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Torts—Violation of the Building Code as Evidence of Negligence

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reaffirms the manifest policy of Section 59 to hold owners liable when some one else operates these vehicles negligently, unless it is clearly and unambiguously shown that it was without their permission.

VIOLATION OF THE BUILDING CODE AS EVIDENCE OF NEGLIGENCE

In New York, a cause of action based upon common law negligence places a burden on the plaintiff to show an absence of contributory negligence.

The State Legislature may, however, create by statute, a standard of care or duty for the protection of a specifically designated class, the infraction of which will be conclusive of negligence. The resultant liability attaches regardless of negligence and is recognized only when the courts find that the statute manifests a legislative intent to that effect. Once this absolute statutory liability has been determined, contributory negligence is of no consequence.[32]

The plaintiff in *Major v. Waverly and Ogden, Inc.*[33] was injured in a fall on stairs unprotected by a handrail and lacking illumination. Both deficiencies were in violation of regulations promulgated by the State Building Commission. The Code had been adopted by the village in which the building, an apartment house, was situated.[34] The defendant, owner of the building, claimed that the plaintiff, a guest of his tenant, was guilty of contributory negligence.[35] The trial court agreed and the plaintiff, upon appeal, reiterated her allegation that the defendant's infraction was conclusive of negligence and objected to the trial court's instruction that it was incumbent upon her to dispel any evidence of contributory negligence.

The regulations of the building code were promulgated by the Building Code Commission under authorization set forth in the Executive Law.[36]

The verdict for the apartment owner was unanimously upheld by the Appellate Division[37] and the Court of Appeals.[38]

The opinion considered and distinguished the case of *Koenig v. Patrick Construction Co.*[39] which had been cited by the plaintiff as an impelling precedent for her contention that proof of a violation of the Building Code was itself conclusive evidence of negligence.

That case held that a failure by an employer to provide safety devices for the injured employee in contravention of specific requirements of the Labor Law made the infraction subject to an absolute statutory liability. The language

32. Koenig v. Patrick Construction Corp., 298 N.Y. 313, 83 N.E.2d 133 (1948).
33. 7 N.Y.2d 332, 197 N.Y.S.2d 165 (1960).
34. Once adopted by the political subdivisions, the Code took the effect of law therein and amendments, additions and revisions by the State Building Commission were automatically incorporated into the local ordinance.
35. The plaintiff was visiting at a friend's apartment in the defendant's building and was watching television in the otherwise darkened livingroom. She rushed to find the bathroom, opened the wrong door and fell down the unlit stairs.
36. N.Y. Executive Law § 374-a.
37. 8 A.D.2d 380, 190 N.Y.2d 526 (2d Dep't 1959).
38. Supra note 33.
39. Supra note 32.

of that statute set forth an unmistakable legislative intent to give the employee a degree of protection greater than that provided by the common law. Present in that statute, however, was a clearly defined class engaged in a hazardous calling who were intended to be protected by a fiat and an unvarying duty directed to their employers.

No similar legislative intent was apparent to this Court in its reading of the Executive Law. No well defined class was to be particularly protected from any specific hazard which might cause injury. On the contrary, the Court found unequivocal language suggesting that the Executive Law was enacted to protect the people of the State in general.[40] It empowered the Building Code Commission to draw up basic and uniform performance standards to alleviate the hardship caused by obsolete, conflicting, unnecessarily complex and costly local standards for building construction. Reference in the Executive Law to reasonable standards for the protection of occupants and users were only incidental to the paramount purposes therein.

The Court looked for express or implied language which would show a legislative intent in the Executive Law to create a greater liability than the common law concept of negligence.[41] It found no such intent therein and would not presuppose it of the Legislature to abrogate the common law in the absence of a crystal clear statutory expression that so far-reaching a result should follow.

The Court noted that such a ready construction would soon jeopardize the whole common law concept of negligence in this State by making other statutes providing standards of care prone to the same loose construction.

A second reason was given by the Court in refusing to find a liability predicated solely on a violation of the Code. The rules of the Building Code were subject to modification, repeal or amendment by the Commission and were binding only by virtue of the original adoption of the Code by local ordinance.

The common law can be changed only by the State Legislature and not by the whim of a subordinate political sub-division. The Commission can amend and repeal the standards, emanating from its powers under the Code, but it can not reasonably be concluded that an administrative body could achieve, in their quasi-legislative capacity, that which heretofore could be done only through substantive law-making by the Legislature. Such a proposition would be untenable because the Constitution reserves that power to the State Legislature.[42]

Therefore, to hold that a violation of the regulations of the Code in the instant case was conclusive of negligence would be to assume that the Com-

40. N.Y. Executive Law § 370:
. . . the health, safety, welfare, comfort and security of the people of the state . . . .
The purposes set forth in § 370 are followed closely in the standards provided in § 375(3) and (5).
41. Sheppard Co. v. Zachary P. Taylor Pub. Co., 234 N.Y. 465, 138 N.E. 409 (1923).
42. Shumer v. Caplin, 241 N.Y. 346, 150 N.E. 139 (1925).

mission by its regulations can create statutory liability. For this reason, the violation of the Building Code was only held to be some evidence of negligence.[43]

USE OF NEWS ARTICLE FOR ADVERTISING PURPOSES AS VIOLATIVE OF RIGHT OF PRIVACY

The Mosler Safe Company, for the purpose of promoting the sale of its safes, distributed handbills by mail to prospective customers. In order to dramatize the danger in not being equipped with one of these safes, a newspaper account of a destructive fire, including a newsphoto of the flaming building, was reproduced in the handbill. Also included, but separate from the reprinted article, were a few lines of advertising. The description of the fire mentioned the plaintiff by name three times, along with his address and occupation. It was implied that the fire was started through the carelessness of plaintiff and his companion. Because of this unauthorized use of his name, Flores brought an action in libel and for an invasion of his right of privacy under Section 51 of the New York Civil Rights Law. The defendant's motion to dismiss the latter cause of action was overruled in the trial court and this was affirmed by the Appellate Division.[44] The Court of Appeals, in *Flores v. Mosler Safe Company*,[45] also affirmed, holding that the complaint did not, as a matter of law, fail to set forth a use of plaintiff's name which was violative of his statutory right of privacy.

The development of the right of privacy is usually traced back to a law review article written in 1890.[46] The right is based on a person's privilege "to be let alone," and grants recovery for the embarrassment and indignation experienced by one whose private affairs are revealed to the public. The first case in which this right was contended for was *Roberson v. Rochester Folding Box Co.*[47] The New York Court of Appeals therein held, in a decision still controlling, that there exists no common law right of privacy in New York. Chief Justice Parker wrote in the opinion: "The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent."[48] The Legislature in its very next session passed what are now Sections 50 and 51 of the New York Civil Rights Law. Section 50 provides that "A person . . . that uses for advertising or for the purposes of trade, the name . . . of any living person without having first obtained the written permission of such person . . . is guilty of a misdemeanor." Section 51 provides for injunctive relief and damages. It should be noted that the right

43. Ibid.
44. Flores v. Mosler Safe Company, 7 A.D.2d 226, 182 N.Y.S.2d 126 (3d Dep't 1959).
45. 7 N.Y.2d 276, 196 N.Y.S.2d 975 (1959).
46. Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).
47. 171 N.Y. 538, 64 N.E. 442 (1902).
48. Id. at 545, 64 N.E. 443.