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Liability of Vendor of Real Property For Personal Injuries

The author of this Note discusses the liability of the vendor of real property to the vendee or third persons injured on the premises after the sale has been completed. He concludes that the vendor should not be liable unless he has concealed the defect causing the injury, or unless he is also the builder and the defect causing the injury resulted from his negligence.

THE general rule in the United States and England is that a vendor of real property, after parting with title and possession, is not liable for subsequent injuries to his vendee or third persons caused by dangerous conditions existing on the property at the time of sale.[1] This rule has undergone few changes since it was stated in *Palmore v. Morris, Tasker & Co.*[2] sixty years ago. The purpose of this Note is to examine the application of and exceptions to the general rule and to analyze the soundness of that rule when applied to builder-vendors.

I. Application of the General Rule

Since its inception, the general rule has been applied to actions involving injuries on all types of real property, regardless of whether the vendor created the dangerous condition or merely allowed it to arise through disrepair. In applying the general rule, the courts have set forth alternative lines of reasoning, depending on whether the injured plaintiff is the vendee or a third person.[3] When the vendee

1. See 2 Harper & James, Torts 1518 (1956); Prosser, Torts 462 (2d ed. 1955); Restatement, Torts § 352 (1934).

2. 182 Pa. 82, 37 Atl. 995 (1897). In *Palmore*, the plaintiff, injured by a defective gate while standing upon a public sidewalk adjacent to the property, was denied recovery from a vendor who had sold the property the previous day. This case, although involving an injury to one *outside* the premises, is the foundation case for most decisions involving injuries to persons *upon* the premises.

3. Injured persons attempting to recover from the vendor have advanced the following theories of action: negligence, nuisance, implied warranty, and analogy to landlord-tenant cases. Most actions by injured vendees or third persons have been based upon the vendor's negligence in creating the dangerous condition or allowing it to arise through disrepair. This theory has been rejected by the courts except where liability of the vendee is deferred until he has had time to inspect and make repairs (see text accompanying notes 11 and 12 *infra*) or where the concealment exception has been applied (see text accompanying notes 14 through 17 *infra*). See cases cited notes 4 and 7 *infra*.

Recovery on the nuisance theory has been allowed by the New York courts under the Multiple Dwelling Law of that state. These courts have interpreted that law as expanding the theory of nuisance to include disrepair of a multiple dwelling, and have allowed recovery from the vendor by applying the common law doctrine that

is injured, the theory underlying denial of recovery appears to be that the vendee should have inspected the premises before sale and rejected them if their condition was unsatisfactory.[4] Having had this opportunity to inspect, the vendee is presumed to have accepted the condition of the property at the time of sale. This approach is strongly stated in the English case of *Otto v. Bolton & Norris*,[5] in which the vendee's mother was injured by falling plaster from an obviously defective ceiling. The court denied the plaintiff recovery in her suit based on the vendor's negligent construction, and said:

> A purchaser can make any examination he likes, either by himself or by somebody better qualified so to do. He can take it or leave it, but if he takes it, he takes it as he finds it. It is, perhaps, the strongest example of the application of the maxim, "caveat emptor."[6]

Where a third person is injured, recovery is denied on the theory that the duty to maintain the property, being one of ownership and possession, terminates when the property is sold because the vendor has neither control over, nor the right to repair the premises.[7] For example, in *Copfer v. Golden*,[8] the child-plaintiff was attracted to

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the creator of a nuisance does not rid himself of liability by conveying the property to another. N.Y. MULT. DWELL. LAW §§ 78, 309. Under this theory the vendor's liability extends until "the new owner has had reasonable opportunity to discover the condition on prompt inspection and to make necessary repairs." Pharm v. Lituchy, 283 N.Y. 130, 132, 27 N.E.2d 811, 812 (1940). For a discussion of the New York law, see 2 WASH. & LEE L. REV. 148 (1940).

New York has not allowed recovery on the nuisance theory where a multiple dwelling is not involved. See Antonsen v. Bay Ridge Sav. Bank, 266 App. Div. 164, 41 N.Y.S.2d 629 (Sup. Ct. 1943) (per curiam). *Accord*, McQuillan v. Clark Thread Co., 12 N.J. Misc. 409, 172 Atl. 370 (Sup. Ct. 1934); McIntosh v. Goodwin, 40 Tenn. App. 505, 292 S.W.2d 242 (1954). *But see* Bray v. Cross, 98 Ga. App. 612, 106 S.E.2d 315 (1958).

