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no liability for there would have been no damage to a legal person.<sup>32</sup> This "biological" theory of recovery would also permit a remedy under wrongful death statutes where the infant died after it had been born alive, while, at the same time it would also permit the courts to deny recovery under wrongful death statutes where the infant was not born alive.

With approval of this view it is submitted that such cause of action is, in theory at least, soundly founded without sacrificing any fundamental legal concepts or established principles.

### EXTENSION OF *MacPHERSON v. BUICK* TO REAL ESTATE IN NEW YORK

New York, which enunciated the doctrine of *MacPherson v. Buick Motor Co.*,<sup>1</sup> and thereby made the manufacturer of a chattel, "reasonably certain to place life and limb in peril when negligently made,"<sup>2</sup> liable in negligence to remote users, has now extended the rule to real estate to include those who plan (architects) and those who erect (building contractors) structures. In *Inman v. Binghamton Housing Authority*,<sup>3</sup> three years after a building had been completed and accepted by the owner, a child was injured when he fell from a stoop which had been constructed without a protective railing. The court found the distinction between a chattel and structure built upon the land purely technical and stated unequivocally that: "the principle inherent' in the *MacPherson* doctrine applies to determine the liability of architects or builders for their handiwork. . . ."<sup>4</sup>

#### PRIOR LAW

It has heretofore been said that one not a party to the contract could not complain of an injury arising out of the negligent performance of the contract.<sup>5</sup> In the field of personal property this rule of privity was first undermined by the celebrated cases of *Thomas v. Winchester*<sup>6</sup> and *Devlin v.*

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32. That is not to say that the mother would not have a remedy for her own injuries.

1. 217 N.Y. 382, 111 N.E. 1050 (1916).

2. *Id.* at 389, 111 N.E. at 1053. Some jurisdictions erroneously still appear to require that the chattel be "inherently" or "imminently dangerous" per se, thus greatly limiting the application of the rule. New York follows the more liberal interpretation, imposing liability upon the manufacturer of any article which was inherently dangerous because it was negligently constructed, which is quite different from imposing liability upon manufacturers of inherently dangerous articles when such articles are negligently constructed. Certain lower courts in New York, however, have confusedly failed to make this distinction. For an excellent discussion on this point, see Davis, *A Re-Examination of The Doctrine of MacPherson v. Buick and Its Application and Extension in the State of New York*, 24 *Fordham L. Rev.* 204 (1955).

3. 3 N.Y.2d 137, 143 N.E.2d 895 (1957).

4. *Id.* at 144, 143 N.E.2d at 899.

5. *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

6. 6 N.Y. 397 (1852), dealing with a mislabeled bottle of belladonna, held the manufacturer liable to a third party since it was "imminently dangerous."

*Smith*,<sup>7</sup> and subsequently destroyed by the *MacPherson* case. Since the latter decision, the doctrine has been extended to manufacturers of component parts,<sup>8</sup> intermediate suppliers who fail to make a reasonable inspection to discover defects,<sup>9</sup> negligent repairmen,<sup>10</sup> and to property damage claims.<sup>11</sup> However, in most jurisdictions, the *MacPherson* doctrine, even today, has yet to change the traditional rule that a building contractor is not answerable to third persons injured as a result of his negligent performance once he has completed the building and it has been accepted by the owner.<sup>12</sup> Even in New York, the doctrine had not, until the *Inman* case, been extended into the area of real estate structures.<sup>13</sup>

The reasons advanced for the rule, the application of which has caused the liability of contractors to lag thirty years behind that of manufacturers of chattels,<sup>14</sup> are varied. One is the lack of privity of contract;<sup>15</sup> another is the fact that the contractor had no control over the offending structure at the time of the injury;<sup>16</sup> a third is that acceptance by the owner is an intervening agency which breaks the chain of causality, thereby making the owner the proximate cause of the injury and the contractor only remotely the cause;<sup>17</sup> another is a public policy argument to the effect that if such a broad duty is imposed, no one would become a contractor,<sup>18</sup> and there would be no end of litigation.<sup>19</sup> At best, the reasons represent a judicial excuse for a result at once

7. 89 N.Y. 470 (1882), dealing with a negligently constructed scaffold, held the third party could recover, since it was "imminently dangerous."

