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TORT LIABILITY TO THIRD PARTIES ARISING FROM BREACH OF CONTRACT

*Otis Elevator Company v. Embert*¹

The plaintiff, was injured when she fell into an automatic passenger elevator, located in a building owned by the South Street Corporation, defendant number one. The accident occurred when the plaintiff, having opened the elevator door and thinking the elevator was at floor level, entered and fell approximately twelve and one-half inches to the point where the elevator was actually located. The plaintiff brought suit in the Baltimore City Court against the aforementioned corporation, building owner. The latter made the Otis Elevator Company a third-party defendant, alleging that Otis was liable for breach of a contract to furnish maintenance on the elevator. The plaintiff then filed an amended declaration, charging negligence on the part of the South Street Corporation and the Otis Elevator Company. The jury found both defendants negligent but held for Otis in the third-party action.² Otis appealed and the building owner, having paid the judgment, defended the appeal as use plaintiff. As to the liability of Otis, the Maryland Court of Appeals reversed. The Court said that the only way to find Otis liable was in tort for breach of its maintenance contract, as Otis had assumed no duties other than those arising from the contract. There could be no liability in contract as there was no privity between the plaintiff and Otis. There would be tort liability where the breach of contract was also a disregard of the duty, owed the public by Otis, which arose at the making of the contract. The court did not hold that Otis was charged with such a duty to one not in privity of contract; but it merely said that, assuming that to be the Maryland law, there

¹ 198 Md. 585, 84 A. 2d 876 (1951).

² This verdict of the jury is a bit confusing, at first glance. When the plaintiff filed an amended declaration, alleging negligence on the part of both defendants, the South Street Corporation asked the court's permission to refile its third-party complaint against Otis. The latter objected on the ground that this was improper after the amended declaration had been filed and issue joined thereon by both defendants. The court overruled the objection. It seems that the proper label for the "third-party complaint" at this point in the proceedings would have been a cross claim against a co-party in accord with Part Two, III, Joinder Rule 3(b) of the General Rules of Practice and Procedure. At any rate the third-party complaint alleged that Otis was liable to the South Street Corporation for breach of the maintenance contract. It was on this point that the jury held for Otis, while, on the other hand, finding Otis liable to the plaintiff for negligence concerning the operation of the elevator, on which latter point the Court of Appeals reversed.

was no breach of contract in this case. Therefore, there was no disregard of the alleged duty.

In other words, the only point really decided was that the Otis Elevator Company only contracted to maintain the elevator in proper mechanical condition, as distinguished from modernizing it and agreeing to teach how to operate it,³ and that there was no evidence to show that any mechanical defect caused or directly contributed to the accident complained of. However, speaking through Judge Markell, the Court did discuss the question of tort liability to third parties growing out of breach of contract, and referred to various types of cases, both in Maryland and elsewhere, in which such liability had been enforced or claimed.

To analyze some of these cases and to determine the basis on which such liability actually rests, with particular emphasis on the development of the Maryland law in this respect, is the purpose of this note.⁴

The difficulty in finding liability in such cases mainly stems from the misinterpreted English case of *Winterbottom v. Wright*.⁵ In that case it was decided that for breach of a contract to keep a mail coach in repair after it was sold, no cause of action existed in one not a party to the contract. As pointed out by Dean Prosser in his textbook:

“ . . . the decision went no farther than to hold that no action could be maintained on the contract itself; but it was universally misinterpreted, and certain dicta of the judges were taken to mean that there could be no action even in tort, and even if the chattel had been in a defective condition when it was supplied. Springing from this decision, there developed a general rule which prevailed until quite recent years, that the original seller of goods was not liable for damages

³The negligence of the South Street Corporation was principally based upon its failure to warn or advise passengers regarding the operation of the elevator. Cf. *Lee v. Housing Authority*, Baltimore Daily Record, Jan. 19, 1954 (Md., 1954).

