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Talbot Smith

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## COLLATERAL NEGLIGENCE\*

By TALBOT SMITH†

THE DOCTRINE of so-called "collateral" negligence is one of those mysterious and variable X factors involved in the resolution of employer-employee liability.<sup>1</sup> It is an inevitable by-product of the process of rationalization in a field concerning which we are not yet quite sure whether principles of fault or social considerations should govern liability.<sup>2</sup> It is a blood brother in elusiveness to other members of the same family—scope of employment,<sup>3</sup> frolic

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\*A word of explanation is in order. It must be obvious that one attempting to "cover" within the limits of a law review article the subject of an employer's liability for the negligence, collateral or otherwise, of an independent contractor hired for certain work is in much the same position as one who undertakes to set forth the known history of mankind in a thumb-nail sketch. The submitted study does not purport to be exhaustive; many fine distinctions could be drawn in the cases. Possibly one of the difficulties with the independent contractor cases is that too many have already been drawn. We now classify the cases as bridge cases, railroad cases, highway cases, landowner cases, and so forth, and it is but a short step to the white and black bridge cases, and the narrow and standard-gauge railroad cases. There must be some governing principles running through these cases. We are groping for them.

†Associate Professor of Law, University of Missouri.

<sup>1</sup>The word "employee," as we use it, carries no connotation whatever as to legal liability. It is a "neutral expression." See Lewis, J., in *Eggin-ton v. Reader*, [1936] All. Eng. Rep. 7, 10.

<sup>2</sup>The conflicting motivations shaping the judicial conclusion have been examined at length by the leading scholars of our time. Their conclusions are consistent only in their disagreement. Among valuable background material will be found Holmes, *Agency*, (1891) 4 Harv. L. Rev. 345, (1891) 5 Harv. L. Rev. 1, Holmes, *Collected Legal Papers* (1920) 49; Wigmore, *Responsibility for Tortious Acts: Its History*, (1894) 7 Harv. L. Rev. 315, 383, 441, 3 *Select Essays in Anglo-American Legal History* (1909) 474; 2 Pollock and Maitland, *The History of English Law* (2d ed. 1911) 533; Baty, *Vicarious Liability* (1916); Laski, *The Basis of Vicarious Liability*, (1916) 26 Yale L. J. 105; Smith, *Frolic and Detour*, (1923) 23 Col. L. Rev. 444; Douglas, *Vicarious Liability and Administration of Risk*, (1929) 38 Yale L. J. 584, 720; Seavey, *Speculations as to "Respondeat Superior,"* *Harvard Legal Essays* (1934) 433.

<sup>3</sup>The complexity of this determination may be gauged by the fact that the Restatement of *Agency* (1933) sec. 229, in pointing out that the limits of the scope of employment depend upon the particular fact situation in-

and detour with its "mazes of metaphysical refinement,"<sup>4</sup> and the Cardozo-characterized "chaotic"<sup>5</sup> borrowed servant problem.<sup>6</sup> It may be that they are all ruled by the same guiding hand. Odd, indeed, it would be if the governing principles were not in some way related.

Our general problem involves three parties: First, one whom we will describe as the employer. He wishes certain work done, the building of a bridge, the construction of a sewer, or the painting of his home. To accomplish this desired result he employs our second party, an independent contractor, a worker over whom he exercises no control and who answers to him for the result only.<sup>7</sup> One of the employees of such independent contractor negligently injures the plaintiff, our third party. Must the employer respond in damages? The answer is devastatingly simple: The employer need not respond for the collateral negligence of an independent contractor.<sup>8</sup> But when is the act of negligence "collateral?" The servant of an independent contractor may splash mortar from a mortar box into the plaintiff's eye. Is that an act of collateral negligence? So it was held,<sup>9</sup> and hence the employer was not liable. Suppose, however, that the mortar had merely been spattered from a wall in the course of construction over the plaintiff's rear windows and the clothes hanging in her back yard. Collateral? This time the employer had to pay.<sup>10</sup> Are the cases reconcilable? Thus we open Pandora's box.

The ultimate question being the liability of the independent contractor's employer, it may prove helpful in our analysis to review briefly, by way of necessary background material, the lia-

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involved, lists nine categories of inquiry to be pursued, some of which, in themselves, present problems of no inconsiderable magnitude, e.g., subsection *g*, relating to the "quality" of the act done.

<sup>4</sup>Johnson, J., in *Kohlman v. Hyland*, (1926) 54 N. D. 710, 210 N. W. 643.

<sup>5</sup>"The law that defines or seeks to define the distinction between general and special employers is beset with distinctions so delicate that chaos is the consequence." Cardozo, *A Ministry of Justice*, (1921) 35 Harv. L. Rev. 113, 121.

<sup>6</sup>(1940) 38 Mich. L. Rev. 1222.

<sup>7</sup>The orthodox statement is phrased somewhat as follows:

" . . . an independent contractor is one, who exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer except as to the result of his work." *Independent Contractor*, 14 R. C. L. (1916) sec. 2.

<sup>8</sup>See Blackburn, J., in *Dalton v. Angus*, (1881) 6 A. C. 740, 829, quoted in text to note 48, *infra*.

<sup>9</sup>*Strauss v. City of Louisville*, (1900) 108 Ky. 155, 55 S. W. 1075.

<sup>10</sup>*Pye v. Faxon*, (1892) 156 Mass. 471, 31 N. E. 640.

bility of a different type of an employer, the master of an admitted servant. For not only is the basic question (shall or shall not the employer pay?) the same as that involved in the independent contractor's case, but fortunately for the student, as well as the plaintiff, the courts, on this branch of the general problem, have largely abandoned the fictions with which it was so long burdened and obscured.<sup>11</sup> Consider, then, some typical master-servant cases,

The master owns a filling station. It is operated by his servant. The plaintiff brings his car to the station to have the oil changed. The servant does so, but he replaces the plug so negligently that on the highway it soon jars out, the crankcase oil going with it.<sup>12</sup> Or possibly the servant closes the door behind the departing customer carelessly and violently, the broken glass cutting the customer severely.<sup>13</sup> Or, conversely, he may open the door negligently, slamming it into the customer and injuring him.<sup>14</sup> It would be difficult to justify the utility of a system of law which would fail to force a master to respond for these torts. Unordered they may have been and were, but they are as much a part and parcel of the routine everyday operation of the business as the flashing neon sign out front. Such occurrences are as inevitable as the imposition of taxes, and their cost is as much a part of the rightful cost of operation as the payment of the taxes. It is settled that for such torts the master must respond. They are, it is said, "within the scope of the servant's employment."

Suppose, on the other hand, that the customer's actions angered the servant to such an extent that the latter threw eggs,<sup>15</sup> or perhaps even a knife,<sup>16</sup> at him. Unless we are prepared to say that the master's liability knows no bounds whatever it will be difficult to place liability upon him in these cases.<sup>17</sup> Such acts are

<sup>11</sup>Wigmore's discussion is most helpful in tracing the growth of the fiction and its employment. See his *Responsibility for Tortious Acts: Its History*, (1894) 7 Harv. L. Rev. 315, 3 *Select Essays in Anglo-American Legal History* (1909) 474; *Restatement of Agency, Explanatory Notes* (Tent. Draft No. 5, 1930) sec. 470.

<sup>12</sup>*National Refining Co. v. Clancy*, (1929) 31 Ohio App. 99, 166 N. E. 205.

<sup>13</sup>*Kiser v. Skelly Oil Co.*, (1933) 136 Kan. 812, 18 P. (2d) 181.

<sup>14</sup>*McDermott v. Sallaway*, (1908) 198 Mass. 517, 85 N. E. 422.

<sup>15</sup>*Horwitz v. Dickerson*, (Tex. Civ. App. 1930) 25 S. W. (2d) 966.

<sup>16</sup>*Tshudy v. Hubbs Stores Corporation*, (1933) 310 Pa. St. 285, 165 Atl. 238.

<sup>17</sup>Distinguish the cases where liability is imposed because the master ordered the servant to use a little force and he used too much, *Sturgis v. Kansas City Ry. Co.*, (Mo. App. 1921) 228 S. W. 861; or where he was ordered to do an act which, by its nature, brings him into conflict with the plaintiff, *McClung v. Dearborne*, (1890) 134 Pa. St. 396, 19 Atl. 698.

not reasonably to be expected, not a part of the normal injury load that the business should bear. The same reasoning would preclude placing liability on the master for a sexual assault committed by a department-store clerk upon a female customer,<sup>18</sup> although if the servant were intrusted with duties bringing him into more intimate contact with such customers, such as, for instance, the fitting of braces, a court might, on some theory, be persuaded to find otherwise.<sup>19</sup> Likewise if the servant induces the local express agent on his morning deliveries to sit down in a chair wired to electricity which, when the current was turned on, "just twisted my spine and bones," it is difficult to find more in the case than a servant's private prank for which the master should not be liable.<sup>20</sup> But just as in the case of the fitted brace, assault is seen to be not a King's-X word, neither is the word prank. For if the master confides in his servant's care an instrument or device, such as a railroad torpedo or a compressed-air hose, peculiarly susceptible to "sportive misuse,"<sup>21</sup> and it is so misused, a number of courts have held that he must respond for the prank.<sup>22</sup>

There is more here to govern liability than a mere counting of cases pro and con, although one undertaking any specialized study in this field cannot but feel a bond of sympathy with the Missouri court which noted recently, in the course of its opinion upon a scope of employment question, that defendant's industrious counsel had cited to it thirty-two cases one way while the plaintiff's learned counsel had cited over fifty the other.<sup>23</sup> To determine liability in such cases courts do more than solve a problem in double entry bookkeeping. They reflect the solemn conviction of those who live in this industrial age, in a world in which industry, by the very nature of its operations, must consume flesh and blood as well as coal and iron, that such industry shall foot the bill. Foot the bill, that is, for its normal burdens, those reasonably

<sup>18</sup>*Smothers v. Welch & Co.*, (1925) 310 Mo. 144, 274 S. W. 678.

<sup>19</sup>*Stone v. Eisen Co.*, (1916) 219 N. Y. 205, 208, 114 N. E. 44, 45 (on theory of implied contract, however, to treat customer "not only skillfully but decently, respectfully and courteously.")

