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# The Inherently Dangerous Doctrine in Missouri: A Socially Just Doctrine?

## *Ballinger v. Gascosage Electric Cooperative*<sup>1</sup>

The common law is not sterile or rigid and serves the best interests of society by adapting standards of conduct and responsibility that fairly meet the emerging and developing needs of our time.<sup>2</sup>

### I. FACTS AND HOLDING

On August 16, 1983, Gascosage Electric Cooperative (Gascosage), a Missouri cooperative, contracted with Tel-Elec Company (Tel-Elec) to modernize an electrical system in Miller and Pulaski counties.<sup>3</sup> The project included the replacement of a single phase electrical line with a three phase electrical line.<sup>4</sup> The contract provided that the three phase line was to be strung while the "hot phase" of the single phase line remained energized so electrical service would not be interrupted.<sup>5</sup> The actual work on the line was performed by Eazy Construction Co. (Eazy).<sup>6</sup> On November 1, 1983, the plaintiff, Brent Ballinger (Ballinger), a groundman for Eazy, was severely injured by an electrical shock when a conductor he was installing came into contact with the "hot" line.<sup>7</sup>

Ballinger sued Gascosage and Tel-Elec for damages.<sup>8</sup> At trial, Ballinger argued that the accident resulted from Eazy's negligence and that Tel-Elec and Gascosage both were vicariously liable for Eazy's negligence under the

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1. 788 S.W.2d 506 (Mo. 1990) (en banc) [hereinafter *Ballinger II*].

2. *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968).

3. *Ballinger v. Gascosage Elec. Coop.*, No. 163576, Westlaw op. at 2 (Mo. Ct. App. Aug. 29, 1989) (cause ordered transferred to Supreme Court) [hereinafter *Ballinger I*].

4. *Id.* at 2-3. The project included "the installation of 19 new poles supporting a single phase line carrying 7,200 volts of electricity." *Id.* at 2.

5. *Ballinger II*, 788 S.W.2d at 508.

6. *Id.* The Missouri Supreme Court remanded to the trial court to determine whether Tel-Elec and Eazy were engaged in a joint venture or whether Eazy was a subcontractor of Tel-Elec. *Id.* at 516-17.

7. *Id.* at 508.

8. *Id.* at 507.

inherently dangerous doctrine.<sup>9</sup> Gascosage asserted that the activity was not inherently dangerous and that no liability existed.<sup>10</sup> Based upon Ballinger's jury instructions,<sup>11</sup> the jury found both defendants vicariously liable for Eazy's conduct under the inherently dangerous doctrine.<sup>12</sup>

On appeal, Gascosage contended that the jury instructions "improperly stated the law with respect to inherently dangerous activities in that [they] did not require a finding of negligence against Gascosage"<sup>13</sup> as required by *Smith v. Inter-County Telephone Co.*<sup>14</sup> The Missouri Court of Appeals, Southern

9. *Id.* at 508.

10. *Id.* at 509.

11. Ballinger's verdict directing instruction number 8 read as follows:

In your verdict you must assess a percentage of fault to defendants Tel-Elec and Gascosage, whether or not plaintiff Brent Ballinger was partly at fault, if you believe:

First, the installation of new conductors near the energized conductor at the Iberia rephase was an inherently dangerous activity, and

Second during said installation, Eazy either:

failed to maintain proper clearance between the hot phase and the B phase,

or

failed to keep the B phase under positive control, or

failed to adequately ground the B phase, or

failed to supply plaintiff Brent Ballinger with rubber gloves, and

Third, in any one or more of the respects submitted in paragraph Second, Eazy was thereby negligent, and

Fourth, such negligence directly caused or directly contributed to cause damage to plaintiff Brent Ballinger.

The term "inherently dangerous activity" as used in this instruction means an activity which necessarily presents a substantial risk of damage unless adequate precautions are taken.

In assessing any percentage of fault to Tel-Elec and Gascosage under this instruction, you must consider the fault of Eazy as the fault of both Tel-Elec and Gascosage.

*Id.* at 510.

12. *Id.* at 508. The jury assessed defendants' fault at 100 percent. Damages of \$1,500,000 were awarded to Ballinger. *Id.*

13. *Ballinger I*, Westlaw op. at 14. Gascosage raised three other points on appeal: (1) that the evidence was insufficient to support a verdict against Gascosage, (2) that Ballinger improperly suggested Gascosage was insured and asked the jury to ignore fairness and justice in assessing damages, and (3) that Ballinger improperly argued remittitur and additur. *Id.* at 5, 28. The appellate court ruled that point (1) was without merit and that points (2) and (3) entitled Gascosage to a new trial. *Id.* at 28, 36. The supreme court overturned the appellate court's remand for new trial on these issues. *Ballinger II*, 788 S.W.2d at 518.

