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Torts—Liability of State for Absence of Highway Warning Signs

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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).

route marker ("N.L. 13 L-R").[51] The Court held (5-2) that there was no negligence on the part of the state contributing to the accident.

The decision of the Court is confusing as to whether it is based upon the absence of negligence or the absence of causation. The Court held that had the driver paid attention to the physical characteristics of the road and the signs thereon she would have had "adequate" warning of the existence of the intersection. Inasmuch as the driver did not concern herself with these physical characteristics nor with the information the route marker was designed to convey, the majority felt that it could not be assumed that she would have paid more attention to a full "stop" sign had it been there.

The Court's reasoning on the question of causality appears faulty in that it seems to assume a factual conclusion inconsistent with negligence on the part of the state. If existing warnings were adequate, so as to require more caution on the part of the driver, then the state was under no duty to maintain a "stop" sign. And without negligence, a discussion of causality is irrelevant. Therefore it is submitted that the decision must rest entirely upon the absence of negligence.

The position of the dissent was that the physical characteristics of the intersection were an inadequate warning and the state therefore was negligent in removing the "stop" sign. As to causality, the dissent relied upon a presumption that a "stop" sign, had it been there, would have been obeyed.[52]

Statutory Liability Without Fault — Per Curiam

In *Smulczeski v. City Center of Music and Drama*,[53] the defendant was charged with violation of a city ordinance which provided, "Every portion of any special occupancy structure devoted to the use or accommodation of the public . . . shall be properly lighted during every performance . . ." Plaintiff allegedly tripped on a stairway because an overhead light was out. On appeal a lower court verdict for the defendant was reversed on the ground that the instructions to the jury contained an erroneous charge upon a material point. The Court held that the defendant was not entitled to notice of its violation and that a charge contrary to this was not cured by a subsequent charge instructing the jury that the duty imposed on the defendant by the ordinance was absolute.

The *per curiam* opinion appears inconsistent, both internally and with respect to precedent. The traditional New York doctrine is that violation of a local ordinance is only some evidence, to be considered along with other evidence, on the

51. See N. Y. COURT OF CLAIMS ACT §8.
52. Lahr v. Tirrill, 247 N.Y. 112, 8 N.E.2d 298 (1937); Lee v. City Brewing Corp., 279 N.Y. 380, 18 N.E.2d 628 (1939).
53. 3 N.Y.2d 498, 169 N.Y.S.2d 1 (1957).