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Occupant's Duty to Warn Employee of Independent Contractor Discharged by Warning the Independent Contractor

Michael M. Gibson

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cent of building contracts. If they should finance more than ninety per cent, they would be in no worse shape than subcontractors are after the decision in *W & W Floor*, for they could still collect a personal judgment against the owner on the note for the remaining ten per cent. Further, they are in a better position than subcontractors to put pressure on principal contractors to execute bond agreements in their contracts with owners and thus still safely finance one hundred per cent. In the final analysis, the policy of providing adequate protection to subcontractors should outweigh the difficulty, if any, with the law of negotiable instruments.

Finding authority to grant personal judgments in the language of article 5463 is the least strained interpretation of the statute, and more than likely will be found inoffensive to the constitution. Should, however, personal judgments not be authorized by the statutes, or if authorized declared unconstitutional, the need of subcontractors for liens will be heightened, for denying them liens will often reduce their protection from little to none.

Hugh T. Blevins

Occupant's Duty To Warn Employee of Independent Contractor Discharged by Warning the Independent Contractor

Will Ray Henry, an employee of an independent contractor, the Roy Vickers Lease Service, was severely burned on premises controlled by the Delhi-Taylor Oil Corporation.¹ Delhi-Taylor had employed the independent contractor to extend casings on sixteen pipelines passing under a private roadway.² In negotiating the contract with Vickers, Delhi-Taylor's representative had warned both Vickers and his superintendent-foreman³ that they should treat all the pipelines "as if they were under pressure" and "as though they were loaded"⁴ (*i.e.*, that the lines were dangerous and could be carrying flammable material). After a large and deep ditch was dug to expose some of the pipelines and while Henry was engaged in welding operations in the ditch, a dragline operator excavating the ditch punctured a pipeline.⁵ This pipe contained toluene, a highly flammable

¹ The land was owned by the Columbia Southern Corporation. Delhi-Taylor owned an easement through this land for the purpose of running its pipelines underground from its refinery to docks on the coast a few miles distant.

² The sixteen pipelines varied from two to sixteen inches in diameter and were buried at depths varying from four inches to ten feet. To extend the casings around each of the pipelines simply means placing a larger pipe around each pipeline so that any of the pipelines could be removed from under the roadway at any time without disturbing the road material.

³ Hereinafter called superintendent.

⁴ *Delhi-Taylor Oil Corp. v. Henry*, 416 S.W.2d 390, 393 (Tex. 1967).

⁵ The punctured pipe was unexposed by the ditch and lay a few inches beneath the ground. The question was raised by Delhi-Taylor whether Henry's injury was caused by the negligence, if not the sole negligence, of the independent contractor's employee. The jury found the dragline operator, a fellow-servant of Henry, to be free of negligence.

liquid similar to gasoline. The liquid, which was under static pressure,⁶ spurting from the pipe and was ignited when it entered the ditch and came in contact with Henry's welding torch. Henry sued the occupant Delhi-Taylor for damages caused by the failure to warn him personally of the dangerous condition. It was, however, stipulated by the parties that a warning had been given to the independent contractor, Vickers. The trial court rendered judgment for Henry, and the court of civil appeals affirmed.⁷ *Held, reversed*: An adequate warning to an independent contractor or his superintendent concerning hidden defects on the premises discharges the occupant's duty to warn the independent contractor's employees. The court further stated that in future cases full knowledge alone by the independent contractor, without any warning, will likewise relieve the occupant from liability to the employee. *Delhi-Taylor Oil Corp. v. Henry*, 416 S.W.2d 390 (Tex. 1967).

