home. The plaintiff was injured while the car was being delivered to the employer's home, something that might have been antici-

57 114 W. Va. 107, 170 S.E. 905 (1933).
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pated as a probable consequence of the negligent performance of the work directed to be done. But the court, without mentioning any exceptions to the rule, held that the employer was not liable since the one performing the services was an independent contractor. The same type situation was involved and the same result reached in the Oakley case.60

In Gunnoe v. West Virginia Poultry Co-op. Ass'n, Rice v. v. Builders Materials Company and Moore v. Burriss,61 the employers were held not to be liable because the ones performing services were independent contractors. The contractors were owners of vehicles driven by themselves or their employees. The plaintiff in each case sustained injuries due to alleged negligence in the operation of the vehicles in the performance of the work contracted to be done. While the court did not raise the question, it could again be said that these injuries were such as might have been anticipated as the probable consequence of the negligent performance of the work directed or authorized to be done.

It might be that in any or all of these cases, with the exception of the Greaser case, the court might have held the employer liable even though the one performing services was an independent contractor, as it has in many cases, if counsel for the plaintiff had attempted to establish liability on the part of the employer in spite of such relationship by means of one of the exceptions to the independent contractor rule.

However, this was attempted by counsel for plaintiff in a case in which the opinion was handed down after this article was written, and immediately before it went to press, and the attempt was unsuccessful.62 In that case the plaintiff was injured through the alleged negligence of a gasoline distributor and the court followed the Greaser case in holding that a gasoline distributor was an independent contractor. In answer to plaintiff's contention that the employer was not relieved from liability for the reason that the work engaged to be performed was intrinsically dangerous the court quoted the syllabus from the Walton case63 and stated that the rule had no application to the instant case. In support of that statement the court stated, in effect, that while the careless and negligent handling of gasoline is inherently dangerous this is not true if it is carefully handled. The court apparently took the position, and correctly so it seems, that for the work to be intrin-

60 114 W. Va. 188, 171 S.E. 426 (1933).
61 Cases cited note 55 supra.
63 See quotation at note 52, supra.
sically dangerous it should be dangerous however skillfully per-
formed.64

After finding that the work was not intrinsically dangerous 
within the meaning of that part of the rule quoted from the 
*Walton* case the court did not mention the last part of that rule to 
the effect that the employer of an independent contractor is not 
relieved from liability if the work let to be done is of such character 
that injury to third persons or their property might reasonably be 
expected to result directly from its performance if reasonable care 
should be omitted. It would appear that if any of the exceptions 
to the independent contractor rule were applicable under the 
circumstances this would be the logical one since it was alleged that 
plaintiff's injuries resulted from the negligent handling of gasoline, 
the work let to be done, by the one found to be an independent 
contractor. But even if counsel for plaintiff had relied upon this 
exception the court might have found it not to be applicable on the 
ground that the result was not a direct result inasmuch as the 
manner of performance which produced the result was not to be, 
anticipated.65

But even though these cases may not be necessarily inconsis-
tent with the theory that the court has virtually abandoned the 
independent contractor rule, there remain situations where no 
court is likely to hold an employer liable for the acts of an inde-
pendent contractor even though that contractor might be acting 
within the scope of the enterprise. For example, if one should 
be injured by a piece of flying glass when a watch repairman 
egligently drops a watch he is repairing and breaks the crystal, 
should he be able to seek out the person who owns the watch 
and left it with the repairman for repairs and hold him liable 
simply because at the time of the injury the negligent party was 
performing a service for him? Or should a person who hires a 
taxi be held liable for the negligence of the driver during the 
carriage simply because a service is being performed for him? 
While it might be said that in such cases there is no employment 
relationship at all, this would be simply a matter of degree.

The alternative to the discarding of the independent contractor 
rule and applying the rules of agency to such cases is to turn to 
the negligence field of tort law. The court could adhere to its 
direct or collateral result rule and use the foreseeability test as it 
has shown a distinct tendency to do. In the *Brewer* case the court,

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65 See quotation at note 66, infra.
in holding that the employer of the independent contractor was not liable, seemed to use the foreseeability test as a basis for the holding without mentioning direct or collateral result when it stated:

"Surely American could not reasonably have anticipated that Mayfield would pour such a quantity of gasoline into the tank in the sand house of Christopher Coal Company as to overflow and cause the explosion; and there is nothing in the record to charge American with knowledge that Christopher Coal Company had placed a coal stove in its sand house, which stove was burning at the time of the explosion, and had stored there quantities of dynamite, the latter of which was the effective cause of the explosion resulting in plaintiff's injuries." 66

The court in cases prior to the Brewer case was apparently thinking in terms of causation when it speaks of direct result. Therefore it seems that if, from the nature of the work contracted to be done, it can reasonably be foreseen that there is danger of such result the employer is liable if such result actually occurs. That is, if the performance of the work in the normal manner contemplated by the contract would involve an unreasonable risk of such harm to third persons then such harm occurring in the performance of the work is a direct result of the work and the employer is liable. Or, stated in yet another way, where the particular risk is involved in the work to be done itself, then if the result is within that risk, it is a direct result of the work to be done and the employer is liable, otherwise it is a collateral result and the employer is not liable.

The obvious difficulty with following this course is the confusion which would result. This confusion will be apparent to those familiar with the subject of causation in tort law.

In conclusion it seems that whatever the court does in this field in the future, it should at least recognize that if there is anything left of the independent contractor rule in West Virginia that rule has at least been fundamentally modified.

66 76 S.E.2d at 925.