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## WHAT PRICE LIABILITY FOR INSURANCE CARRIERS WHO UNDERTAKE VOLUNTARY SAFETY INSPECTIONS?

*Stephen S. Boynton\* and H. Bradley Evans, Jr.\*\**

It is a basic tort concept that liability for negligence arises from a failure to comply with fixed and uniform standards of conduct. One of the most troublesome problems in tort law is that of measuring the legal standard of conduct for the volunteer. Generally, the person who volunteers to do something that he is under no obligation to do must nevertheless use due care in carrying on the activity that he has undertaken.<sup>1</sup> In recent years, the application of this "ancient learning"<sup>2</sup> has had a profound impact on the insurance industry as the courts have held workmen's compensation and liability insurance carriers liable for alleged negligent performance of voluntary safety inspections on construction jobs.<sup>3</sup> The purpose of this article is to explore the developing case law on this subject and to analyze the relationship between the legal concept and its practical application.<sup>4</sup>

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1 As phrased in the Restatement:

One who gratuitously undertakes with another to do an act or to render services which he should recognize as necessary to the other's bodily safety and thereby leads the other in reasonable reliance upon the performance of such undertaking

(a) to refrain from himself taking the necessary steps to secure his safety or from securing the then available protective action by third persons, or

(b) to enter upon a course of conduct which is dangerous unless the undertaking is carried out,

is subject to liability to the other for bodily harm resulting from the actor's failure to exercise reasonable care to carry out his undertaking. RESTATEMENT OF TORTS § 325 (1934).

2 Justice Cardozo observed in *Glanzer v. Shepard*, 233 N.Y. 236, 239, 135 N.E. 275, 276, 23 A.L.R. 1425, 1427 (1922): "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all."

3 In an address on October 19, 1965, Richard Elliott, Secretary of the National Bureau of Casualty Underwriters stated:

Insurance companies have been disturbed by a number of recent court decisions holding them liable for negligence in the inspection of a risk. In recognition of this, the inspection condition of the policy has been changed to make it clear that the carrier is not obligated to inspect the insured's property or operations and, in the event it does make an inspection, such inspection does not constitute an undertaking, on behalf of or for the benefit of the insured or others, to determine or warrant that the property or operations are safe. Address at Downstate Regional

Meeting of the New York State Ass'n of Ins. Agents, Garden City, Long Island, Oct. 19, 1965, in *Speech Bank*, SP-127, p. 12.

4 It is not within the purview of this article to discuss those cases where an insurer specifically contracts to make inspections where there is no statutory duty imposed or where the insurer contracts to make inspections in lieu of the insured's legal duty as imposed by statute. *E.g.*, *Pilinko v. Merlau*, 10 Misc. 2d 63, 171 N.Y.S.2d 718 (1958), *rev'd on other grounds*, 7 App. Div. 2d 617, 179 N.Y.S.2d 136 (1958) (specific contract for periodic inspections in multiple dwelling; no legal duty on insured other than common law); *Bollin v. Elevator Constr. & Repair Co.*, 361 Pa. 7, 63 A.2d 19, 6 A.L.R.2d 277 (1949) (specific provision in insurance contract to inspect an elevator where there was a statutory duty on the elevator owner to inspect and report on conditions); *Sheridan v. Aetna Cas. & Sur. Co.*, 3 Wash. 2d 423, 100 P.2d 1024 (1940) (specific provision in contract of insurance to inspect

Many workmen's compensation and general liability insurance carriers have a clause in their policies which provides that:

The company shall be permitted to inspect the insured premises, operations and elevators, and to examine and to audit the insured's books and records at any time during the policy period and any extension thereof and within three years after the final termination of this policy as far as they relate to the premium basis or the subject matter of this insurance.<sup>5</sup>

The question presented is whether such a provision creates a liability on the part of the insurance company for any injuries sustained as a result of the insured's negligence when the insurance carrier either fails to take advantage of the permission to inspect the insured premises, or does inspect and fails to discover a defect or a condition that is determined to be a proximate cause of an accident. It is submitted that, without what can be described as special circumstances, an insurance contract with a permissive inspection clause should not *ipso facto* impose liability on the insurer to third parties.