⁴The related problem of proving the negligence, once it is determined that a cause of action in tort may exist, is not discussed in this note. This problem has arisen in Maryland, especially in the food and beverage cases, which cases are mentioned later in the note, *infra*, circa, ns. 15 and 16. For a discussion of the proof problem in these and other similar cases, where to prove negligence is extremely difficult, see Thomsen, *Presumptions and Burden of Proof in Res Ipsa Loquitur Cases in Maryland*, 3 Md. L. Rev. 285 (1939); Farinholt, *Res Ipsa Loquitur*, 10 Md. L. Rev. 337 (1949), and Kaiser, *Pleading Negligence in Maryland — Res Ipsa Loquitur as a Rule of Pleading*, 11 Md. L. Rev. 102 (1950). Cf. *Lee v. Housing Authority*, *ibid.*

⁵10 M. & W. 109, 11 L. J. Ex. 415, 152 Eng. Rep. 402 (1842).

caused by their defects to anyone except his immediate buyer."⁶

However, the above rule is more famous for its exceptions than the rule itself.

One leading exception concerns a seller's liability in tort for harm to a third party where the foreseeable harm was due to the seller's negligence. The principal case is that of *Thomas v. Winchester*,⁷ decided ten years after the aforementioned English case.⁸ In that case the plaintiff, a remote vendee, sued a dealer in drugs and medicines whose agent had negligently mislabelled a poisonous drug. The plaintiff recovered in tort although there was no privity of contract between him and the defendant. The court held that because of the danger involved in dealing with poisonous drugs the defendant owed the public a duty to avoid such mistakes.⁹ In this respect it is to be noted that the disregard of the duty to the public was also a breach of contract with the immediate vendee.

In a Maryland case, *State, use of Hartlove v. Fox & Son*,¹⁰ the court's opinion quoted extensively from, but did not go the full extent of *Thomas v. Winchester*. In the Maryland case the plaintiff's decedent died from a disease contracted from a horse bought by the decedent's brother from the defendant. The Court, although it sustained the defendant's demurrer on the ground that the allegations in the declaration were insufficient to support a cause of action in the plaintiff, pointed out that if a vendor makes a false representation, concerning the subject matter of the sale, knowing it may cause damage to a third party who was not a party to said sale, then he, the defendant vendor, would be liable to the third party.

The Maryland court never applied this rule in its entirety. That portion of the rule requiring intentional misrepresentation was not adopted, as will be seen from an examination of later cases.

⁶ PROSSER, TORTS (1941), 673-674.

⁷ 6 N. Y. (2 Selden) 397, 57 Am. Dec. 455 (1852).

⁸ *Supra*, n. 5.

⁹ *Supra*, n. 7, 410.

"The defendant's duty arose out of the nature of his business, and the danger to others incident to its mismanagement. The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. . . . The wrong done by the defendant was in putting the poison, mislabelled, into the hands of Aspinwall, as an article of merchandise, to be sold and afterwards used, as the extract of dandelion, by some person then unknown."

Aspinwall was the defendant's immediate vendee who was not a party to the suit.

¹⁰ 79 Md. 514, 29 A. 601 (1894).

In *Flaccomio v. Eysink*,¹¹ the plaintiff sued a retail whiskey dealer and a wholesale whiskey dealer for injuries received from whiskey adulterated with wood alcohol. The plaintiff did not recover from either. However, the decision with regard to the wholesale dealer was not based on the fact that there was lacking privity of contract between him and the plaintiff, but because he was not negligent. The Court in mentioning the plaintiff-appellee's argument, which was based on *Thomas v. Winchester*¹² and similar cases, said, "the cases relied on by the appellee do not warrant a different conclusion, but in our judgment fully sustain this view".¹³ In them, "the plaintiff's right to recover was based on averment and proof of the defendant's negligence in labeling and selling a deadly poison".¹⁴ Thus the Court intimated that in a proper case a defendant vendor would be found liable to a remote vendee for negligence.

Such a proper case, *Goldman and Freiman Bottling Co., Inc., v. Sindell*,¹⁵ arose in 1922. The Court allowed the plaintiff, a remote vendee, to recover from the defendant bottling company for internal injuries suffered from the drinking of a bottle of soda, which contained glass particles. The defendant's argument that it could not be charged with negligence, and that, since there was no privity of contract there was no liability, was overruled. The liability was predicated on negligence; there was no intentional misrepresentation involved in the case. Here was the full application of the doctrine of *Thomas v. Winchester*. The doctrine has since been applied in other Maryland cases involving bottling companies and food manufacturers.¹⁶ Therefore, concerning the sale of food and beverage, which, if adulterated with foreign matter, is imminently dangerous to the public and will probably cause harm, the Court of Appeals will hold the negligent party liable to the injured party in an *ex delicto* action.