The theory of implied warranty has been rejected on the ground that warranties are not implied in the sale of real estate. Combow v. Ground Inv. Co., 358 Mo. 934, 218 S.W.2d 539 (1949); Otto v. Bolton & Norris, [1936] 2 K.B. 46; 4 WILLISTON, CONTRACTS § 926 (rev. ed. 1936).

An analogy to the landlord-tenant cases has been rejected on the ground that the two relationships differ substantially. Smith v. Tucker, 151 Tenn. 347, 270 S.W. 66 (1924). In any event, this theory would be unavailing in most jurisdictions since recovery against the landlord is denied. See 2 HARPER & JAMES, TORTS 1509 (1956).

4. Cases involving injured vendees: Stone v. Heyman Bros., 124 Cal. App. 46, 12 P.2d 126 (1st App. Dist. 1932); Kordig v. Grovedale Oleander Homes, Inc., 18 Ill. App. 2d 48, 151 N.E.2d 470 (1958); Mercer v. Meinel, 214 Ill. App. 532 (1919); Combow v. Ground Inv. Co., 358 Mo. 934, 218 S.W.2d 539 (1949); Smith v. Tucker, 151 Tenn. 347, 270 S.W. 66 (1924); McIntosh v. Goodwin, 40 Tenn. App. 505, 292 S.W.2d 242 (1954); Ropeke v. Palmer, 6 Tenn. App. 348 (1927); Otto v. Bolton & Norris, [1936] 2 K.B. 46; Bottomley v. Bannister, [1932] 1 K.B. 458.

5. [1936] 2 K.B. 46. For a criticism of this case, see 52 L.Q. REV. 313 (1936).

6. Otto v. Bolton & Norris, [1936] 2 K.B. 46, 52.

7. Cases involving injured third persons: Copfer v. Golden, 135 Cal. App. 2d 623, 288 P.2d 90 (2d App. Dist. 1955); Upp v. Darner, 150 Iowa 403, 130 N.W. 409 (1911) (third party's horse killed on premises); McQuillan v. Clark Thread Co., 12 N.J. Misc. 409, 172 Atl. 370 (Sup. Ct. 1934); Slavitz v. Morris Park Estates, 98 Misc. 314, 162 N.Y. Supp. 888 (Sup. Ct. 1917) (decided on the nuisance theory); Palmore v. Morris, Tasker & Co., 182 Pa. 82, 37 Atl. 995 (1897).

8. 135 Cal. App. 2d 623, 288 P.2d 90 (1955).

the premises by various objects placed there, and was injured while playing on a stripped-down trailer. After finding the owner liable for an attractive nuisance, the court released the vendor who had conveyed the property seven months earlier, saying:

> After the owner of property has disposed of it he is no longer liable for what may happen thereon for the reason that he is in no position to control the use thereof and his duty to children of tender years who come thereon is at an end. . . . By the conveyances, defendants . . . divested themselves of title and all right to possession and of reentry for any purpose; all duties of ownership as to them were at an end.[9]

In most instances, the reasoning supporting the application of the general rule is sound. Once the property has left the possession and control of the vendor, he can neither enter upon the land to make repairs, nor can he require the vendee to make them. He cannot control the manner in which the premises are used or protect the people who use them. Furthermore, to protect his own interests the vendee should inspect the property he is buying; as a practical matter, sales of real estate are not concluded until the vendee or his agent has made an examination to discover its true condition. If he conducts a reasonable inspection, the vendee can discover patent defects and may reject the property or insist upon repair. Therefore, he should be bound by his inspection with respect to defects which could have been discovered.

This reasoning, of course, is unsatisfactory when a dangerous condition is *latent*. In that situation, the vendee is unlikely to discover the condition upon his pre-sale inspection, and, therefore, will be unaware of the need to repair when the property is in his exclusive control. An occupier of land is not liable for injuries caused by defects not known or reasonably discoverable by him.[10] Therefore, where the vendor and the vendee have no knowledge of the latent defect, neither would be liable to an injured third person. The vendee, when buying previously occupied property, must assume that some physical deterioration has occurred, a fact normally reflected in the purchase price. Therefore, an injured vendee should not be allowed to look to the vendor for indemnification for injuries resulting from a dangerous condition not within the vendor's knowledge. Furthermore, a contrary result would require the vendor to insure against injuries long after his interest in the property ceases.