One of the earliest cases on this subject is the 1890 case of *Van Winkle v. American Steam-Boiler Insurance Company*<sup>6</sup> in which an alleged negligent inspection of a boiler failed to uncover a defect which subsequently caused an explosion. In holding the insurer liable for resulting injuries, the court reasoned that, although the insurance company was not compelled by virtue of its contract to supervise the maintenance of the boiler, "it is undeniable that, as it proceeded to do so, it thereby became bound by the express terms of its contract . . ." <sup>7</sup> In describing the insurer's "supervision," however, the court emphasized that the insurer "co-operated with the owner of this dangerous instrument in its management, in a particular indispensable to its safe use, and it thereby in that degree constituted itself the agent or the substitute of such owner."<sup>8</sup>

The dangerous instrumentality and the management factor are the practical keys to properly interpreting the application of the volunteer concept. Unfortunately, many cases that cite *Van Winkle* overlook these features. New Jersey, however, in subsequent opinions has accepted these factors as essential criteria for the imposition of liability.<sup>9</sup> For example, in 1963 the New Jersey Superior Court in *Viducich v. Greater New York Mutual Insurance Company*<sup>10</sup> held that, where there had been but one inspection on the insured's premises and no report made, liability would not attach for injury caused by an allegedly

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and report on conditions of an elevator where there was a statutory duty on the elevator owner to inspect and report condition).

<sup>5</sup> Comprehensive General Liability Policy, Liberty Mutual Insurance Company, Conditions § 2 (GPO 2120 R5, 6-1-62).

<sup>6</sup> 52 N.J.L. 240, 19 A. 472 (1890).

<sup>7</sup> *Id.* at 245, 19 A. at 474.

<sup>8</sup> *Id.*

<sup>9</sup> *Cf.*, *McCourt v. Public Service Coordinated Transp.*, 122 N.J.L. 419, 5 A.2d 734 (1939) in which suit was brought by an incompetent who was injured on a right of way by one of defendant's cars. In an effort to sidestep the duty owed to a trespasser on land, the plaintiff unsuccessfully attempted to employ the reasoning of a "highly dangerous" activity as applied in *Van Winkle*, which would produce a higher standard of care.

<sup>10</sup> 80 N.J. Super. 15, 192 A.2d 596 (1963).

defective woodshaping machine. The court pointed out that *Van Winkle* was not controlling because in that case repeated inspections had been made, and that this had amounted to the carrier assuming the responsibility of management.<sup>11</sup> Consequently, the court reasoned that, without conduct which obviously produces reliance on such inspection, no liability can be imposed.<sup>12</sup> Similarly, in the Maryland case of *Zamecki v. Hartford Accident & Indemnity Company*,<sup>13</sup> an action was brought as a result of personal injuries sustained when a grandstand collapsed which the insurer had reserved the right to inspect in its insurance policy. Distinguishing *Van Winkle*, the court held, *inter alia*, that no duty arose to the plaintiff from voluntary inspections where there was no conduct amounting to management.<sup>14</sup>

Although the courts in the cases discussed above spoke of management, the clear implication is that the absence of *reliance* upon the inspection by the insured or by third parties was the basis for the decisions. The decisive role of reliance is illustrated by *Hartford Steam Boiler Inspection & Insurance Company v. Pabst Brewing Company*.<sup>15</sup> In that case certain boilers were inspected gratuitously by the defendant insurer pursuant to a permissive clause in the policy, and the evidence showed that the insured had relied upon the carrier's inspections. One of the boilers subsequently exploded. The court stated:

We are of opinion that these facts of continuous conduct on the part of the Insurance Company in reference to the inspections and their purpose — if relied upon by the Brewing Company and so understood by the Insurance Company, as alleged — are of probative force to show both the undertaking of duty and relation of the parties upon which the action for negligence in performance thereof may be predicated.<sup>16</sup>

Thus, the negligence in actual inspection and the failure to discover the defect have been considered the proximate cause of injuries under circumstances where others relied upon the inspections. It would appear, however, that without *clear* reliance upon such inspections by the injured parties, no right of action would lie for gratuitous safety inspections.

In 1964, however, a veritable legal bombshell exploded when the Supreme Court of Illinois delivered the opinion of *Nelson v. Union Wire Rope Corporation*.<sup>17</sup> During the construction of the Duval County Courthouse in Jacksonville, Florida, a hoist fell when a cable broke causing extensive personal injuries and death to employees of a general contractor and subcontractor who were riding the hoist. Eighteen plaintiffs recovered judgments totaling \$1,569,400 for personal injury and wrongful death against the workmen's compensation and public liability carrier of the general contractor. The theory upon which the plaintiffs recovered was that there was negligence in inspecting the safety

11 *Id.* at 21-22, 192 A.2d at 600.