14. 559 S.W.2d 518, 523 (Mo. 1977). For the necessary elements of a *prima*

District, reversed and remanded,<sup>15</sup> but stated that "in the absence . . . of *Smith*, this court would hold that Gascosage's first point has no merit. Under the constraint of *Smith*, this court holds that Gascosage's first point is valid."<sup>16</sup> Upon filing the opinion, the court of appeals transferred the case to the Missouri Supreme Court for a reexamination of the requirements of *Smith*.<sup>17</sup> The Missouri Supreme Court reversed and held that landowners and employers could be held vicariously liable under the inherently dangerous doctrine even absent the employer's or landowner's negligence.<sup>18</sup>

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*facie* case before Ballinger using the inherently dangerous doctrine, see *infra* text accompanying note 40.

15. *Id.* at 507. Tel-Elec also appealed the decision on the grounds that a prior worker's compensation settlement barred their liability. *Ballinger I*, Westlaw op. at 5. In a prior worker's compensation hearing Ballinger had stipulated that his employer was "Tel-Electric [sic] d/b/a Eazy Construction Company." *Ballinger II*, 788 S.W.2d at 508. Prior to the jury trial Tel-Elec had filed a motion for summary judgment based on the grounds that the worker's compensation settlement was a bar to Ballinger's action. The motion was denied. *Id.*

Ballinger also appealed on the grounds that the trial court should have given jury instructions permitting punitive damages. *Id.* at 507. The appellate court affirmed the trial court's denial of punitive damages instruction. *Ballinger I*, Westlaw op. at 55.

16. *Ballinger I*, Westlaw op. at 15.

17. *Id.*

18. *Ballinger II*, 788 S.W.2d at 511. The supreme court also held that when there is no viable claim of defendant's negligence under the inherently dangerous doctrine, punitive damages may not be recovered. *Id.* at 517. The court compared the relationship between an employer and an independent contractor to that of a master-servant and partner-agency relationship in which punitive damages are allowed. *Id.* The court distinguished the employer-independent contractor relationship from the relationships mentioned above in that the employer of an independent contractor does not have the right to control the activity. *Id.* The court then found that social policy does not support recovery of punitive damages because an inherently dangerous activity often has a beneficial purpose and also because the independent contractor should be more skilled than the employer in managing the risk of the activity. *Id.* Therefore, the court refused to extend the vicarious liability of the employer beyond the actual damages suffered by the plaintiff.

## II. LEGAL BACKGROUND

Generally, a party ("employer") who contracts with an independent contractor<sup>19</sup> is not liable for any bodily injury that results from a tortious act or omission of the independent contractor or his servants.<sup>20</sup> If an activity is inherently dangerous, however, the employer is liable for injuries caused by the failure of the independent contractor to exercise due care in the performance of the activity.<sup>21</sup> The liability is based upon the premise that a person who engages an independent contractor to perform inherently dangerous work remains subject to a non-delegable duty to assure that all reasonable precautions are taken during its performance.<sup>22</sup>

Although the inherently dangerous doctrine is recognized widely and commonly used, the courts have neither identified particular activities as inherently dangerous,<sup>23</sup> nor concluded whether the identification of an inherently dangerous activity should be made by judge or jury.<sup>24</sup> Rather, an inherently dangerous activity is broadly defined as work in which the employer "should recognize as necessarily requiring the creation . . . of a condition involving a peculiar risk of bodily harm to others unless special precautions are taken."<sup>25</sup> The doctrine is applied most often to construction

19. "An independent contractor is a person who contracts with another to do something for another who is not controlled by the other nor subject to the other's right to control with respect to the physical conduct in the performance of the undertaking." RESTATEMENT (SECOND) OF AGENCY § 2 note b (1990).

20. *Smith*, 559 S.W.2d at 521.

21. 41 AM. JUR. 2D *Independent Contractors* § 39 (1958).