8. *Smith v. Peerless Glass Co.*, 259 N.Y. 292, 181 N.E. 576 (1932).

9. *LaRocca v. Farrington*, 301 N.Y. 247, 93 N.E.2d 829 (1950).

10. *Kalinowski v. Truck Equipment Co.*, 237 App. Div. 472, 261 N.Y. Supp. 657 (4th Dep't 1933).

11. *Genesee County Patrons Fire Relief Ass'n v. L. Sonneborn Sons, Inc.*, 263 N.Y. 463, 189 N.E. 551 (1934).

12. *Ford v. Sturgis*, 14 F.2d 253 (D.C. Cir. 1926). Note that the Ford case cited the *MacPherson* decision, but regarded it only as an application of an already existing exception, viz. inherently dangerous goods. This is clearly erroneous in light of the later correct liberal treatment of the case by the courts. See also *Erie & Western Transp. Co. v. Chicago*, 178 Fed. 42 (7th Cir. 1910); *The Mayor of Albany v. Cunliff*, 2 N.Y. 165 (1849); *Coleman v. Guidone & Son, Inc.*, 192 App. Div. 120, 182 N.Y. Supp. 625 (2d Dep't 1920); *Delney v. Supreme Inv. Co.*, 251 Wis. 374, 29 N.W.2d 754 (1947).

13. For an earlier indication that the Court of Appeals would adopt this position, see *Adams v. White Constr. Co.*, 299 N.Y. 641, 87 N.E.2d 52 (1949).

14. Prosser, *Torts* § 85 (2d ed. 1955).

15. *Ford v. Sturgis*, 14 F.2d 253 (D.C. Cir. 1926); *Galbraith v. Illinois Steel Co.*, 133 Fed. 485 (7th Cir. 1904); *Salliotte v. King Bridge Co.*, 122 Fed. 378 (6th Cir. 1903).

16. *Travis v. Rochester Bridge Co.*, 188 Ind. 79, 122 N.E. 1 (1919); *Cunningham v. T. A. Gillespie Co.*, 241 Mass. 280, 135 N.E. 105 (1922).

17. *Goar v. Village of Stephen*, 157 Minn. 228, 196 N.W. 171 (1923); *Travis v. Rochester Bridge Co.*, 188 Ind. 79, 122 N.E. 1 (1919). In the Travis case, the court affected a distinction between manufacturers and contractors by stating that the builder's work is done under the supervision, inspection, and often plans of the employer (hence intervening cause), while a manufacturer is in complete control prior to distribution to the public.

18. *Ford v. Sturgis*, 14 F.2d 253 (D.C. Cir. 1926).

19. *Berg v. Otis Elevator Co.*, 64 Utah 518, 231 Pac. 832 (1924).

illogical and inconsistent with the rule applied in cases involving the sale of chattels.

#### ADOPTION OF THE MACPHERSON RULE

In time the courts began to recognize the inequities which a strict adherence to the rule would produce, and began to temper its application. Thus, a third party was allowed a cause of action where the structure was imminently dangerous to life and limb;<sup>20</sup> where the contractor, with knowledge of the latent defect, turned over the structure to the owner without disclosure—liability being based on “something like fraud”;<sup>21</sup> where the court found an implied invitation from the fact that the structure was certain to be used by someone other than the contractee;<sup>22</sup> and where the condition created was a nuisance per se.<sup>23</sup> It is well to note, however, that in these cases the courts paid lip service to the old general rule, regarding their decisions as exceptions. It was not until section 385 of the Restatement of Torts<sup>24</sup> was announced that the contractor, whose work has been accepted, was placed on the same basis as a manufacturer. *Moran v. Pittsburg-Des Moines Steel Co.*,<sup>25</sup> the first case to adopt this section of the Restatement, represents a complete overthrow of the old general rule. Other jurisdictions, though still the minority, have followed suit.<sup>26</sup> There is also substantial secondary authority in support of the extension.<sup>27</sup> It is well to point out, however, that the extension does not constitute a departure from the rule of non-liability, where as a matter of fact, the owner's positive acts operate as an intervening cause.<sup>28</sup> Where the owner actively supervises and inspects the construction job, a question of fact is presented as to whether or not such activity constitutes a breach in the chain of causation.