<sup>20</sup>*Cinden v. DeMonlin Bros. & Co.*, (1924) 245 Ill. App. 248.

<sup>21</sup>See Horack's discussion, *The Dangerous Instrument Doctrine*, (1917) 26 Yale L. J. 224.

<sup>22</sup>*Pittsburgh, C. & St. L. Ry. Co. v. Shields*, (1890) 47 Ohio St. 387, 24 N. E. 658 (railroad torpedo); *Robinson v. Melville Mfg. Co.*, (1914) 165 N. C. 495, 81 S. E. 681. The cases pro and con are collected in (1924) 30 A. L. R. 693.

<sup>23</sup>See Bailey, J., in *Priest v. F. W. Woolworth*, (1933) 228 Mo. App. 23, 25, 62 S. W. (2d) 926, 927.

appurtenant to the conduct of the business. For this reason, once having fixed the status of the parties<sup>24</sup> as that of master and servant the normal liability pattern is somewhat as follows: The master must answer for the routine acts of the servant in the performance of what the servant reasonably believes to be his job.<sup>25</sup> But those acts abnormal and outrageous, not reasonably a part of the business enterprise, charge up no liability to the master.<sup>26</sup> They are, it is said, outside the "scope of the employment." It is not determinative, for the imposition of liability upon the employer, whether the act was merely negligent or was wilful. We have outgrown the period when it was said that "the dividing line is the wilfulness of the act."<sup>27</sup>

But the employer may parcel out bits of his enterprise. He may split off portions and hand them over to others, independent contractors, for accomplishment, just as a child may tear off successive portions of a piece of bread and toss them to the birds. Thus a railroad company, extending its lines into new territory, may either construct the required bridges itself, or it may content itself with the necessary grading and laying of the tracks and turn the matter of bridge construction over to specialists in that line of endeavor.<sup>28</sup> Two vexing questions arise at this point: First, we might well ask whether it is true in fact that the employer-railroad has the same unrestricted power of split-off as the child with his piece of bread. As to this the short answer is that it has not, the element of "danger," to which we will later advert, exercising a restraining influence.<sup>29</sup> And we might well also ask just how dependent an independent contractor may be upon the employer as to advice, supervision, or control before his independence will be denied.<sup>30</sup> These are, it is true, large questions, but we note them not for present solution but merely for the purpose of the record.

<sup>24</sup>See Stevens, *The Test of the Employment Relation*, (1939) 38 Mich. L. Rev. 188, on the test of control.

<sup>25</sup>*Staples v. Schmid*, (1893) 18 R. I. 224, 26 Atl. 193.

<sup>26</sup>Note particularly *Smith, Frolic and Detour*, (1923) 23 Col. L. Rev. 444 and *Douglas, Vicarious Liability and Administration of Risk*, (1929) 38 Yale L. J. 584, 720.

<sup>27</sup>*Wright v. Wilcox*, (1838) 19 Wend. (N.Y.) 343.

<sup>28</sup>*Hole v. Sittingbourne Ry. Co.*, (1861) 6 H. & N. 488.

<sup>29</sup>The cases are collected in exhaustive monographs in (1923) 23 A. L. R. 948, 1016, and 1084.

<sup>30</sup>The supervision involved may range all of the way from complete control as a matter of right, in which case liability follows control, *Gadsden v. Craft & Co.*, (1917) 173 N. C. 418, 92 S. E. 174, to a routine provision that the work shall be done in accordance with the plans and specifications, which has apparently seemed obnoxious to no court. The cases are collected in (1922) 20 A. L. R. 684.

Our assumption just now will be that the contractor is in truth independent, not one of the pathological cases. Upon this assumption, what are the liability patterns? There are two, well-defined. First, that involving the independent contractor himself and his workmen. This is the usual master-servant problem,<sup>31</sup> presenting, as always, scope of employment questions, the master being liable for acts within the scope, etc. Second, that involving the employer, sometimes called the "contractee,"<sup>32</sup> and the independent contractor.

This latter aspect, the relationship between the employer and his independent contractor, particularly concerns us. As to it, the orthodox theory is that the employer is not liable for the torts of such independent contractor or his servants.<sup>33</sup> The matter is not so simple, however. Exceptions flourish. They are, in fact, so numerous that one of our leading writers has expressed the opinion that comparatively little remains today of what we referred to as the orthodox theory, the employer's non-liability.<sup>34</sup> Broad these exceptions undoubtedly are, both in scope and number: the employer remains liable if the operation engaged in by the independent contractor or his employee involves an illegal act, the breach of a duty of the employer which is non-delegable either because of statute or common law, or acts either inherently dangerous, or dangerous unless suitable precautions are taken.<sup>35</sup> Provided, however, and here enters the collateral negligence qualification, the subject of this study: Provided, however, that the employer shall not be liable under one of the aforementioned exceptions if the act in controversy, out of which the litigation

<sup>31</sup>Note 91, *infra*

<sup>32</sup>See *Pennsylvania R. Co. v. Allegheny County*, (1936) 324 Pa. St. 216, 218, 188 Atl. 178, 179.

<sup>33</sup>Restatement, Torts (1934) sec. 409.

<sup>34</sup>Harper, *The Basis of the Immunity of an Employer of an Independent Contractor*, (1935) 10 Ind. L. J. 494, 497.

<sup>35</sup>Note again the annotations made in (1923) 23 A. L. R. 948, 1016, and 1084. Possibly the most frequently cited example of a restriction based upon the element of danger is that involved in the so-called "inherently" dangerous situations. As to these, the usual statement is that if the operation attempted to be split off is inherently dangerous, the employer remains liable for torts in its accomplishment. *Olah v. Katz*, (1926) 234 Mich. 112, 207 N. W. 892. Whether this is because the employer is personally at fault in direction the accomplishment of such an operation, vicarious liability not being involved, *McCommon v. Hodgate Co.*, (1933) 282 Mass. 584, 185 N. E. 483, *Salmond, The Law of Torts*, (9th ed. 1936) 831, or whether his liability rests upon principles of respondeat superior, seems for most purposes, including the determination of collateral negligence, immaterial. It may, however, become important in a situation in which the subjective attitude of the employer is significant, such as an action involving punitive damages. See *Introductory Note to Topic 1*, c. 15, (1934) 2 Torts Restatement.

arose, involved a mere collateral act of negligence.<sup>36</sup> Thus the common dogma. Hosts of questions crowd the collateral proviso. It has for years remained murky and vague in its outlines. Salmond,<sup>37</sup> for instance, notes that it is "by no means always easy" to decide whether negligence is collateral or not, and Harper<sup>38</sup> frankly says that the collateral negligence distinction "is a shadowy one at best." What, then, is collateral negligence? The question, in this form, cannot be answered. To ask if a particular act of negligence is "collateral" is like asking how high is "up." Up to what? Collateral to what? The expression collateral negligence cannot stand by itself, for it means negligence collateral-to-something. It may be advisable to go back to the beginning, historically, in our effort to see what that something is.

The doctrine of collateral negligence had its leading exposition in the case of *Hole v. Sittingbourne Ry. Co.*<sup>39</sup> The defendant railway company had been authorized by an act of parliament to construct a bridge across a navigable river. It was provided in the enabling act that river traffic should not be delayed for a longer period of time than necessary to clear the bridge of traffic and raise it. However, as a result of faulty bridge construction, the plaintiff's vessel was in fact delayed over three days and action was brought against the railway company. It defended upon the ground that whatever delay there had been because of the non-opening was caused by the negligence of the builder, an independent contractor, in the construction of the bridge, for which the railway company was not responsible. The court, however, ruled otherwise, holding that it was the duty of the railway to build a bridge which would open, as required by statute, and since this duty had not been met, liability followed. This was not, said the court, mere collateral negligence.

All of this seems clear enough in the light of modern legal thought. What is not so clear, however, is the court's reason for stressing in its opinion the matter of "collateral" negligence. Pollock, C. B., wants it clearly understood that he is resting his decision upon the distinction between "mischief which is collateral and that which directly results from the act which the contractor agreed and was authorized to do,"<sup>40</sup> this being an example of the

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<sup>36</sup>Charlesworth, *The Law of Negligence* (1938) 63; Harper, *A Treatise on the Law of Torts* (1933) sec. 292.

<sup>37</sup>Salmond, *The Law of Torts* (9th ed. 1936) 121.

<sup>38</sup>Harper, *A Treatise on the Law of Torts* (1933) sec. 292.

<sup>39</sup>(1861) 6 H. & N. 488.

<sup>40</sup>*Hole v. Sittingbourne Ry. Co.*, (1861) 6 H. & N. 488, 498.

latter type. Wilde, B., similarly emphasized the idea of collateral negligence.<sup>41</sup> Why has *collateral* negligence become, for the first time, of such importance that a substantial portion of the opinion must be devoted to it? The answer may be suggested by the development of the doctrine of the independent contractor. In 1826, in the great case of *Laugher v. Pointer*,<sup>42</sup> Abbott, C. J., and Littleton, J., forcibly enunciated the rationale of the doctrine of the independent contractor.<sup>43</sup> *Bush v. Steinman*,<sup>44</sup> which had refused to recognize the doctrine, was distinguished upon the ground that it concerned an injury arising in connection with real property.<sup>45</sup> Following the *Laugher Case* the doctrine of the independent contractor was accorded wide recognition and became firmly established in the law.<sup>46</sup> In 1853, however, in the case of *Ellis v. Sheffield Gas Consumers' Co.*,<sup>47</sup> the English courts made their first great inroad upon it, holding that the employment of an independent contractor afforded no protection to the employer if the work contracted for was itself illegal. And in the *Hole Case* the court was being asked to enunciate another exception, to impose liability again upon an employer regardless of the fact that he had hired an independent contractor.

The court did so, but it seems quite logical, under the circumstances, that it should wish to make it clear that these opinions should not be construed as a repudiation of the independent contractor doctrine, that the court continued ready to grant the insulation to the employer if the independent contractor were negligent in some matter merely collateral to his work. The *Hole Case*, however, explains the court, involves something different. It involves the obligation of an employer to erect and complete a structure having certain characteristics, in this case

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<sup>41</sup>*Hole v. Sittingbourne Ry. Co.*, (1861) 6 H. & N. 488, 500.

<sup>42</sup>(1826) 5 B. & C. 547.

