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of the accident is only a misdemeanor.[40] However, the trial court allowed the jury to decide, on the evidence, whether a felony had been committed and whether the homicide was justifiable under section 1055 of the Penal Law. The Court indicated that since the decedent had not committed a felony the question of justifiable homicide should not have been submitted to the jury. Such instruction was clear error. However, it was unavailable to appellant since no exception had been taken to this portion of the charge.

The degree of force which may be employed by a police officer in the apprehension of a fleeing misdemeanant has been closely restricted. To justify the taking of a human life it must be shown that a felony has actually been committed.[41] In cases of suspected felonies the officer acts at his peril.

Negligence — City Not Liable for Death of Pedestrian Forced into the Street by Sidewalk Obstruction

In *Morello v. Brookfield Construction Co.*,[42] Philip Morello was hit by an automobile while crossing beneath a newly constructed overpass, and died of the sustained injuries. The administratrix and wife of the deceased brought an action based on negligence and nuisance against the automobile driver, construction company, electrical contractor, and city—the theory being that insufficient lighting affected the driver's visibility and that debris on the north sidewalk had forced the deceased pedestrian into the road.

The trial jury absolved all defendants except the automobile driver, having determined that the insufficient lighting was not in any way, causally or proximately, related to the accident, but that the sole cause of the accident was the driver's negligence. The trial judge had previously dismissed the plaintiff's cause of action sounding in nuisance as "merged" with the negligence count, and eleminated the plaintiff's "debris theory" as not supported by sufficient evidence. Whether these acts of the trial judge, as affirmed by the Appellate Division,[43] were warranted and proper was the question presented to the Court of Appeals.

The majority of the Court decided that the trial court acted properly in dismissing the nuisance count. Where a nuisance arises solely from negligence, the nuisance and negligence elements may be so intertwined as to be practically in-

40. N. Y. VEHICLE AND TRAFFIC LAW §70(5)(a).
41. Conraddy v. People, 5 Parker Cr. Rep. 234 (1862); Magar v. Hammond, 183 N.Y. 387, 76 N.E. 474 (1906).
42. 4 N.Y.2d 83, 172 N.Y.S.2d 577 (1958).
43. Morello v. Brookfield Construction Co., 2 A.D.2d 849, 156 N.Y.S.2d 163 (1st Dep't 1956).

separable[44] and any attempt to separate them is a useless task.[45] In such a case as this one, the single wrong done may be characterized as either negligence or nuisance,[46] and it does no harm if presented to the jury in only one aspect. This situation is to be differentiated from one where the nuisance is an absolute nuisance, involving the creation of obnoxious or hazardous conditions irrespective of negligence.[47]

The majority also concluded that the plaintiff's "debris theory" was not supported by the evidence. The only witnesses to the accident were the occupants of the car, who could not testify as to which direction the deceased pedestrian was facing or walking. Even assuming the deceased had been on the north sidewalk, the debris did not render the sidewalk impassable[48] and whether Morello was forced off the sidewalk is mere speculation.

The dissent, while recognizing that the evidence was not overwhelming, believed that a reasonable inference could be drawn as to why the deceased crossed the street at the point of the accident. Morello was expected home from work at the time, and the location of his employment in relation to his home suggests that he was crossing from the north side. Although the north sidewalk was not impassable, it was hazardous because of chunks of dirt and stone. Whether this debris forced the deceased into the road should have been decided by the jury.

Courts are reluctant to make decisions on slight probabilities, but such problems often arise where the victim is deceased. The liberal viewpoint of the dissent seems to be the more practical in recognizing[49] this problem.

Liability of State for Absence of Highway Warning Signs

In *Hicks v. State*,[50] plaintiffs, occupants of two cars involved in a collision, charged the state traffic commission with negligence in removing a "stop" sign at the intersection of a state and county highway and replacing it with a standard

44. McNutty v. Ludwig & Co., 153 App.Div. 206, 213, 138 N.Y.Supp. 84, 90 (2d Dep't 1912).

45. Khoury v. County of Saratoga, 267 N.Y. 384, 389, 196 N.E. 299, 300 (1935).

46. McFarlane v. City of Niagara Falls, 247 N.Y. 340, 345, 160 N.E. 391, 392 (1928).

47. *Ibid.*

48. See *O'Neill v. City of Port Jervis*, 253 N.Y. 423, 171 N.E. 694 (1930), allowing plaintiff a recovery where the sidewalk was impassable.

49. In a death case, a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence. See Noseworthy v. City of New York, 298 N.Y. 76, 80 N.E.2d 744 (1948).

50. 3 A.D.2d 106, 159 N.Y.S.2d 1 (3d Dep't 1956); 4 N.Y.2d 1, 171 N.Y.S. 827 (1958).