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Torts—Interest on Damages Awarded in Negligence Is Discretionary with Jury

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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.

reason or another does not make a timely request for submission of the issue of interest to the jury, it is not even a matter of the jury's discretion. In a recent case, where the interest was approximately one-half of the actual damages awarded, such a failure by counsel touched off an inquiry into the rules governing the award of interest in New York.

In *Purcell v. Long Island Daily Press Pub. Co.*,[13] the Court of Appeals was presented with what appeared to be the much desired opportunity to overrule the long standing and much criticized rule governing the award of interest in negligence actions.

The Supreme Court, Kings County, after receiving a verdict of damages for negligence in causing a fire, granted a motion of plaintiff awarding interest on the verdict as a matter of right. The Appellate Division affirmed the verdict unanimously, and affirmed the award of interest with two judges dissenting.[14]

The Court of Appeals did not question the verdict of negligence, but voted 6-1 to reverse the award of interest, with Judge Fuld dissenting in a separate opinion. The Court upheld the old rule, that the power to allow interest on a verdict for damage negligently caused was exclusively within the discretion of the jury, and that such interest could not be added as a matter of right in the absence of a prior request that the matter be submitted to the jury.

The Court, the dissent,[15] the Appellate Division,[16] the long line of cases[17] and the text writers[18] all agree that it is both an inequitable and unsound distinction which allows interest as of right in cases of wilful torts and disallows it in cases of negligent torts. That interest is necessary to complete indemnity in both cases is not questioned. The dichotomy is a result of their opposing positions on what to do about it. The Court feels, as the appellant urged, that any change in the rule as it now stands should be a legislative change. They point to the case of *Faber v. City of New York*[19] and the subsequent change in the Civil Practice Act[20] to provide for the allowance of interest in that type of case. The respondent, Appellate Division and Judge Fuld feel that an unjust rule, court-made and court-developed should not be followed pending an act of the legislature to end the injustice.[21] It is a well-known fact that the legislature is subject to pressure groups and has a propensity to delay. The effect of this may in some instances be injustice or delay resulting in injustice.

Two Court of Appeals decisions have severely criticized the rule. "Such a distinction is manifestly unsound, because interest is essential to complete

13. 9 N.Y.2d 255, 213 N.Y.S.2d 425 (1961).
14. 11 A.D.2d 814, 204 N.Y.S.2d 924 (2d Dep't 1960).
15. Supra note 13.
16. Supra note 14.
17. See, e.g., Flamm v. Noble, 296 N.Y. 262, 72 N.E.2d 886 (1947); Wilson v. City of Troy, 135 N.Y. 96, 32 N.E. 44 (1892).
18. See 60 Harv. L. Rev. 1158 (1947).
19. 222 N.Y. 255, 118 N.E. 609 (1918).
20. N.Y. Civ. Prac. Act. § 480.
21. Supra notes 13 and 14.

indemnity in both classes of cases."[22] The Court feels that since the problem has been recognized, criticized and yet left undisturbed by this Court in the past it is compelled to continue the preservation.

It is submitted that the Court may be guilty of following the nonexistent dictates of its own bench, when it states "The established line of Court of Appeals authority in this area, which in fact though criticizing the rule twice, at the same time preserved it, clearly compels this conclusion."[23] In *Flamm v. Noble*[24] (in which Chief Judge Loughran decried the inequity of the rule) it was not necessary to a proper disposition of the case that the rule be questioned. The action was one for fraud or duress, and under other law required interest as a matter of right. The language of the Court strongly warrants the presumption that had the case at bar been the next on the docket, the Court of Appeals would have overruled the line of cases,[25] ending the question once and for all. Unfortunately, such was not the case and the rule lived on in spite of condemnation by the entire Court.