I. DUTY OF AN OCCUPANT AND AN EMPLOYER

In Texas the occupant⁸ of land has an affirmative duty to keep his premises in a reasonably safe condition for invitees.⁹ The occupant is charged with this duty because of his control and superior knowledge of the land¹⁰ and because of the benefit conferred on him by the invitee. The standard applied to determine the existence of the duty is objective: whether the occupant knew, or as a reasonably prudent person should have known, of any unsafe conditions on his premises.¹¹ To fulfill this standard the occupant must exercise ordinary care to inspect the premises for dangerous conditions.¹² If hidden dangers of which the invitee is unaware¹³ are present on the premises, the occupant must take reasonable precautions to protect the invitee from these hidden dangers or to warn him thereof.¹⁴ The occupant has discharged his duty and is relieved from liability whenever he eliminates the hidden danger or warns the invitee of its existence. If there are open and obvious dangers known to the invitee or of which he is

⁶ Static pressure is the pressure created entirely by the weight of the liquid. The pipeline from the refinery to the dock ran downhill. When the pump was shut off, the valve at the dock was closed causing the pipeline to remain full of toluene.

⁷ *Delhi-Taylor Oil Corp. v. Henry*, 403 S.W.2d 885 (Tex. Civ. App. 1966).

⁸ The term occupant refers to both an owner and an occupier of land.

⁹ An invitee is defined as a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or the occupant or for their mutual advantage. *Texas Power & Light Co. v. Holder*, 385 S.W.2d 873 (Tex. Civ. App. 1964), *error ref. n.r.e.* A servant or employee of another person (*i.e.*, an independent contractor), who enters the premises on the business of his master, in which business the master and the owner or occupant have a mutual interest, occupies the status of invitee. *Snelling v. Harper*, 137 S.W.2d 222 (Tex. Civ. App. 1940), *error dismissed, judgment correct*. Therefore, both the independent contractor and his employee are invitees.

¹⁰ *Renfro Drug Co. v. Lewis*, 149 Tex. 507, 235 S.W.2d 609 (1950); *Smith v. Henger*, 148 Tex. 456, 226 S.W.2d 425 (1950); *Walgreen-Texas Co. v. Shivers*, 137 Tex. 493, 154 S.W.2d 625 (1941).

¹¹ *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (Tex. 1963).

¹² *Id.*; *Genell, Inc. v. Flynn*, 163 Tex. 632, 358 S.W.2d 543 (1962); *Smith v. Henger*, 148 Tex. 456, 226 S.W.2d 425 (1950).

¹³ The invitee must be unaware of the dangerous condition, or the doctrine of "no duty" would apply, and the occupant would owe the invitee no duty. There is "no duty" to warn a person of things he already knows.

¹⁴ *Western Auto Supply Co. v. Campbell*, 373 S.W.2d 735 (Tex. 1963); *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (Tex. 1963); *Genell, Inc. v. Flynn*, 163 Tex. 632, 358 S.W.2d 543 (1962); *Smith v. Henger*, 148 Tex. 456, 226 S.W.2d 425 (1950).

charged with knowledge, *Halepeska v. Calliban Interests, Inc.*¹⁵ says the occupant owes "no duty" to warn or to protect the invitee.

The fact that an occupant may be imposed with the duty to protect or warn an invitee in no way alters the relationship between an independent contractor and his employees when an independent contractor is hired to do work on an occupant's land. The relationship between the independent contractor and his employees is that of master and servant. The employer owes a duty to use ordinary care to warn his employees of any dangers on the premises, incident to their work, and of which the employer is aware.¹⁶ At common law a suit against the employer for injuries caused by a breach of this duty was subject to the defenses of contributory negligence, assumption of risk and the fellow-servant doctrine. However, today the suit would be controlled by the Workmen's Compensation Act,¹⁷ and these defenses would no longer defeat the employee's injury claim.¹⁸