22. *Id.*

23. *Id.*

24. In *Nance v. Leritz*, 785 S.W.2d 790 (Mo. Ct. App. 1990), the court held that it is "a question of fact for the jury whether the work necessarily involved some inherently dangerous activity." *Id.* at 793. However, in *Barbera v. Brod Dugan Co.*, 770 S.W.2d 318 (Mo. Ct. App. 1989) the court of appeals for the Western District (as opposed to the Eastern District which decided *Leritz*) found that the determination of whether an activity was inherently dangerous was "a mixed question of law and fact which may be made by a trial judge as a matter of law in certain cases." *Id.* at 322.

25. *Stubblefield v. Federal Reserve Bank*, 356 Mo. 1018, 1026, 204 S.W.2d 718, 722 (1947). A peculiar risk is a risk to which persons in the community are not generally subjected to by the ordinary forms of negligence usual in the community. RESTATEMENT (SECOND) OF TORTS § 416 comment d (1990). If a contractor is employed to transport goods by truck, the employer is not liable for the contractor's failure to inspect the brakes because this is a common risk to which the community is routinely subjected. *Id.* However, if a contractor is employed to transport giant logs, the employer would be subject to liability for the contractor's failure to take special precautions. *Id.* For an example of a Missouri court applying this concept, see

type activities. This definition encompasses both "ultrahazardous" and "non-ultrahazardous"<sup>26</sup> activities, but does not include activities in which reasonable care could prevent injury.<sup>27</sup> Therefore, a plaintiff can only use the inherently dangerous doctrine where the injury arises from a risk intrinsic in the work itself and not from a collateral risk.<sup>28</sup>

In Missouri, the doctrine did not originally protect employees. Rather, only injured third parties were protected.<sup>29</sup> In the 1928 decision of *Mallory v. Louisiana Pure Ice & Supply Co.*, the Missouri Supreme Court departed from the majority rule and extended the doctrine to include employees of an independent contractor, based upon the premise that the employee should stand in no worse position than the general public.<sup>30</sup> From 1928 until 1977, the doctrine provided recovery for injured third parties,<sup>31</sup> although use of the

*Hofstetter v. Union Elec. Co.*, 724 S.W.2d 527 (Mo. Ct. App. 1987). In *Hofstetter*, the court refused to apply the inherently dangerous doctrine when an injury resulted because a piece of machinery was unequipped with a ladder for mounting and dismounting. *Id.* at 531. The risk was viewed as a common risk. *Id.*

26. 41 AM. JUR.2D *Independent Contractors* § 41 (1990).

27. Note, *Liability to Employees of Independent Contractors Engaged in Inherently Dangerous Work: A Workable Worker's Compensation Proposal*, 48 FORDHAM L. REV. 1165, 1170 (1980).

28. *Hofstetter*, 724 S.W.2d at 530. This concept is illustrated in *Salmon v. Kansas City*, 241 Mo. 14, 41-42, 145 S.W. 16, 24 (1912), where an employee of a contractor was injured when an undetonated dynamite charge exploded. The court refused to allow recovery because the inherently dangerous activity only involved the explosive danger when performed with normal care. *Id.* at 40, 145 S.W. at 23. Here the injury resulted from the contractor's negligent failure to detect the unexploded charge not the inherent danger apparent when one uses dynamite. *Id.* The court found that if the foreman had counted the number of explosion he would have been aware that one charge was undetonated. *Id.*

29. In *Salmon* the court stated that "whatever duty the [defendant] owes it owes to the public and not to the servants of the contractor [sought to hold the employer liable]." *Salmon*, 241 Mo. at 39, 145 S.W. at 23.

30. 320 Mo. 95, 6 S.W.2d 617 (1928).

A distinct minority of jurisdictions holds that employees of the independent contractor are protected by the inherently dangerous doctrine and may therefore, sue the employer. Most of these courts have considered only the common law, concluding that for purposes of this doctrine, employees of the independent contractor should stand in no worse position than members of the general public.

Note, *supra* note 27, at 1178-79.

31. See *Underwood v. Crosby*, 447 S.W.2d 566, 568 (Mo. 1969); *Stubblefield v. Federal Reserve Bank*, 356 Mo. 1018, 1026, 204 S.W.2d 718, 722 (1947); *Boulch v. John B. Gutmann Co.*, 366 S.W.2d 21, 31 (Mo. Ct. App. 1963); *Neal v. 12th & Grand Ave. Bldg. Co.*, 228 Mo. App. 536, 542-43, 70 S.W.2d 136, 140-41 (1934).

doctrine has shifted entirely to injured employees of independent contractors since 1977.<sup>32</sup> The Restatement (Second) of Torts,<sup>33</sup> and all but a few states,<sup>34</sup> view the employer's duty as a vicarious duty that does not rest upon any personal negligence of the employer.<sup>35</sup> Before 1977, Missouri courts

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32. In all published cases of Missouri since 1977 the plaintiff has been an injured employee of the independent contractor. See *Donovan v. General Motors Corp.*, 762 F.2d 701, 703-04 (8th Cir. 1985); *Nance v. Leritz*, 785 S.W.2d 790, 792 (Mo. Ct. App. 1990); *Barbera v. Brod Dugan Co.*, 770 S.W.2d 318, 323 (Mo. Ct. App. 1989); *Hofstetter v. Union Elec. Co.*, 724 S.W.2d 527, 531 (Mo. Ct. App. 1987).