Another exception to the *Winterbottom v. Wright*¹⁷ rule or an expansion of the "imminent danger to the public" doctrine, which ever one prefers to call it, arose in the case of *MacPherson v. Buick Motor Company*.¹⁸ There the de-

¹¹ 129 Md. 367, 100 A. 510 (1916).

¹² *Supra*, n. 7.

¹³ *Supra*, n. 11, 374.

¹⁴ *Ibid.*, 377. The emphasis is that of the court.

¹⁵ 140 Md. 488, 117 A. 866 (1922).

¹⁶ *Armour & Co. v. Leasure*, 177 Md. 393, 9 A. 2d 572 (1939); *Coca-Cola Bottling Works v. Catron*, 186 Md. 156, 46 A. 2d 303 (1946); *Cloverland Farms Dairy v. Ellin*, 195 Md. 663, 75 A. 2d 116 (1950).

¹⁷ *Supra*, n. 5.

¹⁸ 217 N. Y. 382, 111 N. E. 1050 (1916).

defendant manufactured automobiles, and bought its wheels from a reputable wheel manufacturer. The plaintiff bought his car from a retail dealer, and was injured when one of the wheels proved defective and collapsed. The defendant had failed to inspect this wheel and was found liable for this negligence. The Court pointed out that an automobile was of such a nature that if it was not carefully made it would almost certainly cause injury to someone of the general public, i.e., anyone who might purchase it from the retailer, and those who might be riding with him, or with whom he might collide because of the defect. The Court then said:

“We hold, then, that the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.”¹⁹

This decision has been followed in most courts which have since dealt with the problem concerning manufacturers.²⁰ The idea of inherent danger apparently means no more than that substantial harm is to be foreseen if the chattel is defective.²¹

The Maryland Court of Appeals has never expressly applied the rule of *MacPherson v. Buick Motor Company*. However, there are five cases, closely touching on the principle here involved, which should be reviewed, the latest of which says that the rule of the *MacPherson* case has received a “qualified recognition in Maryland”.

First is the case of *Consolidated Gas Company v. Connor*,²² which was decided prior to the *MacPherson v. Buick Motor Company* case. There the defendant had a contract with the city to repair the gas pipes. The defendant negligently sent gas through a defective gas pipe, injuring a

¹⁹ *Ibid*, 1053.

²⁰ PROSSER, *op. cit.*, *supra*, n. 6, 678.

²¹ RESTATEMENT, TORTS (1934), Sec. 395.

²² 114 Md. 140, 78 A. 725 (1910).

third party, the plaintiff, and was held liable. However, the court treated the defendant gas company as an agent of the city, and liable to third parties for its misfeasance. A later case,²³ decided recently, also involved the alleged negligence of a Gas company. There the negligence amounted to nonfeasance and the defendant was not held liable. The nonfeasance consisted of failure to have a certain street light repaired within a reasonable time. The Court noted the earlier Maryland case,²⁴ and distinguished the two on the ground of misfeasance and nonfeasance.

However, in the case now being noted,²⁵ Judge Markell, delivering the court's opinion, said:

"If one contracts with a municipality to furnish water or gas or electricity for public and private purposes and fails to do so, he incurs no tort liability for damage by fire due to lack of water to extinguish the fire or for injury sustained in the darkness due to lack of gas or electricity. The absence of tort liability for breach of contract is not qualified by the distinction between nonfeasance and misfeasance. In such cases such a distinction is not between non-performance and 'misperformance' of a contract, but only between conduct, in breach of a contract, which constitutes only a breach of contract, and conduct which also constitutes a breach of duty, arising out of the nature of the work undertaken and the conduct, to third persons."²⁶

The third case is that of *State of Maryland, to the use of Bond, et al., v. Consolidated Gas, Electric Light and Power Company*.²⁷ There the alleged negligence was selling a defective gas stove which injured a third party. Here the defendant was a retail dealer, not a manufacturer, and also, there was no allegation that "the article in itself was inherently dangerous".²⁸ These features the court declared distinguished this case from the problem confronting the New York Court in *MacPherson v. The Buick Motor Company*.²⁹ In holding that there was no liability the Court said:

". . . authorities, in this State and elsewhere, which hold that a manufacturer is liable for injury to

²³ E. Coast Fr. Lines v. Cons. Gas Co., 187 Md. 385, 50 A. 2d 246 (1946).