II. OCCUPANT'S DUTY TO WARN EMPLOYEES OF INDEPENDENT CONTRACTOR

Although it was clear that an independent contractor owed his employee a duty to warn of any dangerous conditions existing on the premises, not until 1924 in *Galveston-Houston Electric Railway v. Reinle*¹⁹ did the Texas Supreme Court decide whether an occupant also had a duty to warn personally employees of the independent contractor. In that case an employee of an independent contractor was electrocuted when a boom which he was operating came into contact with an uninsulated high-voltage wire. The supreme court held that it was the duty of the occupant to give the employee notice or warning of the danger. This duty existed even though the independent contractor had full knowledge of the danger and also owed an independent duty to warn the employee of the danger. The reason the occupant was held liable was that he knew that the nature of the work to be performed by the independent contractor required workmen to be exposed to dangerous conditions on the premises. The court stated that an occupant for his own advantage cannot invite others on

¹⁵ 371 S.W.2d 368 (Tex. 1963). The supreme court in *Delbi-Taylor* never mentioned the "no duty" doctrine discussed in *Halepeska* presumably because the dangerous condition in *Delbi-Taylor* was hidden, not open and obvious. Furthermore, the issue was never raised by either counsel in their briefs. Plaintiff Henry seemed to be insufficiently aware of the circumstances to be charged with the knowledge of the hidden danger. However, assuming Henry was an experienced welder of petroleum pipelines, would not such experience be sufficient to charge him with the knowledge of the hidden danger so as to invoke the "no duty" doctrine even though the danger was hidden and not open and obvious? An invitee should not recover if he is as legally aware of the danger as the occupant.

The two cases can also be distinguished in that *Halepeska* caused the injury to himself, while Henry was injured by no fault of his own. But this should not matter because in *Delbi-Taylor* the third party was found to be not negligent, so no intervening causation is possible. *Delbi-Taylor* is a case illustrative of the recent trend away from the "no duty" doctrine of *Halepeska*.

¹⁶ *Frontier Theatres Inc. v. Brown*, 362 S.W.2d 360 (Tex. Civ. App. 1962), *rev'd on other grounds*, 369 S.W.2d 299 (Tex. 1963); *Harmon v. Sears, Roebuck & Co.*, 324 S.W.2d 92 (Tex. Civ. App. 1959), *error ref. n.r.e.*; *City of Austin v. Johnson*, 195 S.W.2d 222 (Tex. Civ. App. 1946), *error ref. n.r.e.*

¹⁷ TEX. REV. CIV. STAT. ANN. arts. 8306-09 (1967).

¹⁸ *Id.* art. 8306, § 1.

¹⁹ 113 Tex. 456, 258 S.W. 803 (1924).

premises under his control without using proper care to warn of dangers of which the invitee is not aware. The occupant, while retaining control of the premises, cannot escape the duty to warn by attempting to delegate it to the independent contractor.

The duty to warn, however, is not imposed when the owner of land has no control over the premises.²⁰ When the owner puts some other person in control of the premises, such person (*e.g.*, an independent contractor) assumes the duty to keep the premises under his control in safe condition.²¹ Thus, a general contractor in control of premises owes to employees of a subcontractor a duty similar to that owed by an occupant to an employee of an independent contractor.²²

A distinction must be made between the occupant's liability to the employee of an independent contractor when the injury is caused by a danger inherent in the premises and the occupant's liability when the injury is caused by the sole negligence of the independent contractor. The occupant in the latter situation is not liable, because he has no control over the conduct of the independent contractor.²³ In the former situation the occupant is liable because a duty is imposed by law to protect those persons invited on the premises.²⁴ Before the decision in the *Delhi-Taylor* case, if both the occupant and the independent contractor knew of the danger and failed to warn the independent contractor's employee, they were concurrently liable²⁵ because all persons whose acts contribute to an injury are liable, and the negligence of one does not excuse the negligence of the others.²⁶

III. CHANGES MADE BY DELHI-TAYLOR V. HENRY

The old adage that the law changes with the times is reflected in the case of *Delhi-Taylor Oil Corp. v. Henry*.²⁷ Today more specialization is present in fields occupied by independent contractors than was true when *Reinle* was decided. The independent contractor and a few of his employees no longer perform the work. Instead they are aided by other subcontractors: electricians, plumbers, carpenters, technicians and various other specialists. Obviously impressed with this change in circumstances, the supreme court in *Delhi-Taylor* expressly overruled *Reinle*, noting that to im-

²⁰ *McKee v. Patterson*, 153 Tex. 517, 271 S.W.2d 391 (1954); *Nance Exploration Co. v. Texas Employers' Ins. Ass'n*, 305 S.W.2d 621 (Tex. Civ. App. 1957), *error ref. n.r.e.* (no control, therefore no duty).