33. In an introductory note to topic 2, *Harm Caused by Negligence of a Carefully Selected Independent Contractor*, the RESTATEMENT (SECOND) OF TORTS states:

[T]he rules stated in the following §§ 416-429, unlike those stated in the preceding §§ 410-415, do not rest upon any personal negligence of the employer. They are rules of vicarious liability, making the employer liable for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault.

RESTATEMENT (SECOND) OF TORTS §§ 416-29 introductory note (1990).

Section 416 states:

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

*Id.* § 416.

Section 427 states:

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

*Id.* § 427.

34. See *McGary v. United States*, 370 F. Supp. 525, 564 (D. Nev. 1973); *Florida Power & Light Co. v. Price*, 170 So. 2d 293 (Fla. 1964).

35. The contractor has a duty to indemnify the employer for damages caused by the contractor's negligence. *Zueck v. Oppenheimer Properties*, No. 125159, Westlaw op. at 12 (Mo. Ct. App. Aug. 28, 1990) (Smith, J., concurring).

applied a similar standard.<sup>36</sup> Yet, in *Smith v. Inter County Telephone Co.*, the Missouri Supreme Court changed that standard.<sup>37</sup>

In *Smith*, the plaintiff obtained a jury verdict for injuries arising out of a trench cave-in.<sup>38</sup> The verdict was based upon a contractual assumption of liability, but the Missouri Supreme Court ruled that the contractual assumption theory was not supported by the evidence.<sup>39</sup> The court then found that the plaintiff might make a submissible case under the inherently dangerous doctrine if the following elements exist:

- (1) performance of the contract necessarily involve[d] some inherently dangerous activity; (2) the activity which caused the damage was reasonably necessary to the performance of the contract and was inherently dangerous; (3) the one contracting with the independent contractor *negligently failed to insure that adequate precautions were taken to avoid damage by reason of the inherently dangerous activity; and (4) plaintiff's damage was a direct result of such negligence.*<sup>40</sup>

From 1977 until the Missouri Supreme Court decision in *Ballinger*, Missouri courts required proof of all of the elements listed above to make a submissible case under the inherently dangerous doctrine. *Ballinger* rejected *Smith's* requirement of element three.

### III. INSTANT DECISION

The *Ballinger* court addressed Gascosage's argument that if the employer is to be held liable under the inherently dangerous doctrine, the employer must be negligent in ensuring adequate precautions were taken to avoid injuries.<sup>41</sup> The court first examined the Restatement (Second) of Torts and found that sections 417 and 427 do not rest upon any personal negligence of the employer.<sup>42</sup> Instead, the court found that the Restatement holds the employer

36. In *Salmon*, the court briefly discusses, but makes no determination, whether the doctrine attaches vicariously or requires negligence on the part of the employer or landowner. *Salmon*, 241 Mo. at 38, 145 S.W. at 23. The author found no other Missouri case prior to *Smith v. Inter-County Tel. Co.*, 559 S.W.2d 518, 523 (Mo. 1977) (en banc), which specifically stated that the employer must be culpable in any manner.

37. 559 S.W.2d 518 (Mo. 1977).

38. *Id.* at 520.

39. *Id.* at 525-26.

40. *Id.* at 523 (emphasis added).

41. *Ballinger II*, 788 S.W.2d at 509-11.