<sup>43</sup>The defendant should not be held liable for the negligent driving of the coachman he had employed from a stable-keeper, according to these Justices (Bayley, J. and Holroyd, J., dissenting) because the relationship of master and servant did not exist between them, the defendant not having the selection of the driver, the power of dismissal, nor the wage obligation. Furthermore, it was pointed out that he did not have the care or management of the team. These views were adopted as the basis of the decision for the defendant in *Quarman v. Burnett*, (1840) 6 M. & W. 499, a case almost identical on its facts with *Laugher v. Pointer*.

<sup>44</sup>(1799) 1 Bos. & B. 404.

<sup>45</sup>This distinction of the *Bush Case* was finally repudiated in *Reedie v. London & N. W. Ry.*, (1849) 4 Ex. 244.

<sup>46</sup>*Quarman v. Burnett*, (1840) 6 M. & W. 499; *Milligan v. Wedge*, (1840) 12 A. & E. 737; *Rapson v. Cubitt*, (1842) 9 M. & W. 710.

<sup>47</sup>(1853) 2 E. & B. 767.

the ability to open quickly in order to allow the passage of river-borne traffic. The obligation was not met. Hence the result of the case, to hold the employer liable regardless of the fact that an independent contractor performed the actual work of construction. If the statute sets a standard for the result we must distinguish between such result and the operations leading thereto, between the loaf of bread on the pantry shelf and the kneading of the dough. Upon this analysis the court, in its language concerning collateral negligence, is not drawing a distinction between "collateral" negligence and any other kind of negligence, but rather between any negligence collateral to the accomplishment of a given result and the result itself. It would seem as though the court is emphasizing that despite the exceptional liability imposed upon the employer in the *Ellis Case* and likewise in the case before it, the independent contractor's power of insulation is still strong and his negligence in the performance of the work will no more subject the employer to liability now than it did in the period immediately following the *Laugher* decision—although if the result falls short of a statutory standard, that is another matter.

Support for this interpretation of the *Hole* decision may be found in the oft-quoted words of Lord Blackburn in *Dalton v. Angus*<sup>48</sup> in which he says:

"Ever since *Quarman v. Burnett*, it has been considered settled law that one employing another is not liable for his *collateral negligence* unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants."<sup>48a</sup>

Now *Quarman v. Burnett*<sup>49</sup> was the famous case in which two elderly ladies were held not liable for the negligent driving of a coachman hired by them "from a job-mistress of the name of Morelock." The reason for the non-liability was that the coachman was not the servant of the defendant ladies, although performing certain labour under their direction, but was, rather, an independent contractor. *Quarman*, then, merely holds that an employer is not liable for the negligence, collateral negligence if you will, of an independent contractor. The word "collateral" may be struck from Lord Blackburn's first sentence and it still remains expressive of the orthodox independent contractor doctrine. The term "collateral negligence," incidentally, is not found in the *Quarman Case*.

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<sup>48</sup> (1881) 6 A. C. 740, 829.

<sup>48a</sup> Italics, the author's.

<sup>49</sup> (1840) 6 M. & W. 499. See note 43, supra.

The distinction between negligence collateral to the conduct of certain operations, and a failure as to the result of those operations is neither difficult to see nor to apply, at least in this period of our legal history. An employer hires an independent contractor to construct a bridge. If, in violation of statutory provision, the bridge will not open to allow traffic to pass, the *Hole Case* holds that the employment of an independent contractor is no defense. As to negligence in the course of construction, the employer of the independent contractor enjoys his usual freedom from liability. Thus far, then, we have no serious difficulty with the application of the collateral negligence doctrine. But thus far (1861) we have had enunciated, of the great classes of exceptions to the independent contractor doctrine, only two—that denying the normal insulating effect if the act ordered done is illegal,<sup>50</sup> or second, if a mandatory statutory duty is involved.<sup>51</sup> The great bulk of decisions extending the rule of the employer's liability for the breach of common law duties is yet to be rendered, and the decision most productive of exceptions—that the employer remains liable in spite of the employment of the independent contractor, if he orders an act done "from which in the natural course of things injurious consequences will flow unless means are taken to prevent them"<sup>52</sup>—is still fifteen years in the future. With, however, the opinion in *Pickard v. Smith*,<sup>53</sup> and particularly with *Bower v. Peate*,<sup>54</sup> the tide of exceptions to the rule of non-liability came on in full flood. An employer remained liable for breach of common law, as well as statutory duties, for acts probably dangerous, and for operations inherently dangerous. Naturally, the collateral negligence doctrine now came in for searching examination. In a world allegedly rushing the employer to his financial destruction, it seemed to promise a secure haven. Cockburn himself in the *Hole Case* had assured industrial England that for collateral negligence the employer would not be called upon to respond, and the literal import of his words was eagerly seized upon.

Observe, now, its attempted application in a case not involving a statutory mandate, the garden variety "accident" arising from a workman's negligent act. In the case of *Holliday v. National Telephone Company*,<sup>55</sup> the defendant company employed an inde-

<sup>50</sup>*Ellis v. Sheffield Gas Consumers' Co.*, (1853) 2 E. & B. 767.

<sup>51</sup>*Hole v. Sittingbourne Ry. Co.*, (1861) 6 H. & N. 488.

<sup>52</sup>*Bower v. Peate*, (1876) 1 Q. B. D. 221.

<sup>53</sup>(1861) 10 C. B. (N.S.) 470.

<sup>54</sup>(1876) 1 Q. B. D. 221.

<sup>55</sup>[1899] 1 Q. B. 221, rev'd [1899] 2 Q. B. 392.

pendent contractor to do the soldering involved in a wiring project. As a part of such work it was a common and, the court states, the proper practice to dip the blowtorch used into the caldron of molten metal for the purpose of heating the torch. The particular blowtorch employed, however, was out of order and exploded when so heated, injuring a passerby. The defendant's counsel argued that while it was incidental to the operation to heat the torch, the contractor was not employed to do so by putting it into the molten metal, much less to do so when the safety valve was defective and that hence the act was a mere act of collateral negligence, for which the employer was not liable. Wills, J., in the Divisional Court, agreed, saying that it was "about as typical an instance of negligence merely casual, collateral, or incidental, as can well be conceived."<sup>56</sup> In the Court of Appeal, however, it was pointed out that any operation involving using a caldron of molten metal on a highway involved danger and that this was not a case of mere casual or collateral negligence "within the meaning of that term."<sup>57</sup> But what is the meaning of that term? The court does not explain. The term collateral negligence, wrested from its setting in a frame of statutory requirement in attempts to prevent the forward rush of an engulfing tide of employer liability remains, as far as this case is concerned, shrouded in mystery.

A number of attempts have been made to define collateral negligence. We will consider first the efforts of the courts in the land of the doctrine's birth. In *Hardaker v. Idle District Council*,<sup>58</sup> Lindley, L. J., attempted a delineation in terms of the employer's "duty"—"If the contractor performs their [the employers'] duty for them, it is performed by them through him, and they are not responsible for anything more. They are not responsible for his negligence in other respects, as they would be if he were their servant. Such negligence is sometimes called casual or collateral negligence." Collateral negligence, then, is negligence in respects other than in the performance of the employer's duty. The word "duty" inevitably brings to mind a test of negligence in the law of torts, one's duty not to expose others to unreasonable risk, etc. It would be well to note that the performance or breach of this particular duty is not of primary interest to us. Our inquiry is not whether a tort has been committed. It has been. That particular duty test has been applied and answered in terms of breach. The

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<sup>56</sup>[1899] 1 Q. B. 221, 228.

<sup>57</sup>[1899] 2 Q. B. 392, 400.

<sup>58</sup>[1896] 1 Q. B. 335, 342.

tortfeasor, the workman who actually did the wrong, will theoretically have to pay therefor. So will his master, provided the servant was acting within the scope of his employment. But we are going on to a further question. We want to know whether or not the employer of the independent contractor also should respond in damages for the conceded tort. Lindley, L. J., says that he must if he has not performed his duty. But where will we find this particular duty? If it is contained in terms of a statutory proviso, e.g., to fence a right of way,<sup>59</sup> or to build a bridge that will open,<sup>60</sup> the matter is relatively simple. But when we come to the common law "duties" we are in grave danger of circular reasoning, for, like the word negligence, the expression collateral negligence is both expressive of a factual situation and a legal result.<sup>61</sup> The employer, by hypothesis, is under some kind of a duty to conduct the operation in question with care. A failure in this duty will subject him to liability for the workman's negligence. But, may say the court, the act of negligence here involved is a mere collateral act of negligence. Why merely collateral? Because this act was not one of those as to which the employer was under a duty, i.e., it was merely collateral.

It may be possible to avoid this circuitry if we phrase the general employer's duty, like the tort duty, in terms of foreseeability. As to the tort duty, the orthodox question is, broadly speaking, whether or not the alleged tortfeasor, as a reasonable man, should have foreseen an unreasonable risk of injury of this general type to this plaintiff or his class.<sup>62</sup> Is the same test of foreseeability also applied for a resolution of the general employer's liability? The cases seem to indicate that foreseeability is unquestionably involved to some extent. Thus Romer, L. J.,<sup>63</sup> says that "accidents arising from what is called casual or collateral negligence cannot be guarded against beforehand and do not come

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<sup>59</sup>Gill v. Atlantic & Great Western Ry. Co., (1875) 27 Ohio St. 240.

<sup>60</sup>Hole v. Sittingbourne Ry. Co., (1861) 6 H. & N. 488.

<sup>61</sup>Note Morton's discussion in (1938) 16 Can. Bar Rev. 757, 758.

<sup>62</sup>See Harper, A Treatise on the Law of Torts (1933) 68, 72, 73.