12 *Id.* at 23-24, 192 A.2d at 601.

13 202 Md. 54, 95 A.2d 302 (1953).

14 *Id.* at 60, 95 A.2d at 305.

15 201 F. 617 (7th Cir. 1912).

16 *Id.* at 629.

17 31 Ill. 2d 69, 199 N.E.2d 769 (1964). See Mahoney, *A Closer Look At Nelson v. Union Wire Rope*, 34 INS. COUNSEL J. 255 (1967) for a critical analysis of this case.

practices and machinery of the general contractor. After the hoist was erected, a pulley-type wheel was installed to slow the speed of the hoist. The resultant friction produced excessive wear on the cable and caused it to break. Although the safety devices on the hoist performed within their capacity, they were not designed to hold a platform carrying nineteen men. The inspections were conducted pursuant to the insurance policy, which contained a standard inspection and audit clause.<sup>18</sup> These inspections consisted solely of visual observations of the construction project, including the component parts of the hoist.

At the conclusion of the trial, the jury returned a verdict in favor of the manufacturer of the cable and the designer of the hoist, but found against the insurance carrier. The Illinois Appellate Court affirmed the judgment in favor of the other defendants, but reversed the judgment against the insurance company on the ground that there was no reliance upon the insurance company to perform such inspections, and thus liability should not be imposed for their nonperformance.<sup>19</sup> The Supreme Court of Illinois granted plaintiffs' petition for leave to appeal<sup>20</sup> and subsequently affirmed the judgments as to the manufacturer of the cable and the designer of the hoist, but reversed as to the insurance company, holding that it was a question of fact as to its "negligence."<sup>21</sup> The court reasoned that the question of reliance was not essential to the liability of the insurer since the insurer was not charged with *nonfeasance* but with *misfeasance*: inspections were made but in a negligent manner. Consequently, the court concluded that, if there was negligence in inspection, liability could attach. The court, however, completely ignored the relationship between the alleged negligence and the cause of the injury. As outlined above, the cause of the hoist's fall was the improper use of a pulley.<sup>22</sup> It would appear to be obvious that the insurer's alleged negligence in inspecting was not an efficient producing cause of the injuries and death in the absence of reliance by the plaintiffs or the general contractor. The dissent in *Nelson* quite correctly noted that the majority opinion in favorably citing the *Van Winkle* and *Pabst* cases failed to recognize that those decisions "appear rather to have measured the scope of the duty imposed by the *scope of the undertaking assumed or reasonably thought by others to have been assumed.*"<sup>23</sup> [Emphasis added.]

When this "scope of the undertaking" and the reasonableness of one's relying on actual inspections is considered, a secondary question is presented which clearly underscores the reliance factor: if such voluntary inspections are reserved and undertaken pursuant to the insurance policy, *for whose benefit are they initiated?* In *Uhwelling v. Crown Coach Corporation*,<sup>24</sup> an insurance policy, containing a clause reserving the right to inspect, had been issued on

18 See text accompanying note 5 *supra*.

19 *Nelson v. Union Wire Rope Corp.*, 39 Ill. App. 2d 73, 187 N.E.2d 425 (1963).

20 The Supreme Court also granted leave to "several insurance groups" to file *amici curiae* briefs.

21 *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 769 (1964).

22 The pulley was installed by the general contractor, employer of some of the plaintiffs. Under the Florida Workmen's Compensation Act, the employer was immune from a common law action by the employee. FLA. STAT. ANN. § 440.10, *et seq.* (1966).

23 *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 119, 199 N.E.2d 769, 796 (1964) (dissenting opinion).