II. Time Liability Shifts

In applying the general rule, the courts do not agree upon the time when responsibility for injuries to third persons shifts from the

9. *Id.* at 633, 634, 288 P.2d at 96, 97.
10. See Prosser, Torts § 78 (2d ed. 1955) and cases cited fn. 58, at 459.

vendor to the vendee. In *Palmore*, where a third party was injured the day after the property was sold, the court held the vendor not liable, and stated by way of dictum that the vendee's liability attached at the time of the sale.[11] However, other courts have indicated that the vendee is not liable for injuries to persons on the premises until he has had both notice of and an opportunity to repair the dangerous condition.[12] Since it would be unjust to deny the third person recovery, courts adopting the latter view must, in fairness, hold the vendor liable until the vendee's liability attaches.

Releasing the vendor from liability at the time of sale seems to be the better solution. First, in nearly all cases the vendee has sufficient time to make a close inspection of the property before concluding the sale. Second, present practice is to insure only during the period of possession, making satisfaction of the judgment more likely from the vendee, who is in possession, than from the vendor.[13] Third, the vendee, who owns the property on which the injury occurs, is more likely to be within the jurisdiction and available for suit, while the vendor may have left the state. Finally, the property itself may serve as security for a judgment. Therefore, there seems to be no reason for deferring the vendee's liability beyond the time of sale.

III. The Concealment Exception

When the vendor has knowledge of a latent condition, most courts apply an exception to the general rule. This exception, referred to as the "concealment" or "Restatement" exception, provides:

> A vendor of land, who conceals or fails to disclose to his vendee any condition whether natural or artificial involving unreasonable risk to persons upon the land, is subject to liability for bodily harm caused thereby to the vendee and others upon the land with the consent of the vendee or his subvendee, after the vendee has taken possession, if (a) the vendee does not know of the condition or the risk involved therein, and (b) the vendor knows of the condition and the risk involved therein and has reason to believe that the vendee will not discover the condition or realize the risk.[14]

Under this exception, the vendor remains liable whether he actively conceals the dangerous condition, such as by painting over it, or simply fails to disclose its existence. He must, however, have

11. 182 Pa. 82, 89, 37 Atl. 995, 999 (1897). "[F]rom the moment . . . [the vendee] took possession under his deed, the duties theretofore incumbent on . . . [the vendor] were transferred to him, and he became answerable to the public for neglect in their performance."

12. See Pharm v. Lituchy, 283 N.Y. 130, 27 N.E.2d 811 (1940); Ahern v. Steele, 115 N.Y. 203, 22 N.E. 193 (1889) (dictum) (action against heir); Pavelchak v. Finn, 153 N.Y.S.2d 795 (Sup. Ct. 1956) (dictum). See also Sabiston's Adm'r v. Otis Elevator Co., 251 Ky. 222, 64 S.W.2d 588 (1933) (action against receiver), where the court said that the defendant must at least have knowledge of the dangerous condition before his liability attaches.

13. See 2 Harper & James, Torts 1520 (1956).

14. Restatement, Torts § 353 (1934).

actual knowledge of the condition and realize that an unreasonable risk is involved to those unaware of it.[15]

The concealment doctrine first appeared in dictum in the early *Palmore* case.[16] The rationale underlying the doctrine is that although the vendee should inspect the premises to discover dangerous conditions, the vendor has prevented discovery by his conscious concealment; therefore, he should remain liable for injuries occurring after the property has been sold.[17] Although the courts of England[18] and Tennessee[19] have indicated that the vendor is under no duty to disclose dangerous conditions to his vendee, most courts considering the issue have accepted the concealment doctrine.[20]

The soundness of the concealment doctrine is obvious. If the vendor is not held liable for injuries from concealed defects, he will be encouraged to prevent discovery of dangerous conditions in order to enhance the value of his property. The fact that the vendor may be forced to lower his price or bear the expense of repair if disclosure is required, is not an undue burden when compared with the burden of serious injuries to the vendee or third persons which could result.

The vendor remains liable under the concealment doctrine "until the vendee has discovered the true condition and not merely until he could do so by a proper inspection."[21] Extending the vendor's liability until actual discovery is proper, since the vendee is *unlikely* to make a further investigation of an object apparently safe.

IV. Liability of Builder-Vendor

Until recently, the courts in applying the general rule did not

15. See Restatement, Torts § 353, comment *c* (1934).

16. 182 Pa. 82, 90, 37 Atl. 995, 999 (1897). "And while laying down this rule in this case, we do not intend to be understood as declaring there can be no exception to it. There may be a case where the grantor conceals from the grantee a defect in a structure known to him alone, and not discoverable by careful inspection, that the owner would be held liable, though out of possession. . . ."