<sup>63</sup>Penny v. Wimbledon Urban Council, [1899] 2 Q. B. 72, 78. But note the observation of Joyce, J. in Robinson v. Beaconsfield Rural District Council, [1911] 2 Ch. 188, 192. Note also the language of Finch, J., in Wright v. Tudor City Twelfth Unit, Inc., (1938) 276 N. Y. 303, 307, 12 N. E. (2d) 307, 308: "The general rule applies in that one is not liable for the negligence of independent contractors unless danger is inherent in the work. [Citing cases]. This means that the owner is not liable where the danger arises merely because of negligence of the independent contractor or his employees which is collateral to the work, and which is not reasonably to be expected, but that he is liable where, from the nature of the work, danger is readily foreseeable."

within this rule," and Cockburn, J., in *Bower v. Peate*<sup>64</sup> seems likewise willing to free the employer for injury "resulting from negligence which he had no reason to anticipate." If, however, the limits of foreseeability as to tort "duty" and as to the general employer's "duty" are coextensive, then it would seem to follow that the employer should respond for each and every negligent tort. It had to be foreseeable to be tortious, and since it was foreseeable the employer is under a duty which has been breached. But the cases do not square with such an interpretation. The employer is not held for each and every negligent act of the servants of the independent contractor. Those for which he need not respond, under this phrasing, are those he did not foresee. But how can we advise a client which acts he is foreseeing and which he is not?

Possibly it is significant that in certain of the cases in which the collateral negligence argument has been denied the fault lay in the final, completed structure. Thus the bridge would not open in the *Hole Case*, or a sign over the highway, negligently secured, fell and injured a traveller.<sup>65</sup> From these and similar cases Wells, J., sought to enunciate a doctrine of disappearance. If the questioned act is a "mere incident in the train of operations and leaving no trace upon the completed work" it is an act of casual or collateral negligence.<sup>66</sup> Again, however, the cases diverge if the test purports to be exclusive. There is ample authority that under proper circumstances an injury arising from an excavation, dug near a highway, by an independent contractor, will subject the employer to liability, i.e., he cannot escape liability on the ground that it involves a mere act of casual or collateral negligence.<sup>67</sup> And yet, we suppose, nothing is clearer than that such excavation is a mere incident in the train of operations and, unless a tunnel is being constructed, the hole is finally filled up and leaves no trace upon the completed work.

We will try once more, this time adopting the words of Rigby, L. J., in the *Hardaker Case*, in which he defines collateral negligence as "negligence other than the imperfect or improper performance of the work which the contractor is employed to do." But what is "the work" which the contractor is employed to do? The *Hardaker Case* involved the laying of a sewer. Was the duty

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<sup>64</sup>(1876) 1 Q. B. D. 321, 327.

<sup>65</sup>Tarry v. Ashton, (1876) 1 Q. B. D. 314.

<sup>66</sup>Holliday v. National Telephone Company, [1899] 1 Q. B. 221, 228.

<sup>67</sup>See Annotation, (1938) 115 A. L. R. 965, 966.

merely to lay the sewer properly? Lindley, L. J., said not. "Their duty in sewerage the street was not performed by constructing a proper sewer."<sup>68</sup> The duty was to lay a sewer-without-doing X, here X meaning the particular act of negligence complained of, breaking a gas main. The problem presented is precisely the same as that heretofore considered, phrased, however, in slightly different form, as to which, it should be noted, the potentialities for escape from liability are broader. For what is "the work?" It was just ten years later that a defendant employer argued, unsuccessfully, in the *Holliday Case* that "the work which the contractor (was) employed to do" did not include heating his blow torch in a pot of molten solder, hence that such an act was merely one of collateral negligence for which the employer should not be held.<sup>69</sup> We are forcibly reminded of the early view that the master was not liable for the act of the servant because he had not commanded the act,<sup>70</sup> and there is, no doubt, present a certain parallelism which will be touched upon hereafter.

The test proposed by Rigby, L. J., in the *Hardaker Case* most nearly approximates that usually employed in the American cases, it being phrased in terms of "the work" which the contractor was employed to do.<sup>71</sup> The argument in court shapes up in the follow-

<sup>68</sup>[1896] 1 Q. B. 335, 342.

<sup>69</sup>[1899] 1 Q. B. 221, 228, rev'd [1899] 2 Q. B. 392.

<sup>70</sup>See Wigmore, *Responsibility for Tortious Acts: Its History*, (1894) 7 Harv. L. Rev. 315, 383, 391, 441, reprinted in 3 *Select Essays in Anglo-American Legal History* (1909) 474; *Restatement of Agency, Explanatory Notes* (Tent. Draft No. 5, 1930), sec. 470.

<sup>71</sup>Most of the statements descriptive of the nature of collateral negligence employed by our courts stem from the following passages in the early case of *Robbins v. Chicago*, (1866) 4 Wall. (U.S.) 657, 678-679, 18 L. Ed. 427.

"... the party contracting for the work was liable, in a case like the present, where the work to be done necessarily constituted an obstruction or defect in the street or highway which rendered it dangerous as a way for travel and transportation, unless properly guarded or shut out from public use; . . ." And, also, "Where the obstruction or defect caused or created in the street is purely collateral to the work 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 those acts is equally liable to the injured party." (*Italics the court's.*) The court cited, among other cases, the *Hole* and the *Ellis Cases*.

The following syllabus by the court in the case of *Railroad Co. v. Morey*, (1890) 47 Ohio St. 207, 24 N. E. 269, expressly approved by the court in *Covington & Cincinnati Bridge Co. v. Steinbrock*, (1899) 61 Ohio St. 215, 228, 55 N. E. 618, 620, has also been widely quoted: "One who causes work to be done is not liable, ordinarily, for injuries that result from carelessness in its performance by the employees of an independent

ing manner: The plaintiff may concede the status of the contractor as independent, and may concede the normal liability pattern as to such status, which allows the employer full insulation from liability for negligent acts of an independent contractor and his workmen. But, the plaintiff argues, such a principle has no application where "dangerous" work is involved, my injury being one that might have been anticipated as a direct or necessary consequence of the work contracted for, should reasonable care be omitted in the course of its performance.<sup>72</sup> The defendant now counters with the collateral negligence argument. He replies that in the case at bar the act which occasioned the plaintiff's injury did not, as the plaintiff claims, result necessarily and directly from the work the contractor was authorized to do, but rather was the result of the wrongful acts of the contractor, was purely collateral to the work contracted for. The argument is one of the greatest utility, and it seems applicable to any of the exceptions. It may be employed at will in a lateral support case,<sup>73</sup> a sidewalk excavation case,<sup>74</sup> or a case of alleged inherent danger.<sup>75</sup> It may even be applied, though this requires considerable strength, to an affirmative statutory re-

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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 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. In such case the person causing the work to be done will be liable, though the negligence is that of an independent contractor." See also note 120, *infra*.

<sup>72</sup>The phraseology varies with the cases. Thus compare *Robbins v. Chicago*, (1866) 4 Wall. (U.S.) 657, 18 L. Ed. 427 with *McHarge v. M. M. Newcomer & Co.*, (1907) 117 Tenn. 595, 100 S. W. 700. It has not seemed profitable to attempt a segregation of the cases on the basis of those involving "inherent danger" and those involving danger "in the absence of special precautions," a distinction sometimes made. See the monographs in (1923) 23 A. L. R. 1016 and 1084. This is no doubt a difference in phraseology, and possibly a theoretical difference between them, but in the actual cases the fact situations seem indistinguishable. It is not unusual to find a court talking of both in the same case and apparently using the terms interchangeably. *St. Louis and S. F. R. Co. v. Madden*, (1908) 77 Kan. 80, 93 Pac. 586. Nor is it unusual to find the one defined in terms of the other. Thus, *Finch, J.*, in *Wright v. Tudor City Twelfth Unit Inc.*, (1938) 276 N. Y. 303, 308, 12 N. E. (2d) 307, 308. See also *Woods, J.*, in *Swift & Co. v. Bowling*, (C.C.A. 4th Cir. 1923) 293 Fed. 279, 282; "Evidence of inherent danger—that is, such danger as would have put a man of ordinary prudence on notice that the work could not be safely done, even with due care in the details, unless distinct and definite precautions were taken to guard against injury—would have presented a different case."

<sup>73</sup>*Bonaparte v. Wiseman*, (1899) 89 Md. 12, 42 Atl. 918.

<sup>74</sup>*Robbins v. Chicago*, (1866) 4 Wall. (U.S.) 657, 18 L. Ed. 427.

<sup>75</sup>*Covington & Cincinnati Bridge Co. v. Steinbrock*, (1899) 61 Ohio St. 215, 55 N. E. 618.

quirement, such as a provision that a railroad shall fill in or plank over all spaces between the tracks. The technique, as above, is simply to construe "all spaces" to mean all spaces opened up necessarily by doing the work of the employer as distinguished by those opened up by the negligence of the contractor.<sup>76</sup>

Our problem, then, as to collateral negligence, lies in the interpretation of the word "necessary" or "direct," or some term conveying the thought that the injury must flow as of course from the work ordered. Let us employ in our examination a formula somewhat more brief: If the act from which the injury arose was a necessary or direct part of the work involved, the employer shall respond in damages. If not, i.e., if the act was a mere collateral act of negligence, he need not. Does this mean that the employer must in terms order to be done the precise act which resulted in injury to the plaintiff? If he does, of course he is liable,<sup>77</sup> but such is a comparatively rare case. Suppose that the employer merely orders a ditch dug across the public street. He may concede that if a traveler should fall into the ditch he would be liable, but this does not happen. The traveler is hurt by colliding with a pile of earth which had been left in the street alongside the excavation.<sup>78</sup> The employer can prove that at no time had he ordered the dirt of excavation to be so piled. It is, he insists, the private failing of the workman, who should alone be liable. It is his own collateral negligence. The contract, he adds, may be searched in vain, clause by clause, for any authority or direction to so pile the dirt.<sup>79</sup> Occasionally the argument has been sustained. Thus it has been said that "In the case at bar the railroad company was not required by the contract to dig any hole in a traveled public street, much less to leave the same open and unguarded at night."<sup>80</sup>

<sup>76</sup>*Rinker v. Galveston-Houston Electric Ry.* (Tex. Civ. App. 1915) 176 S. W. 737.

<sup>77</sup>*Cleveland, C. C. & St. L. R. Co. v. Simpson*, (1914) 182 Ind. 693, 104 N. E. 301.

<sup>78</sup>*Pine Bluff Nat'l Gas Co. v. Senyard*, (1913) 108 Ark. 229, 158 S. W. 1091.

<sup>79</sup>In *Ewing v. Litzmann*, (Tex. Civ. App. 1916) 188 S. W. 742, the plaintiff was injured by the fall of a fence which had been erected by the independent contractor in its course of construction of a building. "It is true that the fence was erected and maintained by the contractors as an incident of the construction of the building, but their contract with [the employer] did not require the building of the fence," (p. 745), and, on motion for rehearing, "The owner . . . did not contract for or direct the construction of the fence." (p. 745).