²¹ *Smith v. Henger*, 148 Tex. 456, 226 S.W.2d 425 (1950).

²² *McKee v. Patterson*, 153 Tex. 517, 271 S.W.2d 391 (1954); *Smith v. Henger*, 148 Tex. 456, 226 S.W.2d 425 (1950); *Texas Elec. Serv. Co. v. Holt*, 249 S.W.2d 662 (Tex. Civ. App. 1952), *error ref. n.r.e.*

²³ *Union Tank & Supply Co. v. Kelley*, 167 F.2d 811 (5th Cir. 1948); *Galveston-Houston Elec. Ry. v. Reinle*, 113 Tex. 456, 258 S.W. 803 (1924); *Nance Exploration Co. v. Texas Employers' Ins. Ass'n*, 305 S.W.2d 621 (Tex. Civ. App. 1957), *error ref. n.r.e.*

²⁴ *Galveston-Houston Elec. Ry. v. Reinle*, 113 Tex. 456, 258 S.W. 803 (1924). But, an employee of an independent contractor is not a "third person" within the rule that an occupant is liable to third persons for the negligence of the independent contractor in the performance of work that is inherently dangerous.

²⁵ *Sun Oil Co. v. Kineten*, 164 F.2d 806 (5th Cir. 1947).

²⁶ *Strakos v. Gehring*, 360 S.W.2d 787 (Tex. 1962); *DeWinne v. Allen*, 154 Tex. 316, 277 S.W.2d 95 (1955).

²⁷ 416 S.W.2d 390 (Tex. 1967).

pose upon the occupant the duty to warn every employee of an independent contractor who might come on the premises is an impossible burden, because independent contractors employ scores of employees and their identities change daily.²⁸

In holding that an adequate warning to an independent contractor or his superintendent discharges the duty of the occupant to warn an employee of the independent contractor,²⁹ the court was influenced by the argument that the occupant should not be required to foresee and anticipate that the independent contractor will not discharge his duty to warn his employee.³⁰ As a general rule of law, a person is not bound to anticipate negligent or unlawful conduct on the part of another.³¹ But the abstract statement that one may assume that others will act in a lawful and non-negligent manner is, because of its generality, misleading. Though a person is not bound to anticipate unlawful or negligent conduct by others, he is nevertheless under a duty to use ordinary care to prevent injury to another.³² Even after the occupant has warned the independent contractor of the particular danger, the occupant may still owe the employee a duty to warn the employee personally *if the occupant actually sees the employee in danger* and realizes from the situation that the independent contractor has not communicated the warning given him by the occupant. But even if this duty is imposed upon the occupant, to prove its breach is a difficult task for two reasons: (1) under the test formulated by the supreme court, the occupant may reasonably assume that the independent contractor communicated the warning, and (2) factual situations will seldom permit the occupant to determine adequately whether the employee has been personally warned of the danger. This is demonstrated by *Delbi-Taylor*. Even if the occupant had actually observed Henry perform his job prior to his injury, it would be difficult for a reasonable man to say Henry had not been warned by the independent contractor and therefore was in danger of injury.

Before concluding that the occupant's warning to the independent contractor discharged the occupant's duty to the employee, the court was faced with the question of the adequacy of a particular warning. The

²⁸ Also supporting the decision is the fact that the term independent contractor implies the right for the independent contractor to employ as few or as many employees as he may see fit and generally to perform the duties of the work without intervention from the occupant.

