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Torts—Liberal Construction of Rule Enacted Under Labor Law Protects Construction Workers

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> charged. . . . The dangerous condition claimed is not alleged to have been created by defendants but by the actions of the elements. In such instance the three-year Statute of Limitations applicable to negligence applies (Civ. Prac. Act. § 49, subd. 6).[1]

In the important case of *McFarlane v. City of Niagara Falls*[2], to which the Court refers, Chief Judge Cardozo carefully reviewed the various meanings of the concept of nuisance, including nuisance arising from negligence:

> Other situations there are, however, where what was lawful in its origin may be turned into a nuisance by negligence in maintenance. The coal hole, built under a license, may involve a liability for nuisance, if there is negligence in covering it. . . . In these and like situations, the danger being a continuing one, is often characterized as a nuisance, though dependant upon negligence.[3]

The Court approaches the present case by reasoning that the nuisance alleged by the plaintiff was not one which grew out of some positive act on the part of the defendant, which was later changed into a nuisance by defendant's negligence. Here, the original act was not due to defendant's conduct, since the elements caused the accumulation of snow and ice on the stairway. Defendant's conduct then became operative, *i.e.*, his failure to remove the snow and ice after sufficient time had passed for him to have had notice of the condition. Perhaps, if the defendant had built his apartment house with an open entrance to the roof and the accumulation of ice and snow on the stairway kept recurring, the defendant might have been found liable for creating a nuisance. Otherwise, the first wrongful conduct on the part of the defendant was his simple failure to remove the snow and ice or, in other words, his negligence.

Thus the Court found that the personal injuries suffered by the plaintiff were due to defendant's negligence, if anything, and governed by the three-year limitation, because a clear cause of action based upon negligence was discernible, while only minor aspects of an action based upon statute or nuisance were apparent from the facts of the case.

D. P. S.

LIBERAL CONSTRUCTION OF RULE ENACTED UNDER LABOR LAW PROTECTS CONSTRUCTION WORKERS

In *Conte v. Large Scale Development Corp.*, the Court of Appeals held that under Rule 23-35.1 passed by the State Board of Standards and Appeals a general contractor and an owner of property are responsible for providing protective guards and supports for an *earthen* ramp used in excavation work by several subcontractors on the job.[4]

While operating a tractor-type earth moving machine, the plaintiff, em-

1. Lorberblatt v. Gerst, supra note 95 at 248, 219 N.Y.S.2d at 43.
2. 247 N.Y. 340, 160 N.E. 391 (1928).
3. Id. at 343-344, 160 N.E. at 392.
4. 10 N.Y.2d 20, 217 N.Y.S.2d 25 (1961).

ployed by a subcontractor, attempted to ascend an earthen ramp used by vehicles traveling between the excavation and street level. Failing to make the incline, the plaintiff backed down the ramp. Then, the plaintiff claimed, the edge of the ramp crumbled and the machine rolled over into a hole severely injuring him.

He brought an action against the general contractor and the owner of the property, who were joined as co-defendants. The trial judge instructed the jury that the defendants had not properly constructed the ramp and that this violation of Rule 23-35.1 was negligence as a matter of law. He only allowed the jury to decide the issues of proximate cause and damages. The jury returned a verdict in favor of the plaintiff and awarded him $250,000 in damages. The trial court entered judgment in accordance with the jury verdict and also dismissed a third party complaint brought by the defendants against the subcontractor. On appeal, the Appellate Division modified the trial court's decision by dismissing the plaintiff's complaint and affirming the dismissal of the third party complaint.[5] The Court of Appeals reversed the dismissal of the plaintiff's complaint and ordered a new trial. The Court, however, affirmed the dismissal of the third party complaint.

Section 241 of the Labor Law which is applicable to all contractors and owners provides for the protection of construction workers while on the job. Subsection 6 of this law declares:

> The Board of Standards and Appeals may make rules to provide for the protection of workmen in connection with excavation work for the construction of buildings, . . . and the owners and contractors for such work shall comply therewith.

Through the power granted by this statute, the Board of Standards and Appeals passed Rule 23-35.1 which provides:

> All runways and ramps shall be substantially constructed and securely braced and supported. Runways and ramps for the use of heavy vehicles shall have a width of not less than 12 feet and shall be provided with timber curbs not less than 8″ × 8″ placed parallel to, and secured to, the sides of the runway or ramp. The floor shall be of not less than three inch planking.

The majority of the Court of Appeals, disagreeing with the Appellate Division, decided that this rule applies to earthen ramps as well as to constructed ramps. They reasoned that since the overall intent of both Section 241 and Rule 23-35.1 is the protection of construction workers, it is irrelevant to this design of safety whether a ramp be made of earth or be artificially constructed. In either case, the workmen must be protected. Further, the majority reasoned that the definition of the word ramp in no way excludes earthen inclines; and an earthen ramp can be "supported," "braced," and fitted with "timber curbs."

5. 10 A.D.2d 255, 198 N.Y.S.2d 989 (1st Dep't 1960).

This interpretation by the Court of Appeals is questionable, because it does not seem likely that the term "substantially constructed and securely braced and supported" is meant to apply to earthen ramps. And, realistically, "timber curbs" cannot be "secured to the side" of a dirt incline. Further, Rule 23-35.1 describes the floor of a ramp which is to be made of not less than three inch planking. This specification was obviously meant only to apply to artificially constructed ramps.

The Court of Appeals further ruled that even though Rule 23-35.1 did include earthen ramps, the violation of the rule by the defendants cannot be considered as negligence as a matter of law. The Court backed this conclusion by relying on several New York cases which have held that only violations of statutes enacted by the State Legislature can be held to be negligence as a matter of law.[6] A violation of rules created by any other body cannot create liability without regard to the defendant's own negligence.[7] The State Constitution allows only the State Legislature to enact statutes, the violation of which is negligence as a matter of law.[8] Thus, even the Legislature cannot change this requirement by providing that the rules promulgated by another body can have the power of a state statute.[9] The violation of a rule enacted by a body other than the State Legislature is simply evidence of negligence which can be taken into consideration by the jury along with other evidence, but such a violation is not negligence as a matter of law.[10]

Following the ruling of *Walters v. Rao Elec. Equipment Co.*, which held that Section 241 imposed a non-delegable duty upon general contractors and owners of property, the Court of Appeals also declared that the defendants, as active tortfeasors, cannot recover from the subcontractor if the plaintiff should win his suit.[11] Therefore, the Court affirmed that part of the trial court and Appellate Division decisions which dismissed the third party complaint brought by the defendants against the sub-contractor.

These rulings on the issues of the violation of rules promulgated by administrative agencies and the delegation of duties imposed by Section 241 are an affirmance of settled doctrine of New York law.[12]

R. D. S.

INTEREST ON DAMAGES AWARDED IN NEGLIGENCE IS DISCRETIONARY WITH JURY

The rule for awarding interest for damages in New York State is that it is a matter of right in the case of intentional torts; a matter of the jury's discretion in the case of negligence. In fact, if counsel for the claimant for one

6. Waverly v. Ogden, 7 N.Y.2d 332, 197 N.Y.S.2d 165 (1960); Teller v. Prospect Heights Hosp., 280 N.Y. 456, 21 N.E.2d 504 (1939); Schumer v. Caplin, 241 N.Y. 346, 150 N.E. 139 (1925).
7. Schumer v. Caplin, supra note 6.
8. Ibid.
9. Ibid.
10. Ibid.
11. 289 N.Y. 57, 43 N.E.2d 810 (1942).
12. Supra note 3.