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Torts—Negligence—Incidental Injuries

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according to its own circumstances, and a decrease in the probative value of the testimony in question or a clearer showing that it was used to incite the prejudice of the jury, could easily result in reversal.

Violation Of Local Traffic Ordinance—Evidence Of Negligence

New York City traffic regulations[62] establish a right of way in favor of pedestrians over automobile drivers at crossings not protected by a police officer or a traffic light. In *Taggart v. Vogel*,[63] plaintiff was struck by defendant's automobile while crossing at such an intersection. The Court of Appeals held (6-1) that the refusal of the trial judge to charge these regulations and his instructions to apply the same standard of care to both parties amounted to reversable error. The Court stated that the above regulations increased the responsibility of drivers, and a violation amounted to some evidence of negligence.

The effect which the Court gives to local traffic regulations in this case tacitly reaffirms the established principle that although the violation of a local ordinance will not amount to negligance per se,[64] it is relevant as amounting to some evidence of negligence on the part of the violator.[65]

Negligence—Question Of Fact

In *Levine v. City of New York*,[66] the Court was faced with the problem of determining whether the referee or the Appellate Division[67] made the appropriate findings of fact.[68] It held in agreement with the referee that it was more probable than not that the defendant was negligent. Judgment was therefore entered in favor of the plaintiff on the reinstated referee's report. This conclusion, because it involves only a factual appraisal, leaves no room for comment.[69]

Negligence—Incidental Injuries

Zipprich v. Smith Trucking Company and *Creaser v. Smith Trucking Company*,[70] personal injury actions arising out of the same accident, were tried

62. NEW YORK CITY TRAFFIC REGULATIONS §77.
63. 3 N.Y.2d 58, 163 N.Y.S.2d 674 (1957).
64. Fluker v. Ziegele Brewing Co., 201 N.Y. 40, 93 N.E. 1112 (1911).
65. Carlock v. Westchester Lighting Co., 268 N.Y. 345, 197 N.E. 306 (1935).
66. 2 N.Y.2d 246, 159 N.Y.S.2d 193 (1957).
67. 1 A.D.2d 661, 147 N.Y.S.2d 684 (1st Dep't 1955).
68. Section 605 of the Civil Practice Act compels the Court of Appeals to review findings of fact when the Appellate Division finds new facts in modifying or reversing the trial court.
69. For an interesting discussion of this case on a prior appeal, 309 N.Y. 88, 127 N.E.2d 825 (1955), see 5 BUFFALO L. REV. 240 (1956), wherein the writer asserts that the Court strained to allow recovery under the guise of the invitee theory when really applying the attractive nuisance doctrine which is not acceptable in the New York courts.
70. 2 N.Y.2d 177, 157 N.Y.S.2d 966 (1956).

together. After the liability of the defendant was clearly established in the first instance and affirmed by the Appellate Division,[71] the defendant objected to the verdict on the grounds, *inter alia,* that the charges to the jury concerning a private investigator were prejudicial error, and that certain evidence concerning injuries sustained by Creaser was not admissable.

The Court of Appeals,[72] in a brief decision, determined all the objections in favor of the plaintiff. On one point, the admissability of evidence in the *Creaser* case,[73] two judges dissented.

The Court determined that the lower court's charges concerning the private investigator were proper since the interest of the investigator whose compensation depended upon the production of favorable evidence for his client should be considered by the jury along with all other factors in determining the witness' credibility. The private interest of investigators can be brought out in evidence,[74] and the jury may consider the fact that the witness was paid for his services.[75] However it would have been error to instruct the jury that the testimony of private detectives should be looked upon with suspicion and distrust.[76]