In *Wilson v. City of Troy*,[26] the Court was in the same position as in the later *Flamm v. Noble*. The appeal in that case did not bring into issue the propriety of this rule, but rather the question of whether it was proper to submit to the jury the question of interest. To resolve the issue it was not necessary to even approach the question of interest as a matter of right. The decision holding that it was proper, was no more than a holding that an injured party is entitled to at *least* a consideration by the jury of his right to full indemnity. The defendant had no grounds for reversal on an error under which it was not he who suffered but the plaintiff.

It is a matter of interest that since the rule allows the jury the discretion of allowing interest or not, it is considered by the Court to be sufficient to dispel any suggestion of inequity in the effects of the rule.[27] Should interest be a question of fact? It would seem that the province of the jury would be to determine whether there has been a tort, and if so how much damage did the injured party suffer? If interest from the time of the injury is to be the measure, for indemnity to be full, it seems unreasonable that the award should even be placed in such a position that it might be denied.

The Court here seems to be overly concerned with the ramifications of a decision which would overrule the prior cases. They feel that in view of the length of time it often takes for a case to reach a final disposition, verdicts would be more inflated than they are already. It may be true that verdicts are higher than they should be, but that was not the concern of the Court at that

22. Flamm v. Noble, supra note 17 at 268, 72 N.E.2d at 888.
23. Supra note 13 at 258, 213 N.Y.S.2d at 427.
24. Supra note 17.
25. Parrott v. Knickerbocker Ice Co. 46 N.Y. 361 (1871); Walrath v. Redfield, 18 N.Y. 457 (1858).
26. Supra note 17.
27. Purcell v. Long Island Daily Press Pub. Co., supra note 13 at 259, 213 N.Y.S.2d at 428.

time. As for interest inflating the verdict, the damage was suffered at the time of the negligence, and from that time on the defendant had something of the plaintiff's. Were justice swift he would have had his money at once. It is not and so he did not receive his damages until the case was decided. Since then he has been denied the fair market value for the use of his money, and that is interest. It is not as if he were asking for something more than what he lost. The inherent justice of the award of interest must not be denied to an injured party merely because of infirmities in the judicial system.

The Court here has failed to make use of an opportunity provided by the Appellate Division, in accordance with what seemed to that court to be the wishes of the Court of Appeals. The issue will very likely remain in its present unsatisfactory state until the legislature overcomes its obstacles and rectifies this court-made injustice.

D. R. K.

SURGEON'S LIABILITY FOR PATIENT'S DEATH IS JURY QUESTION

In the case of *Weiss v. Rubin*[27a] death of plaintiff's intestate resulted from the transfusion of incompatible blood administered during the course of an operation. Plaintiff recovered a verdict and judgment against the hospital, anesthetist, and attending surgeon in Supreme Court, which was affirmed by the Appellate Division.[28] On appeal to the Court of Appeals the liability of the anesthetist and hospital was conceded and the only issue was whether there was sufficient evidence of negligence on the part of the surgeon to send the case to the jury.

Defendant surgeon herein was a specialist in urology and was in complete charge of the operation on the decedent. It was hospital procedure that the surgeon in charge, prior to the operation, prepare a written order if he wanted blood available during the operation. Except in an emergency situation, which was not present in this case, this was the only way that blood might be procured for transfusion purposes during an operation. Through the conceded negligence of the nurse assigned to the operation by the hospital, and the anesthetist whose duty it was to administer transfusions upon instructions from the surgeon in charge, a pint of blood prepared for a previous patient was brought into the operating room and administered to plaintiff's intestate. After the blood was produced in the operating room the anesthetist said, "Doctor, I have blood ready for this lady. Shall I give it?" Defendant surgeon, knowing that he had not prepared a written order for the blood, and knowing that this was the only manner in which blood could be procured during an operation answered "Yes." The incompatible blood was administered and decedent developed an anaphylactic reaction and died.

The Court of Appeals in a five to two decision held that the jury had a

27a. 9 N.Y.2d 230, 213 N.Y.S.2d 65 (1961).
28. 11 A.D.2d 818, 205 N.Y.S.2d 274 (2d Dep't 1960).