42. *Id.* at 511. See *supra* note 33.

liable irrespective of whether the employer had been at fault,<sup>43</sup> and likened the employer's liability to master-servant vicarious liability.<sup>44</sup> The court also noted that the Restatement was based upon the policy that an employer should not be permitted to shift responsibility for an inherently dangerous activity.<sup>45</sup>

In addition, the court examined Missouri case law originating before the *Smith* decision, including four cases cited in *Smith*.<sup>46</sup> The court concluded that the *Smith* court "wrote beyond the necessities of the case" and "listed elements not previously required by Missouri case law."<sup>47</sup> The court reasoned that "there was no purpose in *Smith* to change the governing law"<sup>48</sup> and that it was better to correct the law than to perpetuate an error.<sup>49</sup> Thus, the court eliminated the requirement of the employer's negligence.<sup>50</sup>

#### IV. ANALYSIS

The primary goal of tort compensation is to make the injured party whole again.<sup>51</sup> The courts are justified in applying vicarious liability to the employer of an independent contractor engaged in an inherently dangerous activity when an innocent third party is injured as a result of that activity. A third party often may be unaware of the activity or of its dangers and cannot take preventive action. Ideally, vicarious liability would not be needed if the injured party could be assured a recovery from the independent contractor. However, unlike the workmen of the independent contractor the third party is not covered by worker's compensation and the third party cannot choose a financially responsible defendant. Thus, if the third party is not allowed to

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43. *Ballinger II*, 788 S.W.2d at 511.

44. *Id.*

45. *Id.*

46. *Id.* at 510. The court reviewed *Stubblefield v. Federal Reserve Bank*, 356 Mo. 1018, 1026-27, 204 S.W.2d 718, 722 (1947); *Loth v. Columbia Theater Co.*, 197 Mo. 328, 354-55, 94 S.W. 847, 854 (1906); *Barkley v. Mitchell*, 411 S.W.2d 817, 826 (Mo. Ct. App. 1967); and *Carson v. Blodgett Constr. Co.*, 189 Mo. App. 120, 126, 174 S.W. 447, 448 (1915);. The opinion in *Smith v. Inter-County Tel. Co.*, 559 S.W.2d 518 (Mo. 1977) (en banc), cited the latter four cases as authentic exposition of Missouri law. *Ballinger II*, 788 S.W.2d at 510.

47. *Ballinger II*, 788 S.W.2d at 511.

48. *Id.*

49. *Id.*

50. *Id.*

51. Note, *supra* note 27, at 1181.

recover from the employer the third party could be left without a source of recovery.<sup>52</sup>

Although the employer may not sufficiently control the contractor to create a legal liability for injuries to third parties, recovery from the employer is supported on moral grounds.<sup>53</sup> If the harm of the inherently dangerous activity must be allocated between either the third party or the employer, the employer obviously should bear the risk. The activity the employer commissions has a higher degree of risk than normal activities and "he remains the person primarily benefited from it [because] he selects the contractor."<sup>54</sup> While the employer receives the benefit of the activity the innocent third party receives no benefit, only the harm from the activity. Thus, to protect the innocent party, vicarious liability must be imposed.

The rule does not impose undue hardship upon the employer in protecting a third party.<sup>55</sup> Granted, the courts have not provided employers with detailed lists of inherently dangerous activities for which special precautions must be taken.<sup>56</sup> However, it creates only moderate difficulty for an employer to identify the potential harm to third parties.<sup>57</sup> "Denial of access to the facility, protective barricades from excavations, protective overheads from the dangers of work aloft . . . are not difficult for even a layman to anticipate and insist upon."<sup>58</sup>

Even if an activity is inherently dangerous and an employer is held vicariously liable as a result of that activity when an innocent third party is injured, the employer is afforded adequate protection from the financial cost of the injury. First, the employer has the right to carefully select the contractor "and is free to insist upon one who is financially responsible, and to demand indemnity from him, and . . . the insurance necessary to distribute

52. *Zueck*, Westlaw op. at 9 (Smith, J., concurring).

53. Note, *supra* note 27, at 1176. Here the author states:

In the mid-nineteenth century, the rationale underlying respondent superior was broadened to encompass the imposition of liability on employers of independent contractors for injuries resulting from inherently dangerous work performed by the contractors. Subsequently, many courts, recognizing the employer's moral responsibility to prevent an unreasonable risk of injury to others, have effectively imposed the relationship of master and servant on the employer and the independent contractor to prevent the employer from avoiding responsibility.

*Id.* (footnotes omitted).

54. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 71 (4th ed. 1971).

55. For a discussion of the potential unfairness that may exist if the jury is allowed to determine whether the activity is inherently dangerous, see *Zueck*, Westlaw op. at 14 (Smith, J., concurring).

56. See *supra* text accompanying notes 23-24.

57. *Zueck*, Westlaw op. at 11 (Smith, J., concurring).