The *Creaser* case[77] presented the only real problem for the Court. As the result of the accident, plaintiff suffered a weakened ankle and a fifty per cent limitation of arm and shoulder motion, and while walking to the doctor's office, he fell, sustaining a fracture of the arm. Evidence objected to was to the effect that the injury of the original accident was the proximate cause of the later accident. The lower court in admitting this evidence allowed the jury to consider both injuries in determining the amount of damages. It was held in *Wagner v. Mittendorf*[78] that added injuries may be included in damages provided a sufficient causal connection can be established indicating that they arose out of the first injury. This was substantially the law previous to this decision,[79] and it stands unchallenged today even by the dissent in the present case. The basis of contention here is whether the causal connection between the injuries was sufficient. The correctness of the Court's decision that the weakened ankle and damaged arm and shoulder proximately caused the fall is open to question. The dissent's

71. 1 A.D.2d 756, 148 N.Y.S.2d 924 (4th Dep't 1955).
72. See note 70 *supra.*
73. Creaser v. Smith Trucking Company, note 70 *supra.*
74. Wood v. New York State Electric & Gas Corp., 257 App. Div. 172, 12 N.Y.S.2d 947 (1st Dep't 1939), *aff'd* 281 N.Y. 797, 24 N.E.2d 480 (1939).
75. Schwartz v. Prudential Insurance Co., 259 App. Div. 1052, 21 N.Y.S.2d 68 (2d Dep't 1940).
76. *Ibid.*
77. Creaser v. Smith Trucking Company, note 70 *supra.*
78. 232 N.Y. 481, 134 N.E. 539 (1922).
79. Matter of Phillips v. Holmes Express Co., 190 App. Div. 336, 179 N.Y. Supp. 400 (3rd Dep't 1919), *aff'd mem.,* 229 N.Y. 527, 129 N.E. 902 (1920).

opinion that any connection was merely speculative seems, on the basis of the record presented, to be more accurate.

This Court goes further in this case than in any previous similar one in upholding the presence of a sufficient causal connection.[80] As a result, future claimants will probably find it easier to prove causal connection and, thus, may recover greater amounts of damages.

Tortfeasors In Pari Delicto—No Indemnification

The problem of indemnification between joint tortfeasors was recently considered in the case of *Harrington v. 615 West Corp.*[81] In this case a tenant recovered a judgment against her landlord and a painting contractor engaged by said landlord, when she tripped over a rope laid by the contractor while on her way to a clothesline maintained for the convenience of the tenants. The Court of Appeals, affirming trial term, dismissed the landlord's cross complaint against the contractor for indemnification, after it had been reinstated by the Appellate Division.[82]

The crucial problem involved in the present appeal concerns the right of indemnification as between the co-defendants. Clearly the weight of authority in this jurisdiction recognizes the right of recovery of a passive wrongdoer over against a primary, active wrongdoer whose misconduct created the dangerous condition.[83] It then becomes necessary, once the joint delinquency of the defendants has been established, that the dealings between the parties be observed so as to ascertain whether their negligence is active or passive.[84] This Court in approaching the problem held that the negligence of both defendants lies solely in their failure to take proper precautions as to the danger created by the rope, with the knowledge of each that the rope was there and that tenants were accustomed to pass that way. Consequently the negligence of each co-defendant was active; thus barring any application of the rule of indemnification as between active and passive wrongdoes.[85]

The dissent, relying on the opinion of the Appellate Division, contended that the act of the painting contractor in placing the rope without the proper

80. *Ibid.;* Brooks v. Rochester Railroad Co., 156 N.Y. 244, 50 N.E. 945 (1898); Wilker v. State, 284 App. Div. 996, 135 N.Y.S.2d 342 (3rd Dep't 1954); Avesato v. Paul Tishman Co., 142 N.Y.S.2d 760(Sup. Ct. 1955).

81. Harrington v. 615 West Corp., 2 N.Y.2d 476, 161 N.Y.S.2d 106 (1957).

82. 1 A.D.2d 435, 151 N.Y.S.2d 564 (1st Dep't 1956).

83. Hyman v. Barrett, 224 N.Y. 436, 121 N.E. 271 (1918); Tipaldi v. Riverside Mem. Chapel, 298 N.Y. 682, 82 N.E.2d 585 (1948).

84. McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 107 N.E.2d 464 (1952).

85. Oceanic Steam Nav. Co. v. Compagnia, 134 N.Y. 461, 31 N.E. 987 (1892).