²⁹ The decision reached by the supreme court is supported by Texas court of civil appeals cases: *Tyler v. McDaniel*, 386 S.W.2d 552 (Tex. Civ. App. 1965), *error ref. n.r.e.*; *Nance Exploration Co. v. Texas Employers' Ins. Ass'n*, 305 S.W.2d 621 (Tex. Civ. App. 1957), *error ref. n.r.e.*; *Texas Elec. Serv. Co. v. Holt*, 249 S.W.2d 662 (Tex. Civ. App. 1952), *error ref. n.r.e.* Fifth Circuit cases likewise support the decision: *Turner v. West Texas Util. Co.*, 290 F.2d 191 (5th Cir. 1961); *Gulf Oil Corp. v. Bivins*, 276 F.2d 753 (5th Cir. 1960). The *Delbi-Taylor* decision is also supported by cases from other jurisdictions: *Bakovich v. Peoples Gas Light & Coke Co.*, 45 Ill. App. 2d 182, 195 N.E.2d 260 (1963); *Levesque v. Fraser Paper Ltd.*, 159 Me. 131, 189 A.2d 375 (1963); *Hunt v. Laclede Gas Co.*, 406 S.W.2d 33 (Mo. 1966); *Storm v. New York Tel. Co.*, 270 N.Y. 103, 200 N.E. 659 (1936); *Schwarz v. General Elec. Realty Corp.*, 163 Ohio St. 354, 126 N.E.2d 906 (1955); *Grace v. Henry Disston & Sons*, 369 Pa. 265, 85 A.2d 118 (1952).

³⁰ *Tyler v. McDaniel*, 386 S.W.2d 552 (Tex. Civ. App. 1965), *error ref. n.r.e.*; *Texas Elec. Serv. Co. v. Holt*, 249 S.W.2d 662 (Tex. Civ. App. 1952), *error ref. n.r.e.*; *Storm v. New York Tel. Co.*, 270 N.Y. 103, 200 N.E. 659 (1936).

³¹ *DeWinne v. Allen*, 154 Tex. 316, 277 S.W.2d 95 (1955).

³² *Owens v. Acme Oil Co.*, 408 S.W.2d 947 (Tex. Civ. App. 1966), *error ref. n.r.e.*

warning which an occupant must communicate to an invitee must be sufficient to put the invitee on guard concerning the particular danger involved. Knowledge alone by the invitee is not enough. There must be knowledge of the danger involved and the appreciation of the danger.³³ The invitee must be in a position to make an intelligent choice concerning whether to encounter the particular danger.³⁴ Thus, the function of the warning is to give the invitee knowledge and an opportunity to appreciate the danger so that he can decide whether to confront it. The supreme court in *Delbi-Taylor* held that the warning to treat the pipelines "as though they were loaded" was sufficient to inform the independent contractor of the danger and, therefore, adequate. But the court felt the warning was adequate only "when considered with their [the independent contractor's and his superintendent's] knowledge of the premises and the dangers inherent therein."³⁵ The warning was undeniably a weak one, and probably the same result would have been reached even if no warning had been communicated. Because of the knowledge already possessed by the independent contractor and his superintendent,³⁶ the warning did not apprise them of anything that they should not have already presumed to be true.

One weakness in the supreme court's warning test is that there is no assurance the employee will ever know about the danger. An alternative test to determine if the occupant's duty to warn is discharged would add an additional factor. Under this test, the warning will be deemed adequate only when the occupant can reasonably believe that the warning given the independent contractor will ultimately be communicated to the individual employee. If so, the occupant has discharged his duty to protect this particular invitee from harm.³⁷ Although such a test would give more assurance that the employee will become aware of the danger, it is obviously difficult to apply.