58. *Id.*

the risk is properly a cost of doing business.<sup>59</sup> Second, punitive damages are prohibited.<sup>60</sup> In addition, the doctrine does not extend to injuries arising from collateral negligence of the independent contractor.<sup>61</sup> For example, if the inherent risk was electrocution, the employer would not be liable for injuries resulting from the independent contractor's defective machinery. Thus, the employer is not unduly burdened by application of the doctrine.

In contrast to application of the inherently dangerous doctrine when third parties are injured, imposing vicarious liability upon the employer may be unjustified when an employee of an independent contractor is allowed to recover. The policy reasons for protecting an injured employee are not as strong as those for protecting an innocent third party. First, the employer should not expect an innocent third party to be aware of inherent danger, but that same employer may not have the expertise to ensure that the employee is protected and should be able to "assume that the worker, or his supervisors, are possessed of sufficient skill to recognize the degree of danger involved and to adjust their methods of work accordingly."<sup>62</sup> In addition, even if the employer has the expertise to recognize the inherent risks to the employee, protecting the employee is much more difficult. Protecting the third party will often involve very simple precautions such as placing protective barriers around the work-site, while protecting the workmen will often involve continually monitoring the work and specifically commanding the method for carrying out the work. By definition an employer does not have the right to control the day-to-day details of the project and is prohibited from assuring adequate precautions are taken to protect the workmen.<sup>63</sup> As stated in *Salmon*, "it would be a strange anomaly in jurisprudence were we to hold that an employer is liable to the servant of an independent contractor because of the negligence of the contractor in the performance" of the inherently dangerous activity.<sup>64</sup> Second, unlike an injured third party, who, absent the inherently dangerous doctrine, may have no other source of recovery if the contractor is not financially responsible, an injured employee is entitled to recovery under worker's compensation laws.<sup>65</sup> Third, allowing the employee to recover under the inherently dangerous doctrine may create an "unwarranted

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59. W. PROSSER, *supra* note 54, § 71.

60. *See supra* note 18.

61. *See supra* note 28 and accompanying text.

62. *Donch v. Delta Inspection Servs., Inc.*, 165 N.J. Super. 567, 574, 398 A.2d 925, 928 (1979) (quoting *Wolczak v. National Elec.*, 66 N.J. Super. 64, 168 A.2d 412 (1961)).

63. *See supra* note 19.

64. 241 Mo. 14, 41-42, 145 S.W. 16, 24 (1912).

65. *See* MO. REV. STAT. § 287 (1986).

windfall" for injured workers who also recovers under the worker's compensation.<sup>66</sup> In addition, since the contractor pays the premium for the worker's compensation insurance, this cost is figured into his cost of doing business and is passed on to the employer.<sup>67</sup> Fourth, recovery by an employee under the inherently dangerous doctrine coupled with the worker's compensation laws creates further inequity. Recovery by the employee under the worker's compensation laws protects the contractor from indemnification.<sup>68</sup> Hence, to hold the employer vicariously liable for injuries to the employee creates the unusual and unfair situation in which the employer is exposed to greater liability to the independent contractor's employees than to his own employees.<sup>69</sup>

By imposing vicarious liability upon the employer, the court has created a more socially desirable result for third parties, but may have increased the unfairness to the employer when the injured party is an employee of the independent contractor. When the *Mallory* court originally extended the doctrine to include employees of the independent contractor,<sup>70</sup> the employees were not covered by worker's compensation laws.<sup>71</sup> Thus, the court sought to protect all injured parties. Since the adoption of worker's compensation laws in Missouri, however, employees have been statutorily protected and may no longer need this protection. Therefore, the courts should reconsider the desirability of permitting an injured employee to recover under the inherently dangerous doctrine.

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66. Note, *supra* note 27, at 1180. Granted, some may argue that worker's compensation is inadequate compensation for the injured employee; however, the injured employer receives additional compensation than an injured third party.

67. *Id.*

68. MO. REV. STAT. § 287.120(1) (Supp. 1990) states:

Every employer subject to the provisions of this chapter shall be liable, irrespective of the negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of his employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person. The term "accident" as used in this section shall include, but not be limited to, injury or death of the employee caused by the unprovoked violence or assault against the employee by any person.

69. Note, *supra* note 27, at 1180-81.

70. See *supra* note 30 and accompanying text.

71. Worker's compensation laws became effective in Missouri on September 1, 1925. See MO. REV. STAT. § 287 introductory note (Vernon 1965). The accident in *Mallory* occurred in 1924. *Mallory*, 320 Mo. at 102, 6 S.W.2d at 619.