#### APPLICATION OF THE DOCTRINE TO REAL PROPERTY

The Court of Appeals in the *Inman* case was quick to correct the appellate division which had indicated its approval of the extension.<sup>29</sup> The Court of Appeals stated that all the essential elements of *MacPherson v. Buick* must be present to apply the doctrine.<sup>30</sup> The court found latency of the defect to be

20. *Ibid.*

21. *Bryson v. Hines*, 268 Fed. 290 (4th Cir. 1920); *Penn Steel Co. v. Elmore & Hamilton Contracting Co.*, 175 Fed. 176 (C.C.N.D.N.Y. 1909); *Murphy v. Barlow Realty Co.*, 206 Minn. 527, 289 N.W. 563 (1939).

22. *Colbert v. Holland Furnace Co.*, 333 Ill. 78, 164 N.E. 162 (1928).

23. *Brown v. Welsbach Corp.*, 301 N.Y. 202, 93 N.E.2d 640 (1950); *Schumacher v. Carl G. Neumann Dredging and Improvement Co.*, 206 Wis. 220, 239 N.W. 459 (1931).

24. Restatement, Torts § 385 (1939).

25. 166 F.2d 908 (3d Cir.), cert. denied, 334 U.S. 846 (1948).

26. *Hanna v. Fletcher*, 231 F.2d 469 (D.C. Cir.), cert. denied, 351 U.S. 939 (1956); *Hale v. Depaoli*, 33 Cal. 2d 288, 201 P.2d 1 (1948); *Hunter v. Quality Homes Inc.*, 45 Del. (6 Terry) 100, 68 A.2d 620 (1949); *Russel v. Whitcomb*, 100 N.H. 171, 121 A.2d 781 (1956); *Foley v. Pittsburg-Des Moines Steel Co.*, 363 Pa. 1, 68 A.2d 517 (1949).

27. Prosser, Torts § 85 (2d ed. 1955); 2 Harper and James, Torts § 28.10 (1956).

28. Prosser, *op. cit.* supra note 27, § 49.

29. 1 A.D.2d 559, 152 N.Y.S.2d 79 (3d Dep't 1956), rev'd, 3 N.Y.2d 137, 143 N.E.2d 895 (1957).

30. 3 N.Y.2d at 145, 143 N.E.2d at 899.

such an element,<sup>31</sup> citing as authority *Campo v. Scofield*.<sup>32</sup> In the *Campo* decision, plaintiff injured his fingers in an onion-topper allegedly due to the lack of a safety guard. The Court of Appeals dismissed the complaint due to the absence of an allegation indicating a latent defect, thereby settling a heretofore unsettled aspect of the *MacPherson* doctrine. That decision read with the instant case conclusively indicates that a manufacturer and contractor will not be liable to a third party if the offending defect be patent. Quite obviously, however, much difficulty will arise in determining what is a latent defect and from whose viewpoint it is to be judged. The latter point is interesting since the court in the *Inman* case made no reference in its discussion to the fact that plaintiff was a two year old infant to whom the absence of a porch rail would not be a patent defect. One might assume from this that the character of the defect is not to be viewed from the plaintiff's position, but rather from that of the present owner whose failure to correct a patent defect, would then operate as an intervening cause.

Confusing also is the fact that the *MacPherson* decision does not state whether imminency of the danger is a condition precedent to the application of its rule. A sensitive reading of the decision indicates no such requirement.<sup>33</sup> Yet, there are decisions which, on the basis of lack of imminency, have refused to apply the *MacPherson* rule, because the period of safe use of the instrumentality had destroyed the quality of imminence.<sup>34</sup> However, in jurisdictions outside of New York, a period of seven<sup>35</sup> and twenty years,<sup>36</sup> and in the present New York case, of three years of safe use, would seem to indicate that in the field of real property, the courts will follow the language of Justice Cardozo rather than that of his interpreters. Such a decision seems to be a necessary one, in light of the nature of the building trade and the latency of the defect.

#### ARCHITECTS

Considering the Court of Appeals' recognition of certain essential elements as prerequisites to the application of the *MacPherson* doctrine, it is indeed

31. *Ibid.*

32. 301 N.Y. 468, 95 N.E.2d 802 (1950).