<sup>80</sup>*Hackett v. Western Union*, (1891) 80 Wis. 187, 193, 49 N. W. 822, 823. See also *Whitehill v. Hartman Const. Co.*, (1914) 87 Misc. Rep.

And the enunciation of the employer's liability in such narrow terms that the injury must be the "necessary" result of the operation<sup>81</sup> has furthered this type of interpretation. "It certainly was not necessary," said a dissenting judge in a street-ditch case, "to place the gravel in a place where it would obstruct the street."<sup>82</sup> But the great weight of authority is otherwise. All of the cases holding the employer liable for an act in terms unorderly deny by implication the argument that the employer's liability extends only to those acts he has expressly commanded.<sup>83</sup>

The argument is reminiscent of an earlier day. It was long argued that the master of a servant was liable only for acts he had commanded,<sup>84</sup> and he rarely, we surmise, had difficulty in establishing that he had never at any time commanded his coachman to run down this particular pedestrian appearing as the party plaintiff. The employer's argument, of course, is perfectly consistent with a concept of liability based upon fault alone. But if liability is to be based upon broader social grounds, command would seem to be no more conclusive here than in the master-servant field. We can, with the vast majority of the courts, eliminate the thesis that only those injurious acts expressly ordered are "necessary"

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184, 149 N. Y. S. 518, 519, "The contract with Cohen did not call for the installation or use of a donkey engine;" Gleason v. Salt Lake City, (1937) 94 Utah 1, 74 P. (2d) 1225.

<sup>81</sup>Woodman v. Metropolitan R. Co., (1889) 149 Mass. 335, 21 N. E. 482. 4 Dillon, Municipal Corporations (5th ed. 1911) sec. 1723. From this phraseology follow such arguments as that made in Wright v. Tudor City Twelfth Unit Inc., (1938) 276 N. Y. 303, 307, 12 N. E. (2d) 307, 309, that "it was not necessary to do this work [of cleaning rubber mats with soap and water] on the street, that it should have been done in the basement, and that, therefore, the negligence was collateral and a mere detail of the work." Sometimes the necessary phraseology is softened to "necessarily or naturally;" Hackett v. Western Union, (1891) 80 Wis. 187, 193, 49 N. W. 822, 823.

<sup>82</sup>McCulloch, C. J., dissenting in Pine Bluff Natural Gas Co. v. Senyard, (1913) 108 Ark. 229, 239, 158 S. W. 1091, 1095. One of the clearest statements of this theory is found in Lawrence v. Shipman, (1873) 39 Conn. 586 (arbitration under rule of court reported in supplement to 39 Conn.): "If a contractor faithfully performs his contract, and a third person is injured by the contractor, in the course of its due performance, or by its result, the employer is liable, for he causes the precise act to be done which occasions the injury; but for negligences of the contractor, not done *under* the contract but in *violation* of it, the employer is in general not liable. It is not claimed here that the injury to the plaintiffs arose from the due *performance* of the contract. On the contrary, it resulted from the *breach* of the contract, by the contractor not doing his work with suitable care." (Italics the Court's.) Cf. S. H. Kress v. Bullock Shoe Co., (C.C.A. 5th Cir. 1932) 56 F. (2d) 713.

<sup>83</sup>See cases cited in note 103 *infra*.

<sup>84</sup>Note 11, *supra*.

within the meaning of the word as here used. The authorities supporting this view are meager indeed.<sup>85</sup> We can also eliminate from consideration the view that any act of negligence is either directly ordered<sup>86</sup> or proceeds necessarily, in an absolute sense, from any work ordered, in the sense that hunger necessarily proceeds from fasting. In hands sufficiently skilled and capable we venture the opinion that any act ordinarily deemed dangerous can be performed with perfect safety.<sup>87</sup> The writer hereof can sharpen a lead pencil with a knife without letting blood at any point in the entire operation; not so his three year old son. When the courts say, then, that the employer will be held liable only when the injury involved has proceeded necessarily or directly from the work he has ordered, it is well for our thinking to realize that no work necessarily involves any given act of negligence in the same sense that the work does involve the law of gravity. To put it bluntly, the phrase is meaningless in its literal content. What is meant is that the employer will be held liable for the plaintiff's injury if the act from which it proceeded has a certain relation to the work ordered. In this form it sounds vaguely familiar. We recall that the servant's master is held liable for the plaintiff's injury only if the act involved has a certain relation to the work ordered.

What is that "certain" relation? Consider again the simple case in which the employer has ordered a ditch dug in a public street. The workmen carry out his orders to dig the ditch, and as they dig they pile the dirt on the ground alongside the excavation. They could walk over and deposit it on the adjacent vacant lot but they don't. They just dig. They empty their shovels where they can, with the least possible expenditure of time and energy. When the whistle blows they go home. The next incident of importance to us is the overturning of the plaintiff's car when it strikes the

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<sup>85</sup>See material cited in notes 80-82, *supra*.

<sup>86</sup>"... it is urged that the negligence was not a direct result of the work authorized, but was merely collateral thereto, and therefore there can be no recovery. If this proposition is sound in law, then no recovery can ever be had on account of injury resulting from the negligence of a servant or agent in the performance of an act which he was authorized by his master or principal to perform, because negligence is never authorized by master or principal. The proposition is utterly untenable." Adams, J. in *Metropolitan West Side El. R. R. Co. v. Dick*, (1900) 87 Ill. App. 40, 50.

<sup>87</sup>Note the case of *Joseph R. Foard Co. v. Maryland*, (C.C.A. 4th Cir. 1914) 219 Fed. 827, 833, in which it is said, "It was not disputed that dynamite may be loaded with perfect safety, if adequate care be taken against concussion and heat."

pile of dirt so deposited in the street. Now the employer did not expressly order that the dirt be so left. Such deposit did not "necessarily" proceed from the work ordered. Yet, in this particular case, he was held liable, i.e., the piling of dirt was not "mere" collateral negligence.<sup>88</sup> Or consider this situation: a building is almost entirely consumed by fire, only a brick wall being left standing. The owner employs an independent contractor, a wrecking company, to tear it down. It is theoretically possible to do the work without injuring anyone—scaffolds could be built, nets employed, and other devices utilized, all of which would add enormously to the cost of the operation. The contractor, of course, does not build scaffolds or use nets. He simply makes fast to the wall a rope and pulls. The plaintiff's injury follows. This work could have been done without harm to anyone. The injury that resulted was not inevitable. It was due to but one thing, the negligence of the independent contractor employed to do the work. And yet the court, after examining the argument of collateral negligence with great care, held that this was not such a case and that the employer was liable.<sup>89</sup> An analogous case involves "dropping a tool," the classic example of "mere" collateral negligence. The employer ordered a bridge built over a much-travelled public highway on the Atlantic seaboard. It was no doubt theoretically possible to have built such a bridge without injuring anyone beneath it. For instance, it would have been possible, though costly in the extreme, to have covered completely the highway over the entire length of the space traversed, much as short sidewalk areas are roofed over when construction overhead is taking place. This, however, was not done, and the plaintiff was injured by the fall of an object from the bridge above. We can safely assume that the workman was not ordered to drop his hammer. We will probably agree that dropping the hammer was not a necessary result of the work ordered. Yet again the court held, after a careful examination of the argument that this was mere collateral negligence, that the employer was liable, i.e., that it was not a case of collateral negligence.<sup>90</sup>

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<sup>88</sup>*Pine Bluff Natural Gas Co. v. Senyard*, (1913) 108 Ark. 229, 158 S. W. 1091.

<sup>89</sup>*Covington & Cincinnati Bridge Co. v. Steinbrock*, (1899) 61 Ohio St. 215, 55 N. E. 618.

<sup>90</sup>*Philadelphia, B. & W. R. Co. v. Mitchell*, (1908) 107 Md. 600, 69 Atl. 422. An oft-cited English case, *Reedie v. London & N. W. Ry.*, (1849) 4 Ex. 244, is contra. Dr. Charlesworth, in his treatise on The Law

We believe that these and similar cases present a discernible likeness in rationale. The fact is that they are part of the large field embracing the whole range of employer-employee relationships, and only when viewed in such perspective do they assume their proper places. We realize, of course, that the employer who has certain work to be done may either do the work himself or employ another to do it for him. We have noted that if that other, so employed, is an independent contractor, and we will assume that he is, the employer is under no liability as to his torts, generally speaking. It is to be stressed that the release of the employer does not mean that the victim is without recompense. He has his action not only against the tortfeasor, but also against the employer of such tortfeasor, the independent contractor. Their relationship is that of master and servant, and as to them there is the usual liability measured in terms of scope of employment.<sup>91</sup> But there is this qualification of the employer's freedom from liability: If he has ordered work done which will necessarily or directly result in the creation of a situation presenting obvious and unreasonable hazards, the fact that the work is done by an independent contractor will not operate to relieve such employer of liability. The element of foreseeability of undue risk of harm, to which we have made reference heretofore, is at the root of this doctrine of denial. The same element is, of course, involved in the tort "duty," and it may be well to elaborate somewhat upon their differences since there is an obvious similarity. As employed with relation to one's "duty" not to commit a tort, the foreseeability of injury concerns a specific act or specific type of acts.<sup>92</sup> Here,

of Negligence (1938) 65, questions the Reddie decision on the ground that a highway was there involved, citing *Kearney v. London, B. & S. C. Ry.*, (1871) L. R. 6 Q. B. 759, 40 L. J. Q. B. 285.

<sup>91</sup>See cases under Independent Contractors, (1940) 27 Am. Jur. sec. 52. Note also 1 Thompson, Commentaries on the Law of Negligence (1901) sec. 685.

<sup>92</sup>*Palsgraf v. Long Island R. Co.*, (1928) 248 N. Y. 339, 342, 345, 162 N. E. 99, 101: "If no hazard was apparent to the eye of ordinary vigilance, *an act* innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to someone else. 'In every instance, before negligence can be predicated of a *given act*, back of *the act* must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury.'" Also, "If the harm was not willful, he must show that *the act* as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended." (Italics ours.)