17. Restatement, Torts § 353, comment *c* (1934).

18. See Otto v. Bolton & Norris, [1936] 2 K.B. 46; Bottomley v. Bannister, [1932] 1 K.B. 458.

19. See Smith v. Tucker, 151 Tenn. 347, 270 S.W. 66 (1924) (dictum); McIntosh v. Goodwin, 40 Tenn. App. 505, 292 S.W.2d 242 (1954); Ropeke v. Palmer, 6 Tenn. App. 348 (1927). For a critical evaluation of the Tennessee courts' refusal to allow recovery for injuries caused by concealed defects, see 24 Tenn. L. Rev. 1170 (1957).

20. United States v. Inmon, 205 F.2d 681 (5th Cir. 1953); Caporaletti v. A-F Corp., 137 F. Supp. 14 (D.D.C. 1956), *rev'd per curiam on other grounds*, 240 F.2d 53 (D.C. Cir. 1957); Derby v. Public Serv. Co., 100 N.H. 53, 119 A.2d 335 (1955); McCabe v. Cohen, 294 N.Y. 522, 63 N.E.2d 88 (1945) (per curiam); Kilmer v. White, 254 N.Y. 64, 171 N.E. 908 (1930); Pavelchak v. Finn, 153 N.Y.S.2d 795 (Sup. Ct. 1956); Palmore v. Morris, Tasker & Co., 182 Pa. 82, 37 Atl. 995 (1897) (dictum).

21. Restatement, Torts § 353, comment *c* (1934). See Pavelchak v. Finn, 153 N.Y.S.2d 795 (Sup. Ct. 1956).

distinguish between the liability of a builder-vendor[22] and the vendor of previously occupied property. However, such a distinction was drawn in *Caporaletti v. A-F Corp.*,[23] where the builder-vendor was held liable to his vendee for an injury resulting from a latent defect. In that case the vendee had purchased a tract[24] home and was injured by a wooden step improperly attached to its concrete base. The court, after recognizing that conditions in the building industry have changed since the general rule was formulated, extended the liability of a builder-vendor by saying:

> [T]his court will adopt and apply the principle that a builder who defectively constructs a house, is liable to the purchaser or any other invitee, for personal injuries sustained by the latter, if the defect could not have been discovered on inspection by the ordinary man in the street. In this case the builder must be *charged with knowledge* of his own negligence.[25]

Thus, the court held that a builder-vendor is liable even when he has only *constructive* knowledge of a latent defect.[26]

The reasoning of the court in *Caporaletti* is especially compelling today, since many new homes constructed for sale are built as part of housing developments by large scale builders and contractors. The builder-vendor should be held liable for injuries to the vendee or third parties caused by latent defects resulting from his negligence. The builder holds himself out as a specialist in house construction with the technical knowledge necessary to produce sound buildings. He has the opportunity to inspect the building as construction progresses and can determine the quality of the workmanship and materials used.

The vendee, on the other hand, usually does not have the same opportunity to inspect as the house is erected, since most tract homes are completed before they are offered for sale. Even if he can make such inspection, however, the typical vendee does not possess the technical knowledge to determine the quality of the construction. Furthermore, the builder-vendor is usually in a better financial position to insure against and absorb a substantial loss resulting from an injury to a vendee or third party.

In summary, the rule of law adopted in *Caporaletti* appears to be a desirable development in the liability of owners and occupiers of

22. For purposes of this Note, the term "builder-vendor" includes only those who construct houses for immediate sale. The term does not include one who hires a contractor to build a house for his own occupation and subsequently conveys the premises.

23. 137 F. Supp. 14 (D.D.C. 1956), *rev'd per curiam on other grounds*, 240 F.2d 53 (D.C. Cir. 1957).

24. For purposes of this Note, the term "tract home" is a home built by a large scale builder as part of a housing development.

25. 137 F. Supp. 14, 19 (D.D.C. 1956). (Emphasis added.)

26. Where a defect is patent, the builder-vendor should be relieved from liability since the vendee should discover the condition on reasonable inspection. See Kordig v. Grovedale Oleander Homes, Inc., 18 Ill. App. 2d 48, 151 N.E.2d 470 (1958).

real property. The general rule and the concealment exception, however, seem to give the best result when a builder-vendor is not involved.