

careful in the way in which they heaped up the earth and stones the plaintiff would have avoided them, still I think the nuisance which the defendants employed the contractors to commit was the primary cause of the accident." Erle, J., succinctly stated his conclusion as follows: "I agree that there should be no rule, on this specific ground that, as I understand the facts, the cause of the accident was the very thing done in pursuance of the specific directions of the defendants contained in their contract; and that in my opinion makes the distinction between the present case, and those cited, in which the cause of the accident was the negligence of those doing the thing, not the thing itself."

An employer is responsible for damages resulting from work done in the course of the performance of a contract which authorized the contractors to make use of materials which could not be taken without infringing a statute. *Pitts v. Kingsbridge Highway Board* (1871) 19 Week. Rep. 884, 25 L.T.N.S. 195.

A landowner who enters into a contract for the erection of a building on a plan which is prohibited by a valid by-law of a city is liable to an adjoining proprietor for any damage which may be caused by the erection of the building. *Walker v. McKillan* (1882) 6 Can. S.C. 241, affirming (1881) 21 N.B. 31.

A person who, without special authority, makes or continues a covered excavation in a public street or highway, for a private purpose, is, in the absence of negligence in the party injured, responsible for all injuries resulting from the way being thereby rendered less safe, irrespective of any degree of care and skill in the party who makes or continues the excavation. *Congreve v. Smith* (1858) 18 N.Y. 79 (plaintiff fell through a flagstone over an area which the defendant had excavated without obtaining a license). The court said: "It is no answer to the present action that the covering of the area was done under the contractors, who had contracted to do the work properly, and that the defendants are not responsible for the negligence of the contractors' servants. The act was that of the defendants; they procured it to be done, and do not appear to have objected to it. Besides, the action may well stand on the basis of continuing the area and the stone covering it, they making the easement unsafe, compared with what it otherwise would have been. That is a sufficient ground of liability. The defendants were bound, at their peril, to make and at all times to keep the street as safe as it would have been if the area had not been constructed."

In a later case *Seldon, J.*, in discussing the doctrine thus enunciated, remarked that it could not be material whether the excavation was a covered or an open one, provided it was unauthorized, and proceeded thus: "The fact chiefly relied upon in the defendant's behalf, that the injury resulted immediately from the negligence of a contractor, who was doing the work upon his own responsibility, and was bound by his contract with the defendant to guard, by proper precautions, against accidents does not constitute a defense to the action. The excavation was made on the defendant's account and at his request, in a public street, for a private purpose of the defendant, in which the public had no interest, and, so far as the case discloses, without the consent of the corporate authorities. The act of making the excavation was wrongful, without reference to the manner in which it was made or secured. The defendant was, therefore, liable for the injury which the excavation produced to third persons, without fault on their part, whether the workmen were guilty of negligence or not. . . . The basis of the defendant's liability is his own wrongful act in procuring the excavation to be made without authority, and not the negligence of the contractor or his workmen in performing or guarding the work." *Creed v. Hartmann* (1884) 29 N.Y. 591, 86 Am. Dec. 341 (plaintiff fell through planks stretched across a trench dug for a sewer).

If the plans supplied by the defendant for a building to be erected by him did, as a matter of fact, violate the provisions of a specific statute applicable to the class of work in question, he cannot exculpate