In *re Polemis*, [1921] 3 K. B. 560, 577, Scrutton, L. J.: "To deter-

however, it involves a far broader vision. It includes acts of negligence,<sup>93</sup> of course, for under some circumstances they may reasonably be expected to be so frequent of occurrence or so fruitful of catastrophe should they occur that they alone render the operation pregnant with disaster for the unwary. But it is not limited to such acts. It embraces also the specific result which, in itself, regardless of incidents on the path towards completion, may be a hazard.<sup>94</sup> It includes segments and areas of the operation larger in scope than transitory acts but smaller in extent and magnitude than the whole. Many, in fact, are the situations in which only one or more of the total business operations involved are fraught with undue risk. And, finally, it covers the entire business operation, taken as a whole, often extending over a prolonged period of time. In other words, the emphasis here is not upon an act but upon the business operation ordered to be undertaken, upon "the work" to be accomplished. This, then, is the foreseeability of harm which prevents the split-off of an operation, which causes retention of liability in the employer, regardless of the skill of the contractor and his independence in fact, and if the foreseeability element of the tort "duty" can be so broadly construed it may in itself furnish a solution for the whole problem involved.

If, then, the employer has ordered the doing of a particular act involving undue peril to others, his liability remains as to injuries arising from the ordered act. But no given work to be done, no specified task, broad or narrow, can stand alone. This is not a rule of law but a law of nature, like the law of gravity. If you order a driver to drive his car a certain mile at a speed of forty miles an hour, in order to carry out your command he must accelerate to that speed and he must decelerate from that speed or vice versa. We can go further and say that it makes no differ-

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mine whether *an act* is negligent, it is relevant to determine whether any reasonable person would foresee that *the act* would cause damage; if he would not, the act is not negligent." (Italics ours.)

Charlesworth, *The Law of Negligence* (1939) p. 15: "It may therefore be said that a duty to take care arises whenever a person does or omits to do *an act* which is likely to be a direct cause of physical damage to person or property unless care is taken." (Italics ours.)

<sup>93</sup>Briggs v. Kloss, (1892) 51 Ind. App. 129, 31 N. E. 208; Thomas v. Harrington, (1903) 72 N. H. 45, 54 Atl. 285; Covington & Cincinnati Bridge Co. v. Steinbrock, (1899) 61 Ohio St. 215, 55 N. E. 618; Watkins v. Gabriel Steel Co., (1932) 260 Mich. 692, 245 N. W. 801.

<sup>94</sup>St. Louis, S. M. & S. Ry. Co. v. Hopkins, (1891) 54 Ark. 209, 15 S. W. 610; McNulty v. Ludwig & Co., (1912) 153 App. Div. 206, 138 N. Y. S. 84.

ence how minutely, how precisely, you may circumscribe your command, there will always be uncommanded acts on the road thereto and on the road therefrom. A mathematician can prove this to our entire satisfaction, should we desire mathematical proof. The courts, of course, recognize this law of nature, their problem being where, in the series of acts, to draw the line as to liability. The doctrine of implied authority is based upon it, being known in that part of the book as the authority to do incidental and necessary acts.<sup>95</sup> (Note that word *necessary* again.) The vicarious liability of a master recognizes it, being known in that chapter as a part of what is called scope of employment.<sup>96</sup> And here also, we submit, in this field of employer-contractor the courts recognize it and apply it.

Here its application goes under the name of collateral negligence. We spoke of the street-ditch case, in which the car was overturned by the pile of dirt left alongside the excavation.<sup>97</sup> It was true that such negligence was unnecessary, and it certainly was uncommanded. But how do laborers usually work? What kinds of acts usually accompany their assigned tasks? This is the problem at the heart of frolic and detour. When a truck-driver is sent from A to B with a load of ashes, does he normally deviate more or less for his own purposes?<sup>98</sup> Likewise, when a ditch-digger digs his trench, does he normally deviate more or less for his own purposes or convenience from the express or implied admonitions regarding his work? It is true in the street-ditch case that the work could have been performed without leaving the dirt in the street, but the court did not regard that as controlling. It held

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<sup>95</sup>"It is a fundamental principle in the law of agency that every delegation of authority, whether 'general' or 'special,' carries with it, unless the contrary be expressed, implied authority to do all of those acts, naturally and ordinarily done in such cases, which are reasonably necessary and proper to be done in this case in order to carry into effect the main authority conferred." Mechem, *The Law of Agency* (2d ed. 1914) sec. 715. See also sec. 242 and sec. 789.

<sup>96</sup>"Where authority is conferred to act for another without special limitation, it carries with it, by implication, authority to do all things necessary to its execution," Andrews, J. in *Rounds v. Railroad Co.*, (1876) 64 N. Y. 129, 133. Note also Labatt, *Master and Servant* (2d ed. 1913) sec. 2277: "It is well settled that if the act complained of was incidental to the discharge of the functions covered by the servant's general authority, the master cannot avoid liability on any of the following grounds: . . .;" *Restatement of Agency* (1933) sec. 229.

<sup>97</sup>*Pine Bluff Natural Gas Co. v. Senyard*, (1913) 108 Ark. 229, 158 S. W. 1091.

<sup>98</sup>See *Edwards v. Earnest*, (1922) 208 Ala. 539, 540, 94 So. 498, 600, in which McClellan, J., in a detour case, speaks of the driver's "reasonably to be expected manner of discharge of his duty in the premises."

that if the performance of the work "in the usual and only practical way it could be performed"<sup>99</sup> created the dangerous condition, the employer should respond in damages, and could not escape liability on the grounds that the negligence was merely collateral to the work to be done. This thought is constantly found in the cases and is variously expressed. It may appear as "the ordinary and reasonable"<sup>100</sup> use of the agencies involved, or, more simply, as "the ordinary mode of doing the work."<sup>101</sup> The thought is that an act is not to be adjudged collateral if its performance is reasonably to be expected in view of the normal methods of doing such work, of the place where it was ordered done, and, we would suppose, of the natural traits of the workmen as a group. These certainly, and possibly other, elements seem inherent in a consideration of the *usual* way work of such type is done and the *practical* ways of doing it.

We commenced this study with the master-servant cases, and it will be recalled that the employer of a servant is held to respond for such servant's torts as are within his scope of employment, not because of command to do the acts, but because they fall within the normal injury load of the business under consideration. Any attempt to explain today's cases of frolic and detour, for instance, upon any other basis, such as, for instance, fault arising from command, is doomed to utter failure. The plain fact of the matter is that the cases just don't square with it. The employer is not, however, as we have seen, liable for the whimsical and outrageous acts of his employee. The burdens for such acts, it is apparently felt, are not properly allocable to the business in which the employee happened to be working. The plaintiff has the tortfeasor's responsibility and with that he must be content. Our present problem, of course, is employer-contractor, not master-servant, but no reason suggests itself why the broad principle of liability suggested, which has so influenced other phases of the employer-employee relationship, including workmen's compensation as well as scope of employment, should cease to function because the employer is that type denominated an independent contractor. Possi-

<sup>99</sup>Pine Bluff Natural Gas Co. v. Senyard, (1913) 108 Ark. 229, 236, 158 S. W. 1091, 1094.

<sup>100</sup>Welz v. Manzillo, (1931) 113 Conn. 674, 682, 155 Atl. 841, 845. The Connecticut court has also employed the phrases, "natural and reasonable execution" of the work, and "the use of the ordinarily and reasonably to be contemplated means or agency for doing the work," Jacob v. Mosler Safe Co., (Conn. 1940) 14 A. (2d) 736, 737, 738.

<sup>101</sup>Medley v. Trenton Inv. Co., (1931) 205 Wis. 30, 236 N. W. 713, 715.

bly an attempt to apply the same rationale to collateral negligence will be helpful. The effort seems to be worth making. Upon this theory an employer's liability, retained because of the hazard involved in work ordered, would not be limited to the literal terms of the precise command as to work to be done. The act of negligence from which the injury arose may have been unordered, and unnecessary, but if it is the kind of an act which might reasonably be expected to occur when the operation ordered was performed in the usual and practical, the ordinary, natural, and reasonable manner, the employer should be liable, whether the act is commanded or not.<sup>102</sup>

To put it more shortly, if, in view of all of the circumstances, the injury arose out of an act within the fair scope of the business operation ordered, it should be deemed "necessary" as the term is employed in the formula under consideration. Such acts are a part and parcel of what was ordered done, not something extra, unforeseen, and unexpected. They cannot, on any rational basis, be called "merely" collateral. Hence we find that the piling of the dirt in the street, the demolition of the firewall, the dropping of the object from the bridge, the heating of the blowtorch in the solder, though each involved an act of negligence, imposed liability upon the employer. The acts were not mere collateral acts of negligence, unordered though they may have been. We find substantial support in the cases for the view that the boundaries of the employer's liability in the situation under consideration are not fixed by literal command to do or not to do, are not fixed by words of art, by rote and ritual, but by the fair scope of the enterprise or operation which subjected others to unusual

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<sup>102</sup>That the liability of the employer extends beyond the literal words of command is also recognized in such cases as *McCarrier v. Hollister*, (1902) 15 S. D. 366, 89 N. W. 863, and *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335, in both of which cases the employer had ordered a sewer dug. The plaintiff's injury in the *McCarrier* case resulted from falling into the excavation, in the *Hardaker* case from the contractor's negligent breaking of a gas main. Both cases reach the same result (employer liable), and on strikingly similar language, although the *Hardaker* Case is not cited by the *McCarrier* court. The latter said, in part, "The nature of the work demands more than its [the construction of the sewer's] proper performance." 15 S. D. 366, 369, 89 N. W. 863. The *Hardaker* court observed that "Their [the employers] duty in sewerage the street was not performed by constructing a proper sewer." [1896] 1 Q. B. 335, 342. Both courts obviously conceive of "the work" as comprehending more than the construction of the sewer itself.

hazard.<sup>103</sup> No other conclusion seems possible save that the public feeling as to the responsibility of a business for its proper burdens is making itself felt here as well as in the other branches of the law involving employer-employee-third party relationships.