24 206 Cal. App. 2d 96, 23 Cal. Rptr. 631 (1962).

certain bus equipment. A defective driveshaft damaged the brake system, and an accident resulted in injuries and several deaths. In a multi-party action, the court decided that the insurer had not assumed any duty as to third parties since the inspections were basically for the benefit of the insurer.<sup>25</sup> The same reasoning was applied in *Thompson v. National Press Corporation*<sup>26</sup> in which the plaintiff claimed that the standard inspection and audit clause in a workmen's compensation policy "created an obligation to inspect, and to inspect carefully, and that for failure to make a sufficiently careful inspection"<sup>27</sup> a cause of action arose in favor of the injured plaintiff. The court granted the defendant insurer's motion for summary judgment stating that the inspection and audit clause "is permissive and is intended for the benefit of the insurance carrier. It does not impose an obligation on the insurance carrier to carry on inspection unless it chooses to do so for its own benefit."<sup>28</sup>

By defining the word "volunteer" in terms of benefit, the court held in *Kotarski v. Aetna Casualty & Surety Company*<sup>29</sup> that, even though the insurer gratuitously made inspections, it was not a "volunteer" as defined by Michigan law (and the general law) in that a volunteer is one who undertakes something he is not morally or legally obligated to do *and which is not in pursuance or in protection of any interest of the volunteer*.<sup>30</sup> The court reasoned that the defendant-insurer, as workmen's compensation carrier, had an obvious interest in inspecting the insured's factory and equipment.

It manifestly is to the insurer's advantage (among other interests) to reduce the number of accidents which would give rise to liability under the workmen's compensation statute. Thus, even assuming that defendant did gratuitously undertake to perform certain inspections, it cannot be conceded that it is a "volunteer."<sup>31</sup>

Therefore, if the inspections are viewed in the clear light of the facts, it would appear that the inspections undertaken by an insurance company are not actually within the "volunteer" concept. They are not undertaken in the interest of others but are initiated for the exclusive benefit of the insurer. Hence, if there is reliance, it is unsolicited and should not cause liability to be placed on the insurer when, pursuant to a permissive inspection clause, no inspections are made, or the insurer does inspect and fails to uncover a pre-existing defect or condition that causes the accident and resulting damage. However, if the inspections undertaken by an insurance company are performed in such a manner that objectively they are for the benefit of a third party, then reliance is a determinative factor and can be invoked by the plaintiff. But mere invoca-

25 23 Cal. Rptr. at 651-59.

26 264 F. Supp. 668 (D.D.C. 1966).

27 *Id.*

28 *Id.*

29 244 F. Supp. 547 (E.D. Mich. 1965). *Cf. Williams v. United States Fidelity & Guar. Co.*, 358 F.2d 799 (4th Cir. 1966) where the Virginia Workmen's Compensation statute was similar to Michigan's and the court believed the *Kotarski* case had reached the proper result.

30 *Kotarski v. Aetna Cas. & Sur. Co.*, 244 F. Supp. 547, 551-52 (E.D. Mich. 1965). *See Pace v. Gibson*, 357 Mich. 315, 98 N.W.2d 654 (1959).

31 *Kotarski v. Aetna Cas. & Sur. Co.*, 244 F. Supp. 547, 552 (E.D. Mich. 1965).

tion of reliance should not be sufficient; the burden of proof should demand a showing of reliance *in fact* evidenced by conduct of the insurer indicating that its inspections resulted in dependence on the part of others. Thus, the crucial question presented is: to whom does the benefit derived from such inspections actually inure *under the facts*?

The question of benefit was recently considered in the District of Columbia case of *Gerace v. Liberty Mutual Insurance Company*<sup>32</sup> where several inspections on a construction site were made pursuant to a permissive clause in the insurance contract. In entering summary judgment in favor of the insurance company, the court stated:

[T]he insurance carrier did not undertake to perform a voluntary act for the benefit of someone else. It did so for its own protection in order to reduce risks that might give rise to liability on the policy. Not only is there no basis in reason for the creation of a liability sought to be established here, there is a consideration of public policy to be weighed. Employees and the public generally are helped to some extent by inspections such as the insurance carrier in this case and other similar cases try to make. If a liability for accidents was created in case the insurance company's inspectors fail to discover a defective condition, the result might well follow that insurance companies will refrain from inspection and refrain from even reserving the right to inspect because the risk of inspecting would be too great. The only persons who will suffer would be employees and possibly third parties, as well as the public generally.<sup>33</sup>

The public policy considerations enunciated in *Gerace* echo the sentiments and fears of one of the dissents in *Nelson* that "under the stringent rule adopted by the majority no insurer will hereafter dare offer to perform, or perform, limited inspection services for fear of incurring liability."<sup>34</sup>

In many jurisdictions an action by an employee against his employer is barred by the applicable workmen's compensation act in which it is provided that the insurer is to be equated with the employer and therefore shares its immunity from common-law actions for damages.<sup>35</sup> It is interesting to note that *Nelson* cited the New Hampshire case of *Smith v. American Employers' Insurance Company*<sup>36</sup> as precedent in holding that an action would be permitted

32 264 F. Supp. 95 (D.D.C. 1966).

