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Torts—Subcontractor Fulfilling All Contractual Duties Not Liable for Negligent Injury of Pedestrian

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alleges several separate and distinct theories of negligence, a claim over may be allowed if the recovery sought is based on passive negligence.[41]

After examining the plaintiff's allegations referring to Luckenbach's knowledge of Atlantic's torch operations and the storage of poorly packed inflammable and explosive materials on the pier, the Court concluded that the gravamen of the plaintiff's charges was that Luckenbach negligently maintained its pier so as to constitute a fire hazard. The complaint did not contain allegations of passive negligence against Luckenbach which would make Luckenbach liable for Muehlstein's active negligence. Since actual fault was the predicate for liability against Luckenbach, the Court concluded that it could not claim over against Muehlstein. The Court, in making its decision, stressed quite heavily the fact that Luckenbach knew as well as anyone the nature of the materials it had carelessly stored on its pier and that the maintenance problems were within the ambit of its responsibility. The Court reasoned in this context that decisions in regard to the continued acceptance and storage of such cargo after notice could hardly be deemed passive.

Bd.

RISKY CONDUCT BY EXPERIENCED WORKER AS CONTRIBUTORY NEGLIGENCE

Plaintiff, in a personal injury action, was awarded more than $98,000 for injuries received on the job as a structural steel worker.[42] The Appellate Division modified the judgment by reducing the damages to $70,000.[43] The Court of Appeals, in *McAllister v. New York City Housing Authority*, reversed and dismissed the complaint.[44] In this case, the plaintiff, who had more than 33 years experience in his field, attempted to crawl through a window frame opening that was only temporarily set in place. The opening proved too narrow and as a result of plaintiff's attempts to squeeze through, the frame fell on him causing the injuries complained of.

The Court found that the plaintiff had various alternatives presented to him whereby he might have entered the area safely. In addition, he knew that the frame was only temporarily set in position. These facts, taken together with plaintiff's unquestioned experience, led the Court to conclude that he was contributorily negligent as a matter of law. The decision merely reaffirms settled doctrine in New York law that conduct involving an undue risk of harm to the actor himself will normally prevent recovery.

Bd.

SUBCONTRACTOR FULFILLING ALL CONTRACTUAL DUTIES NOT LIABLE FOR NEGLIGENT INJURY OF PEDESTRIAN

The plaintiff was injured in a fall on a New York City sidewalk that had been temporarily repaired following an excavation job. Although the Court of

41. Putvin v. Buffalo Elec. Co., supra note 38.
42. McAllister v. New York City Housing Authority, 24 Misc. 2d 230, 197 N.Y.S.2d 337 (Sup. Ct. 1959).
43. 12 A.D.2d 626, 210 N.Y.S.2d 766 (3d Dep't 1960).
44. 9 N.Y.2d 568, 216 N.Y.S.2d 77 (1961).

Appeals upheld judgments against the City of New York and the general contractor, Consolidated Telegraph and Electrical Subway Co. (described as Con Tel), it held, in *Sobel v. City of New York*, that the excavator hired by Con Tel was not liable.[45] The excavator, Slattery Rock Corporation, had contracted to do the excavation, backfilling and to repave temporarily (without cementing the paving stones on which the plaintiff subsequently tripped). This meant that the site was to be left in condition for public use until another subcontractor, W. J. Fitzgerald Paving Co., cemented the paving stones together and put them into final condition. Was Slattery under a continuing duty to maintain the site, although its subcontract had been fully performed? The Court stated that Slattery must be exonerated from liability if, under the contractual agreements between the parties, all duties on its part had been fulfilled at the time of the accident.[46] Under the terms of its subcontract Slattery was to maintain the site until 10 days after it had notified Con Tel *in writing* that the site was ready for Fitzgerald to do the permanent paving. Ten days after Slattery had completed the temporary pavement Con Tel ordered Fitzgerald to proceed with the repaving. The Court reasoned that this order indicated that Con Tel knew that Slattery was through and was not waiting for the written notice that Con Tel claimed was necessary to relieve Slattery from liability for further maintenance. The Court thus concluded that the technical omission to serve the notice was immaterial under the circumstances.

Bd.

TRADEMARKS

TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION BY REBOTTLING

The case of *Lanvin Parfums, Inc. v. LeDans Ltd.*[1] presented a problem of far-reaching importance to both the marketers and consumers of brand name products in New York State. The case involved the lucrative practice of buying on the open market the toilet waters of Lanvin Parfums, Inc., dividing the purchased quantities into one dram units, and then rebottling the same. The new bottle was labeled in a way that utilized the established name of Lanvin while stating the fact that it was a rebottled package, and that LeDans Ltd. did the rebottling. The desired effect was of course to convey the message that what was being purchased was no less than a Lanvin product, at a price heretofore unheard of in the perfume market. The result was that LeDans Ltd. was capitalizing on the prestigious name of Lanvin Parfums, Inc. which further

45. 9 N.Y.2d 187, 213 N.Y.S.2d 36 (1961).
46. Probst v. New York Central R.R. Co., 237 App. Div. 562, 261 N.Y. Supp. 120 (1st Dep't 1932).

1. 9 N.Y.2d 516, 215 N.Y.S.2d 257 (1961).