On the other hand, should the work ordered not, in its fair scope, subject others to unreasonable risk of harm, there should be no liability for the employer even though, through some mischance, the plaintiff actually was injured as a result of some incident having to do with the work. If, that is, the act from which the injury flowed was an act which, far from being usual and practical, was unorthodox and extraordinary as a means of accomplishing the business operation involved, or that portion of it under consideration, it would seem clear that such acts should impose no liability upon the employer, i.e., be merely "collateral." There may be, of course, a nice question of fact at this point, but the principle seems clear. Thus one may order a hole dug, reasonably believing from the surface indications that it will be dug in the usual manner, but the independent contractor, for reasons of his own, decides instead to blast out the earth and negligently does so, to the plaintiff's injury.<sup>104</sup> Or the employer may order painted the shutters on his building, reasonably believing that they will be painted in place, as they have always been. This particular independent contractor, however, decides to remove them all from the building before painting, in the course of which project one falls five stories to the street, injuring a pedestrian.<sup>105</sup> Or the employer may order a street paved, in the course of which an

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<sup>103</sup>See also *Girdzus v. Von Etten*, (1918) 211 Ill. App. 524 (piece of wood projecting from material on sidewalk); *Briggs v. Klosse*, (1892) 51 Ind. App. 129, 31 N. E. 208 (plumbers installing water pipes negligently undermined party wall); *Olah v. Katz*, (1926) 234 Mich. 112, 207 N. W. 892 (plumbers left unguarded hole near sidewalk into which child fell); *Watkins v. Gabriel Steel Co.*, (1932) 260 Mich. 692, 245 N. W. 801 (sub-contractors negligently failed to secure steel joists on building in course of construction, because of which plaintiff, masonry workman, fell and was injured); *Thomas v. Harrington*, (1903) 72 N. H. 45, 54 Atl. 285 (plumber negligently left excavation in the street unguarded); *Wright v. Tudor City Twelfth Unit Inc.*, (1938) 276 N. Y. 303, 12 N. E. (2d) 307; *Mullins v. Siegel-Cooper Co.*, (1904) 95 App. Div. 234, 88 N. Y. S. 737, *aff'd* (1905) 183 N. Y. 129, 75 N. E. 1112, (teamsters for workmen building wall had driven across sidewalk to the work, causing defect in walk resulting in plaintiff's injury); *Hammond Ranch Corp'n v. Dodson*, (1940) 199 Ark. 846, 136 S. W. (2d) 484 (airplane pilot employed to spray fields with poison flew in circles over area to be sprayed, but failed to cut off the poison spray when circling plaintiff's pasture).

<sup>104</sup>*McNamee v. Hunt*, (C.C.A. 4th Cir. 1898) 87 Fed. 298.

<sup>105</sup>*Davis v. Whiting & Son*, (1909) 201 Mass. 91, 87 N. E. 199.

embankment is raised, to the plaintiff's injury. It is not raised, however, in the area adjacent to the paving, where the work is being done, but some distance outside such area, due to the method employed by the contractor for carrying on the work.<sup>106</sup> In none of these cases was the employer held liable, i.e., the negligent acts involved were merely "collateral." The decisions seem manifestly sound. An act cannot be said to be within the normal range of a business operation ordered if no reasonable employer would contemplate its performance as a part of the work to be done. If the employer's liability is to be correlated in even a general manner with the foreseeable burdens of the dangerous operation he has ordered, it is obviously unjust to impose liability for unusual and unorthodox methods of performance.

Nor, because an ordered operation involves an undue risk of harm to others in a given aspect, would it seem to follow that the employer's liability should be retained as to every conceivable injury arising from such operation. Those remote to the peril reasonably to be apprehended should not, we take it, be deemed to be within the fair range of the operation as to which liability is retained. Thus consider again the razing of a brick wall left standing in a dangerous condition after a fire. The owner orders it torn down, carefully. We have seen that he is liable for injuries received from the negligent tearing down thereof, even though the particular act which caused the injury had not in terms been commanded.<sup>107</sup> Suppose, however, that the plaintiff receives his injury not from the collapse of the wall or the negligent dropping of bricks therefrom, but from the overturning, because improperly braced, of some machine, such as a derrick, in use in connection with the project. In the actual case most nearly presenting these facts<sup>108</sup> the employer was not liable because the wall, having been left in a safe condition, its removal did not, felt the court, present an operation of danger. But, it continued, "even if the evidence had showed this wall to have been out of 'plumb' and 'manifestly dangerous,' we are of the opinion that the principal contractor would only be liable for damage resulting from the defective condition of the wall."<sup>109</sup> Analogy, too, is convincing. The so-called

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<sup>106</sup>Callahan v. Salt Lake City, (1912) 41 Utah 300, 125 Pac. 863.

<sup>107</sup>Note 89, supra.

<sup>108</sup>James Griffith & Sons Co. v. Williams, (1912) 15 Ohio C. C. (N.S.) 9.

<sup>109</sup>James Griffith & Sons Co. v. Williams, (1912) 15 Ohio C. C. (N.S.) 9, 11.

"dangerous instrumentality" doctrine<sup>110</sup> is quite in point. A master who entrusts railroad torpedoes to his servant will be called upon to respond in damages when the plaintiff is injured through their misuse in jest,<sup>111</sup> even though he had not ordered practical joking by the servant in question and, in fact, had expressly forbidden it. He did, however, realize the jesting potentialities which past experience has shown to inhere in the railroad torpedo. But when the same torpedo is employed as a missile to carry a love letter to a young lady who lives along the railroad's right-of-way, the torpedo later finding its way to the kitchen stove, to the plaintiff's detriment, it is quite consistent with the above authority to say no liability.<sup>112</sup> The mere fact that a device, or an operation, is dangerous under some circumstances should not make the employer liable under any and all circumstances.<sup>113</sup>

Before swinging over to our next course it may not be amiss to look briefly astern. It may be that the decisions here noted do in fact reflect the modern thought in adjacent fields that liability for injuries arising in the course of an ordered operation are not limited to those arising from the terms of precise command, that liability is being imposed for acts within the usual scope of the activities ordered and is not being imposed for unpredictable acts not normally connected therewith. One point of inquiry, however, still remains. There is a great mass of cases yet untouched. For their consideration we will again hypothesize. Let us assume that you hire a painter, an independent contractor, for a complete

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<sup>110</sup>See Horack, *The Dangerous Instrument Doctrine*, (1916) 26 *Yale L. J.* 224.

<sup>111</sup>*Pittsburgh, C. & St. L. Ry. Co. v. Shields*, (1890) 47 *Ohio St.* 387, 24 *N. E.* 658.

<sup>112</sup>*Johnson v. C. R. I. & P. Ry. Co.*, (1913) 157 *Iowa* 738, 141 *N. W.* 430.

<sup>113</sup>The result of the retention of liability on the part of the employer due to his having directed the performance of a dangerous task might justify the position that, liability remaining, the relationship between the employer and the employee of the independent contractor is that of master and servant. Hence the question as to the range of acts for which the employer must respond becomes a scope of employment question, the "employment" however, comprising only that operation as to which liability is retained because of the danger involved. Comparatively few cases suggest this analysis. See *Thomas v. Saulsbury & Co.*, (1924) 212 *Ala.* 245, 102 *So.* 115, and *Gerrard Co. v. Fricker*, (1933) 42 *Ariz.* 501, 27 *P.* (2d) 678. The normal approach of the courts is to fix the status of the parties as that of employer and contractor, following which is considered the problem of whether or not the injury resulted from an act directly or necessarily involved in the work ordered. *Wright v. Tudor City Twelfth Unit, Inc.*, (1938) 276 *N. Y.* 303, 12 *N. E.* (2d) 307 well illustrates the almost invariable technique employed. The result should not vary greatly on either analysis.

repainting of your place of business inside and out, including the showrooms, the upstairs storeroom, and even the sign hanging out over the sidewalk. So the contract reads. The work gets under way. But the painter is jinxed. While he is painting the upstairs storeroom his ladder slips and the paint bucket, cracking through the window, lands on a pedestrian below. But that is not all. While he is painting the sign suspended over the sidewalk the bucket again falls, and another pedestrian takes his place in the ranks of the parties plaintiff. The employer of the independent contractor was under no liability as to the first incident, according to *Drennan Co. v. Jordon*,<sup>114</sup> but as to the second, the case of *Richman Bros. Co. v. Miller*,<sup>115</sup> the employer had to make good in damages. The one act of negligence was collateral and the other not.

Or, you hire a plumber to put water pipes in an old house you have purchased and are remodeling. The story of his activities is replete with injured plaintiffs. To start with, he has to excavate near the sidewalk to get to the water main. He leaves the hole unguarded and the first plaintiff falls in. The failure to fence, light, and barricade is not collateral. The responsibility is yours according to *Olah v. Katz*.<sup>116</sup> His next operation is to dig under a party wall to get into your house. He does so carelessly and the adjoining owner is damaged. Again you respond in damages, the injury not resulting from collateral negligence.<sup>117</sup> But he's not through. Another injury is impending. Working on the second floor, he carelessly dislodges a board from its place on the windowsill and it falls to the courtyard below, injuring the plaintiff who was then and there in the exercise of due care. But this time you are in the clear. It was mere collateral negligence. So said *Hyman v. Barrett*.<sup>118</sup>

It is believed that these incidents fall into a consistent pattern. We have noted heretofore that a business enterprise, in fact any ordered work, involves a series of related operations, segments, phases, or parts. Some of them are of such nature that in their normal conduct they involve, to one exercising reasonable fore-

<sup>114</sup>(1913) 181 Ala. 570, 61 So. 938. The court notes that "If the workman had been the servant of the defendant, it would, perhaps, be liable; but, since he was the servant of an independent contractor, no principle of general law attaches responsibility to the defendant." 181 Ala. 570, 574, 61 So. 938, 939.

<sup>115</sup>(1936) 131 Ohio St. 424, 3 N. E. (2d) 360.

<sup>116</sup>(1926) 234 Mich. 112, 207 N. W. 892.

<sup>117</sup>*Briggs v. Klosse*, (1892) 51 Ind. App. 129, 31 N. E. 208.