²⁴ *Supra*, n. 22.

²⁵ *Supra*, n. 1.

²⁶ *Ibid*, 597-8.

²⁷ 146 Md. 390, 126 A. 305, 42 A. L. R. 1237 (1924).

²⁸ *Ibid*, 399.

²⁹ *Supra*, n. 18.

strangers resulting from the sale of articles inherently dangerous, do not apply to cases like the one under consideration."³⁰

The fourth case³¹ was not decided by the Court of Appeals, but it shows that the Baltimore City Court considered *MacPherson v. Buick Motor Company*³² to be the law in Maryland. The question before the Court was whether or not the Chevrolet Motor Company was liable as a joint tortfeasor for the breaking of defective new superglass. The Court followed the *MacPherson* case and, after quoting from that opinion, held Chevrolet liable. The Court said:

"It is to be gathered . . . that when confronted with a case for decision which presents the same controlling features as were present in 217 N. Y. 382,³³ which the case at bar as made out in the declaration manifestly does, that the Maryland Court of Appeals will follow the precedent, so luminously and convincingly set by Justice Cardozo."³⁴

Finally, in the fifth and latest case, decided after the principal case, an electrician was injured by falling twenty feet due to the mechanism for opening an overhead garage door (on which he was standing) loosening and falling apart. In holding that there should have been directed verdicts in favor of the manufacturer and the installer of the doors, neither of whom was in control thereof at the time of the accident, the Court of Appeals said:

"With the plaintiff's contention that the garage doors were a dangerous instrumentality under the rule of *MacPherson v. Buick*, 217 N. Y. 382, 111 N. E. 1050, we do not agree. The doctrine has received a *qualified* recognition in Maryland, but has not been applied in any case resembling the one before us. See *Otis Elevator v. Embert*, 198 Md. 585, 84 A. 2d 876."^{34a}

The final line of cases to be discussed involves maintenance contracts similar to the one present in the principal

³⁰ *Supra*, n. 27, 397.

³¹ *Kemich v. Legum, et al.*, Baltimore Daily Record, Nov. 20, 1933 (Baltimore City Court, 1933).

³² *Supra*, n. 18.

³³ *Ibid.*

³⁴ *Supra*, n. 31.

^{34a} *Walker, et al., v. Vail, et al.*, 101 A. 2d 201 (Md., 1953). Emphasis supplied.

case.³⁵ Where the contract to maintain concerned an instrumentality which was dangerous in itself, or one which, if negligently repaired, was dangerous and likely to injure some member of the public, it would certainly seem that the failure to properly repair should result in tort liability, irrespective of the contract. The reason for such liability would be the same as it has been in the cases already discussed. That is, the breach of the contract was also a disregard of the duty owed the public, because of the nature of the undertaking.

The Maryland Court apparently recognizes the close analogy between *MacPherson v. Buick Motor Company*³⁶ and a case involving the breach of a maintenance contract where the probability of injury to the public is strong. In the principal case, for the purposes of the opinion, the Court assumed that Maryland followed *MacPherson v. Buick Motor Company*. Even so, the court said that Otis was not liable, *on the ground* that there had been no breach of contract and so no disregard of duty. The significance of this is that the Court thus indicated that at least concerning elevators, the doctrine of the *MacPherson* case applied to maintenance contracts.

Other courts have found tort liability to a third party for the breach of a maintenance contract or one similar thereto. In *Van Winkle v. American Steam Boiler Company*,³⁷ decided over twenty-five years before the *MacPherson* case, it was held that an insurance company, which under its policy reserved the right to inspect an insured boiler and which, although it had no duty to inspect, in fact did repeatedly inspect the boiler, was liable in tort to an adjoining owner for damage caused by the explosion of the boiler, on account of negligence with respect to making its inspections. The Court really based its decision on the misfeasance of an agent for which agents are generally held liable. But after talking Agency the Court said:

"And it would seem that there is a broader ground . . . on which the present case can be based. It is this: that in all cases in which any person undertakes the performance of an act, which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law *ipso facto*, imposes, as a public duty, the obligation to exercise such care and skill."³⁸

³⁵ *Supra*, n. 1.

³⁶ *Supra*, n. 18.

³⁷ 52 N. J. L. 240, 19 A. 472 (1890).

³⁸ *Ibid*, 475.