33 *Id.* at 97.

34 *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 121, 199 N.E.2d 769, 797 (1964) (dissenting opinion).

35 *E.g.*, ALA. CODE tit. 26, § 262(d) (1958); GA. CODE ANN. § 114-101 (1956); HAWAII REV. LAWS § 97-1 (Supp. 1963); IND. ANN. STAT. § 40-1205 (1965); ME. REV. STAT. ANN. tit. 39, § 2(6) (1964); MO. ANN. STAT. § 287.030.2 (1965); NEB. REV. STAT. § 48-111 (Supp. 1965); N.H. REV. STAT. ANN. § 281:2 (1966); ORE. REV. STAT. § 656.018(3) (1965); S.D. CODE § 64.0102(1) (1939); TENN. CODE ANN. § 50-902 (1966); TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (1967); VT. STAT. ANN. tit. 21, § 601(3) (1959); VA. CODE ANN. § 65-3 (1950); *cf.* *Donohue v. Maryland Cas. Co.*, 248 F. Supp. 588 (D. Md. 1965) in which the court held that since an insurer is immune from tort liability when performing a duty imposed on the employer by the Maryland Workmen's Compensation Act [MD. ANN. CODE art. 101 (1957)], there was no reason why the insurer should not also be immune when performing a duty imposed on the employer at common law such as providing a safe place to work, which includes the duty to make safety inspections.

36 102 N.H. 530, 163 A.2d 564 (1960).

against an insurer for negligent inspections.<sup>37</sup> Although the court in *Smith* addressed itself almost exclusively to whether the workmen's compensation act then in effect<sup>38</sup> permitted such an action, the fact that the insurer inspected a compressed air tank monthly and undertook "to notify . . . [the employer] of any dangers, and to recommend changes in the interest of avoiding accidents"<sup>39</sup> placed the case in the special circumstances of reliance enunciated in *Van Winkle*. Subsequent to the *Smith* case, the New Hampshire legislature promptly passed a statute including the employer's insurance carrier in the term "employer," thereby extending the employer's immunity to its carrier.<sup>40</sup>

In the recent case of *Horne v. Security Mutual Casualty Company*<sup>41</sup> a most novel theory was advanced by an injured employee in an effort to impose tort liability on the employer's compensation carrier for alleged negligence in failing to make safety inspections. There the carrier's contract did not have a safety inspection clause. The plaintiff's theory was that the carrier had entered into a contract with the State of Arkansas by which it agreed to provide accident prevention and safety engineering services for him and his fellow workers. The alleged "contract" was a pie-shaped chart that the carrier had filed with the insurance commissioner along with the information necessary to gain authority to write insurance in Arkansas. The chart indicated that 2.14% of each premium dollar was used to provide accident prevention and safety engineering service. The court found, after an extensive review of the cases, that the filing of this document did not create a contract and also held that, under Arkansas law, the carrier was exempt from any liability other than under the Workmen's Compensation Act.<sup>42</sup>

Statutes recently enacted in Iowa and Wisconsin specifically exclude insurance carriers from incurring liability for safety inspections they have undertaken.<sup>43</sup> Exclusive of Iowa and Wisconsin and those states that have determined that an insurance carrier shares the employer's immunity from common-law tort liability under the workmen's compensation statute, further attempts to hold insurance companies liable for negligent safety inspection should be determined on a basis of whether the volunteer in fact increases the risk of danger when negligent inspection creates prejudicial reliance, or whether his actions amount to the undertaking of another's primary duty. For example, in *DeJesus v. Liberty Mutual Insurance Company*,<sup>44</sup> a suit was brought against the workmen's compensation carrier of an employer for an employee's eye injury caused by a strip of bailing wire. Although the lower court held that the Pennsylvania Workmen's Compensation statute extended the employer's immunity to the carrier, the Supreme Court of Pennsylvania found "it unnecessary to reach that

37 *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 76, 199 N.E.2d 769, 774 (1964).

38 Ch. 187:6, [1957] N.H. Laws 222-23, as amended, N.H. REV. STAT. ANN. § 281:14 (1966).

39 *Smith v. American Employers' Ins. Co.*, 102 N.H. 530, 531, 163 A.2d 564, 566 (1960).