<sup>118</sup>(1918) 224 N. Y. 436, 121 N. E. 271.

sight, an undue risk of harm to others. As to these the employer should respond in damages as to any act fairly within their scope. But for any act outside such hazardous phase of the work he enjoys his normal insulation. Thus in the painter case, that portion of the enterprise relating to the painting of the overhead sign obviously was a most hazardous one. As to it, the employer's liability remained, even though the painter was not commanded to drop the bucket. But for acts outside the range of the dangerous operation, even though, perchance, others may be injured from the contractor's "casual" negligence in connection therewith, the employer should be under no liability. Similarly in the case of the plumber, the circumstances were such that two segments of the completed whole, the excavation near the sidewalk and the tunneling under the party wall, created a situation of unusual risk to the person or property of others. For all acts within the normal range of these two portions of the whole, the employer remained liable. But for acts of negligence unrelated thereto, such as knocking the board off the windowsill, acts unrelated in fact to any foreseeably dangerous operation, the employer was not liable. The act of negligence was "collateral."

It is well to note that in each case we had a "mere" act of negligence. Considerable difficulty has been caused in this field by a too-ready assumption, merely because an act is a negligent act, that it is an act of *collateral* negligence, i.e., that the employer is not liable. The unreasonable risk from routine acts of negligence may, however, be the very reason why an operation is said to be inherently dangerous. It must be remembered that the employer's liability remains because he has directed the doing of a dangerous work. The danger, as we have seen, may arise from the result of the ordered operation, such as a lamp or sign, improperly secured, left hanging over a sidewalk.<sup>119</sup> It may arise from negligence in connection with some isolated and transitory process or operation undertaken on the path to completion, such as a temporary excavation dug near a public highway,<sup>120</sup> a hole not there yesterday and to be filled in tomorrow. Or it may arise from the mere routine of accomplishment and be present at all stages of the work until completion thereof, such as the building of a bridge over a crowded

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<sup>119</sup>Note 94, *supra*.

<sup>120</sup>*Robbins v. Chicago*, (1866) 4 Wall. (U.S.) 657, 18 L. Ed. 427; *McCarrier v. Hollister*, (1902) 15 S. D. 366, 89 N. W. 862. There are numerous cases of this type which will be found collected in Annotations in (1923) 23 A. L. R. 984, 1016, and 1084, and (1938) 115 A. L. R. 965.

highway.<sup>121</sup> In other words, the dangerous area of "the work" may involve the result, certain particular steps taken on the way to the result, or the entire series of operations involved, with the final result being relatively safe, such as the bridge case. An undertaking might easily involve, of course, more than one of these types of risk and possibly all of them.

Should there be lacking, however, in the entire operation itself or any portion thereof out of which the injury accrued the element of foreseeable harm to others in the normal conduct of the operation the employer should not be called upon to respond for the negligence involved. Hence the release of the employer when the paint bucket fell during the painting of the inside store-room in the *Drennan Case*, and when the windowsill board fell in the *Hyman Case*. Similar cases abound.<sup>122</sup> Since liability is retained because of the element of undue risk to others, such element must be found before any exception based thereon can possibly be applied. Of course, reasonable men may differ as to whether or not the operation does in fact subject others to unreasonable hazards, but present the hazard must be. It is a *sine qua non*, a condition precedent to liability. If no unusual peril from the performance of the operation in the usual and practical manner is found to exist, no further question will arise. We may be certain in such case that the act will be denominated a mere collateral act of negligence, even though it may have arisen from an act expressly ordered.<sup>123</sup>

Much of the confusion in the cases is due, we believe, to the empirical approach usually employed. The courts do not, in ex-

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<sup>121</sup>*Philadelphia B. & W. R. Co. v. Mitchell*, (1908) 107 Md. 600, 69 Atl. 422.

<sup>122</sup>Significant as to this type of collateral negligence is the Georgia court's paraphrase of their statute relating to independent contractors, as reported in *Lampton v. Cedartown Co.*, (1909) 6 Ga. App. 147, 149, 64 S. E. 495, 496: "Civ. Code 1895, sec. 3818, provides as follows 'The employer generally is not responsible for torts committed by his employee, when the latter exercises an independent business, and in it is not subject to the immediate direction and control of the employer.'" The court continued as follows "In other words, a person who employs an independent contractor to perform a specified piece of work is not liable for injuries caused by any mere *casual* tort which the latter's servants may commit while the work is in progress." (Italics ours.) There are many cases of this type. See also: *Wabash Ry. v. Farver*, (1887) 111 Ind. 195; *Hoff v. Shockley*, (1904) 122 Iowa 720, 98 N. W. 573; *Yellow Poplar Lumber Co. v. Adkins*, (1927) 221 Ky. 794, 299 S. W. 963; *Leavitt v. Bangor R. R. Co.*, (1897) 89 Me. 509; *City Elect. Ry. v. Moores*, (1894) 80 Md. 348, 30 Atl. 643; *Pickett v. Waldorf System, Inc.*, (1922) 241 Mass. 569, 136 N. E. 64; *Weinfeld v. Kaplan*, (1940) 282 N. Y. 348, 26 N. E. (2d) 287; *Crow v. McAdoo*, (Tex. Civ. App. 1920) 219 S. W. 241.

<sup>123</sup>*Swift & Co. v. Bowling*, (C.C.A. 4th Cir. 1923) 293 Fed. 279.

amining a question of negligence, normally list a series of naked facts and seek in them the analogue of the case at bar. They do not, for instance, say, "The following have been described as acts of negligence: Crossing a street, dropping a hammer, shooting a gun, driving a car," and conclude therefrom that the act before it is or is not a negligent act. Yet such is often the technique of able courts, when faced with a collateral negligence question, in those few cases in which there purports to be any examination whatever of the doctrine:

"If the contractor leaves a pickaxe in the road,<sup>124</sup> or negligently drops a stone from a bridge<sup>125</sup> under construction over a highway, or negligently fires a blast, or while making repairs to a house, casually dislodges a board, the employer is not liable. If, however, he makes an excavation, or raises an embankment . . . his employer is liable."<sup>126</sup>

Small wonder that scholars both on the bench and in the schools express doubt as to the principles involved. The empirical approach is, of course, facilitated by the fact that the expression collateral negligence, like the world negligence itself, is employed in at least two different ways, as expressive of a factual situation and as expressive of a legal result.<sup>127</sup> When the servant of an independent contractor was ordered, as we saw, to paint the inside of a second-story room, and his paint bucket, because of a succession of incidents, was finally deposited upon a pedestrian in the street below, we have no quarrel with a court which simply says, as to the employer's liability, that it was an act of collateral negligence.<sup>128</sup> Thus the legal result. Shift over, now, in our use of the term. Digest the case as square authority for the proposition that an independent contractor's dropping of his paint bucket upon a pedestrian below is an act of

<sup>124</sup>This hypothetical case, starting out as an argument made by counsel in the case of *Penny v. Wimbledon Urban District Council*, [1899] 2 Q. B. 72, 76, has been elevated in the course of years to the dignity of a decision. Thus, see its citation in *Hyman v. Barrett*, (1918) 224 N. Y. 436, 121 N. E. 271.

<sup>125</sup>This was the famous *Reedie* case (1849) 4 Ex. 244 which has been questioned by Charlesworth in his recent work on *The Law of Negligence* (1939) 65, citing *Kearney v. London B. & S. C. Ry.*, (1871) L. R. 6 Q. B. 759, 40 L. J. Q. B. 285. There is strong authority in this country contra. See *Philadelphia, B. & W. R. Co. v. Mitchell*, (1908) 107 Md. 600, 69 Atl. 422.

<sup>126</sup>*Boylhart v. Di Marco, Reimann, Inc.*, (1936) 270 N. Y. 217, 220, 200 N. E. 793, 794. Contrast Chapman's careful examination, *Liability for the Negligence of Independent Contractors*, in (1934) 50 Law Q. Rev. 71.

<sup>127</sup>Note remarks of Prof. Montrose in (1938) 16 Can. Bar Rev. 757, 758, *The Basis of the Power of an Agent in Cases of Actual and Apparent Authority*.

<sup>128</sup>*Drennen Co. v. Jordon*, (1913) 181 Ala. 570, 61 So. 938.

collateral negligence. In the next paint-bucket case, however, in which the bucket fell from the hands of the workman painting a sign suspended over a much-travelled street, the court quite properly, we feel, denied the plea of "mere" collateral negligence.<sup>129</sup> The two cases seem reconcilable. But nothing could better illustrate the point that it is utterly futile, and conducive of nothing but confusion, to say baldly that any given act of negligence is an act of "collateral" negligence without explaining what it is collateral to.

For the determination of whether or not a questioned act is an act of collateral negligence we propose, rather than a purely empirical approach, the following type of analysis, suggested by this review of the cases: First, does the performance of the work in its normal manner expose others to undue risk of harm? If so, and the plaintiff has been injured as a result of such performance, there is substantial authority that the injury has proceeded "necessarily" from the work ordered, and the employer will be liable therefor. Some cases, it is true, not finding an express command to do or to omit the act in question, from which the injury arose, describe the act as unnecessary and hence "collateral" to the work to be done, thus releasing the employer from liability. These cases ground liability upon fault, and, while consistent with the reasoning of many of the older cases, are believed to be inconsistent with the modern basis for employers' liability, namely, that every business project shall bear the fair cost of its operation. The modern theory as applied to these cases imposes liability upon the employer for all acts within (and, see below, only those acts within) the normal scope of the hazardous operation ordered. Since, however, the employer's liability rests upon the normal and foreseeable burdens of the operation in question, there will be no liability if the independent contractor, upon his own volition, adopts some unusual mode of performance, such as un contemplated and unnecessary blasting, or if the injury arose from some incident unrelated to the danger causing the employer's retention of liability. Such acts, again, are "collateral." The performance of the work in its normal manner has not exposed others to unreasonable peril and the employer will not be called upon to respond for torts committed in the course of its execution. Such torts are likewise "collateral." The employer has ordered done

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<sup>129</sup>*Richman Bros. Co. v. Miller*, (1936) 131 Ohio St. 424, 3 N. E. (2d) 360.

nothing hazardous and the plaintiff will have to rest content with the liability of the tortfeasor and his immediate employer.

Collateral negligence, then, as actually employed in the cases, is a term of various meanings. It is applicable to no single fact situation, for the same physical act may be an act of collateral negligence in one case and not in the next. The term expresses the legal result of non-liability of the employer of an independent contractor. It performs, then, in the employer-independent contractor field much the same function as the term scope of employment in the master-servant field. It bounds the employer's area of freedom.