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Torts—Emergency Doctrine

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academy went out of existence. The Surrogate's Court and the Appellate Division [82] held that the trust terminated when the academy was closed. The Court of Appeals, (quoting the principle stated in the first paragraph) reversed the lower courts solely on the matter of construction saying that testator intended that the trust be perpetually used for the education of the poor, with the additional expression of a mere preference that they be educated at the academy.[83] They therefore concluded that the trust survived the existence of the academy.

XI. Torts

Emergency Doctrine

In the determination of negligent conduct, the fact that the actor is confronted with a sudden emergency, not caused by his own tortious conduct, which requires instant decision is a factor in an appraisal of the reasonable character of his choice of action.[1] The fact that the emergency is created by the actor's own conduct does not prevent the rule from being applicable if his conduct is not tortious.[2]

In *Meyer v. Whisnant*,[3] the Court of Appeals upheld a dismissal of complaints against a host motorist as a matter of law where it appeared that a "sudden, unanticipated, and unexplained" movement of a westbound auto into the path of the eastbound host motorist's vehicle rendered him the helpless victim of an emergency for which he was not responsible. The fact that defendant motorist was guilty of a violation of the traffic law[4] was insufficient to subject him to tort liability in the absence of a showing of logical connection between the violation and the accident.

A dissenting opinion by Judge Conway, concurred in by Chief Judge Lewis and Judge Froessel, denied the availability of the doctrine to defendant, and stated that plaintiffs had made out a

82. Throughout the long clause testator referred to children, and to the education of children, on thirteen different occasions. The academy was mentioned five times.

83. The court placed emphasis on the fact that children were mentioned thirteen times and the academy only five times.

1. Restatement, Torts § 796.

2. *Id.* § 796, comment (a).

3. 307 N.Y. 369, 121 N.E. 2d 372 (1934).

4. Vehicle & Traffic Law § 81 (26). "The driver of a vehicle when upon a highway outside of a business or residential area shall use the traffic lane at the extreme right except when passing a vehicle, pedestrian, animal or substantial object in such lane." In the instant case, defendant was driving in the left lane of two eastbound lanes at the time of the accident.

prima facie case requiring a jury verdict.[5] It was pointed out that the issue of negligence and causation originally had been left to the jury by the trial court on a proper charge,[6] and thus a reversal on the law by the Appellate Division of a verdict against defendant was unwarranted. On this basis, the case should be remanded for a new trial.

Without denying or underestimating the potential strength of the "emergency doctrine" in New York, or its relative merits and/or infirmities, its application by the majority in the instant case appears doubtful.

Liability of the State to Users of Highways

By provision of the Court of Claims Act,[7] the State, when the negligence of its officers and employees acting in their official capacity results in the infliction of personal injuries, effects a waiver of immunity from, and assumption of liability, consents to have its liability determined in accordance with rules of law applicable to individuals, and submits to the jurisdiction of the Court of Claims to hear and determine claims of liability.[8] By this legislation, that which was once an unenforcible moral obligation has been transformed into an actionable legal right, the rule of *respondeat superior* being applicable to the State.

In a proceeding against the State, *Canepa v. State*,[9] the facts indicated that a state highway had been recently altered, repaired, and a sharp rising curve constructed in order to facilitate an approach to an overhead crossing. Before alteration, the road had been fairly straight. Two ordinary reflectorized "slow" signs had been placed at the east and west approaches respectively. The car involved in the accident failed to pass safely around the

5. See RESTATEMENT, TORTS § 286. "The violation of a legislative enactment by doing a prohibited act . . ., makes the actor liable for an invasion of another . . . if . . . (d) the violation is the legal cause of the invasion . . .." See also 5 AM. JUR., Automobiles § 171. Where the situation of peril arises because of the driver's own negligence, the emergency rule cannot be invoked in his behalf. *Sterling v. Senchack*, 252 App. Div. 894, 300 N. Y. Supp. 297 (2d Dep't 1937).

A charge that violation of Vehicle & Traffic Law § 81 (15) (carrying more than three adult persons in the front seat of a non-commercial vehicle) was prima facie evidence of negligence, but its probative force might be overcome by proof that the violation was not the proximate cause of the accident, was proper.

6. See *Sterling v. Senchack, supra* note 7; *Wood v. Pergament*, 267 App. Div. 875, 46 N. Y. S. 2d 433 (2d Dep't 1944).

7. COURT OF CLAIMS ACT § 8.

8. *Jackson v. State*, 261 N. Y. 134, 184 N. E. 135 (1933). See also, *Smith v. State*, 227 N. Y. 405, 125 N. E. 841 (1920), which suggested that § 12 (a) (now § 8) be written into law, the court being of the opinion that in the absence of this specific statutory enactment the immunity of the State as to its liability had not been hitherto waived by the then Court of Claims Act, (L. 1920, c. 922 § 12).

9. 306 N. Y. 212, 117 N. E. 2d 550 (1954).