33. "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." 217 N.Y. at 389, 111 N.E. at 1053. "Subtle distinctions are drawn by the defendant between things inherently dangerous and things imminently dangerous, but the case does not turn upon these verbal niceties. If danger was to be expected as reasonably certain, there was a duty of vigilance, and this whether you call the danger inherent or imminent." *Id.* at 394, 111 N.E. at 1054-55.

34. *Lynch v. International Harvester Co.*, 60 F.2d 223 (10th Cir. 1932); *Hegglom v. John Wanamaker*, 178 Misc. 792, 36 N.Y.S.2d 777 (Sup. Ct. 1942). Both courts referred to the fact that Justice Cardozo in his *MacPherson* decision, in citing *Loop v. Litchfield*, 42 N.Y. 351 (1870), pointed out that "the risk can hardly have been an imminent one, for the wheel lasted five years before it broke." 217 N.Y. at 386, 111 N.E. at 1052.

35. *Hanna v. Fletcher*, 231 F.2d 469 (D.C. Cir.), cert. denied, 351 U.S. 989 (1956).

36. *Hale v. Depaoli*, 33 Cal. 2d 228, 232, 201 P.2d 1, 3 (1948): "However, the exception to the general rule of nonliability stated in *MacPherson v. Buick Motor Co.* . . . does not include imminence as a requisite."

interesting to note the facility with which the court includes architects in the same breath with building contractors, without any apparent need for discussion. The liability of an architect for damages caused by his negligent work has been based upon contract,<sup>37</sup> criminal law,<sup>38</sup> and tort.<sup>39</sup> The architect has not been held to be an insurer of his work, but in the event that his plans were found to be defective, he was liable for failure to exercise reasonable care in their preparation to one in privity.<sup>40</sup> There are no reported cases in which the architect was held liable to third parties not in privity. All the decisions in which the extension had been applied dealt solely with building contractors.<sup>41</sup> Prior to this extension, of all the cases espousing the non-liability theory, only one is reported where an architect (not supervising on the job) was regarded on the same basis as a contractor,<sup>42</sup> and that a memorandum decision adjunct to *Ford v. Sturgis*.<sup>43</sup> Can it be urged with any degree of force that since under the prior rule, at least one case treated architects as contractors for tort purposes, the same analogy should be followed under the extension? The answer must be no, in light of conditions precedent necessary to the application of the *MacPherson* doctrine, that were not necessary to the application of the *Ford* rule. The most obviously essential element is that the defendant deal with a product. Services are what an architect deals in. Even the most liberal application in the field of personal property, has not yet produced a case where the defendant was the mere designer of the chattel. It is difficult to see how a blueprint as such, without more, can cause injury to person or property. Since architects were afforded the protection of non-liability prior to the extension, it would seem that logically they should escape the liability now imposed by the extension, it not being applicable to one rendering services. But even granting the application of the extension to architects, the question arises: will the effect be different as to architects who deal in services than as to builders who deal in products? Should architects be considered in the same light as accountants, surveyors, attorneys, etc., who incur liability for their negligent language?<sup>44</sup> The leading case in this field is *Ultramares Corp. v. Touche*,<sup>45</sup> in which it is pointed out that liability will be imposed on the defendant, rendering negligent services (there an accountant), not if he can foresee loss to some third party, but only if he can foresee loss to some definite and identified third party. However, the rationale behind this and similar decisions, is that where intangible economic loss is concerned, rather than tangible harm to person or property, courts have become alarmed at possible liability of unknown or

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37. *Schreiner v. Miller*, 67 Iowa 91, 24 N.W. 738 (1885).

38. *State v. Ireland*, 126 N.J.L. 444, 20 A.2d 69 (Sup. Ct. 1941).

39. *Lottman v. Barnett*, 62 Mo. 159 (1876). Here recovery was not based upon negligence in design as causing the injury to the third party, but rather negligence in supervising the actual construction work, the architect, being in effect the builder.

40. *Kortz v. Kimberlin*, 158 Ky. 566, 165 S.W. 654 (1914).

41. See note 26 supra.

42. *Geare v. Sturgis*, 14 F.2d 256 (D.C. Cir. 1926).

43. 14 F.2d 253 (D.C. Cir. 1926).

44. Prosser, *Torts* § 88 at 544 (2d ed. 1955).

45. 255 N.Y. 170, 174 N.E. 441 (1931).