40 N.H. REV. STAT. ANN. § 281:2 (1966).

41 265 F. Supp. 379 (E.D. Ark. 1967).

42 *Id.*; ARK. STAT. ANN. §§ 81-1305, 81-1337, 81-1338(c), 81-1340(a)-(b) (Repl. Vol. 1960).

43 IOWA CODE ANN. § 88 A. 14 (Supp. 1965); WIS. STAT. ANN. § 895.44 (1966).

44 423 Pa. 198, 223 A.2d 849 (1966).

issue . . . .<sup>45</sup> The plaintiff's theory was that the insurance carrier's advertising of safety inspections had introduced the necessary question of reliance. In a *per curiam* opinion, the court rejected the plaintiff's contention and held that, for a cause of action to exist, the plaintiff must allege negligence in the performance or nonperformance of inspection that results in an increased risk of harm or causes reliance by the injured party on the service of inspection.<sup>46</sup> The court based its conclusion on the *Restatement of Torts* rule<sup>47</sup> that, without reliance in fact or conduct that increases the risk, liability should not be attached even when it is determined that one is rendering a service to another. It is submitted that the court placed the matter in proper context by adopting the rule enunciated in the *Restatement*.

Insurance carriers have attempted to eliminate the contractual questions by changing the language of their permissive inspection clauses in the insurance contract so as to clearly indicate that inspections undertaken are for the benefit of the insurer, and that inspections undertaken are not to determine or warrant that the property or operations inspected are safe.<sup>48</sup> It is clear, however, that the basic common-law tort principles involved should not have required the legislatures or the carriers to seek preventative solutions to avoid liability. It is established that negligence alone is not actionable unless it is causative of the injury. Therefore, even if it is assumed that a carrier owes a duty to other parties when safety inspections are undertaken pursuant to a permissive clause in an insurance contract, no liability should be imposed unless it is clearly demonstrated that the risk was increased by the carrier's undertaking of another's primary duty amounting to supervision or management, which has the effect of inducing prejudicial reliance on the part of third parties. Without such recognition by the courts, the insurer is placed in the dilemma of either undertaking inspections which must be so thorough as to encompass all areas of the construction project, although such thorough inspections are clearly

45 *Id.* at 200, 223 A.2d at 850.

46 *Id.*

47 *Id.* The court quoted Section 323 verbatim. That section provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform the undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 323 (1965). *See also* § 324A.

48 The following provision is now in general use on all workmen's compensation policies and on all general liability insurance covering commercial risks; it is also in the standard provisions forms used by members of the National Bureau of Casualty Underwriters, Mutual Insurance Rating Bureau, Multi-Lines Rating Bureau and the National Council of Workmen's Compensation Underwriters:

The company shall be permitted but not obligated to inspect the named insured's property and operations at any time. Neither the company's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the named insured or others, to determine or warrant that such property or operations are safe.

The company may examine and audit the named insured's books and records at any time during the policy period and extensions thereof and within three years after the final termination of this policy, as far as they relate to the subject matter of this insurance. Comprehensive General Liability Policy, Liberty Mutual Insurance Company, VII Conditions § 2 (GPO 2714 10-1-66).

beyond the needs of the carrier, or refraining from undertaking any inspections. Clearly, the first alternative is impractical, and the second would eliminate a useful and beneficial program that has assisted in minimizing injury and loss by accidents on construction projects. Such a dilemma can and should be eliminated by proper judicial analysis of the basic tort principles involved. It is submitted, therefore, that the courts must carefully scrutinize the facts of the cases to determine whether or not the carrier has made the situation worse by inspection, either by increasing the danger or by misleading the injured party, or others, into the belief that any potential danger has been removed. There should be no liability where inspections are conducted that in no way aggravate the situation, and where the injured party is clearly left no worse off than he was before any phase of inspections was undertaken. The substantial contributions to industrial safety and accident prevention<sup>49</sup> made by the insurance industry by virtue of safety inspections should not be judicially thwarted by an unrealistic distortion of valid tort concepts under the guise of limited social justice.

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<sup>49</sup> See St. Clair, *The Case for Private Insurance of Workmen's Compensation*, 31 ROCKY MT. L. REV. 1 (1959); NATIONAL SAFETY COUNCIL, ACCIDENT PREVENTION MANUAL FOR INDUSTRIAL OPERATIONS chs. 12-16 (4th ed. 1959).