A Pennsylvania case,³⁹ decided in 1929, where an insurance company was held not liable as it had not undertaken to inspect, declared there would be liability if the company had undertaken to inspect and done so negligently. This case cited the *Van Winkle* case⁴⁰ with approval in this point.

In the case of *Dahms v. General Elevator Company*,⁴¹ the California courts dealt with practically the same fact set up as is found in the principal case.⁴² In the *Dahms* case the plaintiff, an elevator operator, was injured due to the breaking of the hoisting shaft. The defendant had a contract, to maintain the elevator, with the building owner. The defendant was held liable. The defendant was charged with having the same duties toward the public as manufacturers and vendors. The Court considered this type of case one of the exceptions to the rule set forth in *Winterbottom v. Wright*.⁴³ And at one point in the opinion it was said, ". . . an action sounding in negligence may be maintained by a stranger to a contract for the execution of a specific piece of work or the sale of a manufactured article, if the product of the stipulated work or the article sold was abnormally dangerous or noxious".⁴⁴ This last statement was extended to cover articles which, although not dangerous in themselves, were dangerous if negligently made or constructed.

A later California case⁴⁵ also allowed recovery under a similar set of facts where the plaintiff was a passenger in the elevator.

New York, where the doctrine involved in these cases was so well developed, has held⁴⁶ that "an elevator was a dangerous instrumentality within the doctrine of *Thomas v. Winchester*,⁴⁷ and that one who contracted to repair an elevator owed the same duty to third persons as a manufacturer".⁴⁸

While there are other cases involving the liability of a defendant to third parties for negligence in failure to in-

³⁹ *Anderson v. London Guaranty & Accident Company*, 295 Pa. 368, 145 A. 431 (1929).

⁴⁰ *Supra*, n. 37.

⁴¹ 214 Cal. 733, 7 P. 2d 1013 (1932).

⁴² *Supra*, n. 1.

⁴³ *Supra*, n. 5.

⁴⁴ *Supra*, n. 41, 1015.

⁴⁵ *Cowles v. Independent Elevator Company*, 22 Cal. App. 2d 109, 70 P. 2d 711 (1937).

⁴⁶ *Kahner v. Otis Elevator Company*, 96 App. Div. 169, 89 N. Y. S. 185 (1904).

⁴⁷ *Supra*, n. 7.

⁴⁸ *Otis Elevator Co. v. Embert*, *supra*, n. 1, 599-600, citing *Kahner v. Otis*, *supra*, n. 46.

spect⁴⁹ or repair⁵⁰ an elevator where such negligence caused injury, they do not add substantially to the doctrines herein discussed.

There is no attempt being made to distinguish between contracts to inspect and contracts to repair. The type of contract involved in the principal case⁵¹ was a maintenance contract. Under such an agreement there is a duty both to inspect and repair. Therefore, failure to do either would bring about liability should such failure cause injury to someone.

We now see that the law has made real progress since the days of *Winterbottom v. Wright*.⁵² When one enters into a contract, the breach of which is fraught with real probability of hazard to many unsuspecting members of the public, tort liability to a third party cannot be escaped by hiding behind the contract. The tortfeasor is held responsible to the injured party, and this is as the law reasonably should be. Where negligence can and is likely to injure, to hold that no cause of action in tort exists because the wrongdoer's act was merely a breach of contract is contrary to fundamental concepts of justice.

The Maryland Court, in its holdings, has only applied such liability in the food and beverage cases, but its dicta, it is believed, does not oppose the extension of the doctrine to cover manufacturers, vendors and maintenance contractors, provided, of course, that the necessary element of wide possibility of danger is present.

⁴⁹ *Westinghouse Electric Elevator Company v. Hatcher*, 133 F. 2d 109 (5th Cir., 1943); *Bollin v. Elevator Construction and Repair Company, Inc.*, 361 Pa. 7, 63 A. 2d 19, 6 A. L. R. 2d 277 (1949). Here the Court said the principle of *MacPherson v. Buick Motor Company*, *supra*, n. 18, governed the case at hand.

⁵⁰ *Jones v. Otis Elevator Company*, 231 N. C. 285, 56 S. E. 2d 684 (1949); *Higgins v. Otis Elevator Company*, 69 Ga. App. 584, 26 S. E. 2d 380 (1943). Here the contract was to inspect and repair.

⁵¹ *Supra*, n. 1.

⁵² *Supra*, n. 5.