After deciding that an adequate warning was given and that communication to either the independent contractor or his superintendent discharged the occupant's duty to the independent contractor's employee, the court stated that in future cases full knowledge alone by the independent contractor (no matter how obtained) will discharge the occupant's duty to warn the employee. This is true even though the occupant may not have used ordinary care for the safety of the employee. The court failed to include full knowledge on the part of the independent contractor's superintendent, but the court surely intended to include the superintendent's full knowledge since one of the cases cited in support of the court's holding was such a situation.³⁸

³³ *Ellis v. Moore*, 401 S.W.2d 789 (Tex. 1966); *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (Tex. 1963); *Dee v. Parish*, 160 Tex. 171, 327 S.W.2d 449 (1959); *McKee v. Patterson*, 153 Tex. 517, 271 S.W.2d 391 (1954).

³⁴ *Triangle Motors v. Richmond*, 152 Tex. 354, 258 S.W.2d 60 (1953).

³⁵ *Delhi-Taylor Oil Corp. v. Henry*, 416 S.W.2d 390 (Tex. 1967).

³⁶ The superintendent had previously done a job for the Delhi-Taylor Oil Corporation and had had seventeen years experience working around loaded pipelines. According to the superintendent, the precautions to be taken when working around pipelines are standard, *i.e.*, any existing line is assumed to be loaded.

³⁷ *Gulf Oil Corp. v. Bivins*, 276 F.2d 753 (5th Cir. 1960) (dissent).

³⁸ *Tyler v. McDaniel*, 386 S.W.2d 552 (Tex. Civ. App. 1965), *error ref. n.r.e.*

IV. CONCLUSION

Delbi-Taylor substantially affects the remedy which an injured employee is likely to choose. Under the facts Henry had a valid claim through his employer for workmen's compensation, even though a fellow-servant's (the dragline operator's) negligence might have contributed to Henry's injury.³⁹ Moreover, his employer was the only possible subscriber to workmen's compensation, for the Workmen's Compensation Act excepts independent contractors and their employees from coverage by the occupant.⁴⁰ Thus, Henry had to choose whether to sue the occupant for negligence or his employer under the Workmen's Compensation Act, because an election to sue the occupant rather than the subscriber makes workmen's compensation unavailable.⁴¹ The decision reached in *Delbi-Taylor* greatly reduces the occupant's liability to an employee of an independent contractor, and in effect leaves the employee with only his rights under the Workmen's Compensation laws.

However, on the positive side, the decision in the instant case relieves the occupant of the burdensome responsibilities which he previously owed to employees of independent contractors. No longer will the failure to warn each employee of latent defects result in the occupant's liability if the independent contractor knows of the danger. An adequate warning to, or full knowledge by, the independent contractor or his superintendent will discharge the occupant's duty to warn. Thus the occupant is able to discharge his duty by five different ways: (1) warning the independent contractor; (2) warning the independent contractor's superintendent; (3) warning the employee himself; (4) full knowledge by the independent contractor (no warning given); and (5) full knowledge by the independent contractor's superintendent (no warning given). When the superintendent alone is warned or he alone has knowledge of the danger, this knowledge is imputed to the independent contractor.

Delbi-Taylor is well supported by decisions from other jurisdictions⁴² which have decided the issue, and it will probably be subsequently applied to the situation where a general contractor has control of the premises and is under a similar duty to warn the employees of subcontractors of hidden dangers.

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³⁹ TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (1967).

⁴⁰ *Id.*; *Bridwell v. Bernard*, 159 S.W.2d 981 (Tex. Civ. App. 1942), *error ref. n.r.e.*

⁴¹ TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (1967); *Texas Employers' Ins. Ass'n v. Brandon*, 126 Tex. 636, 89 S.W.2d 982 (1936); *Employers' Indem. Corp. v. Felter*, 277 S.W. 376 (Tex. Comm'n App. 1925); *Texas Employers' Ins. Ass'n v. Fish*, 266 S.W.2d 435 (Tex. Civ. App. 1954), *error ref. n.r.e.*

⁴² *See note 29 supra.*