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Torts—Wrongful Death

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THE COURT OF APPEALS, 1953 TERM

ment. The land was used for reforestation purposes and as a public hunting grounds. Signs posted in the area indicated the propriety of hunting on the land. Further, the district forester in charge of the area testified that the place was open to, and popular with, the public, that he was aware of the presence of wells on the property, but that no systematic check had ever been made to find such wells. The existence of abandoned wells as a source of danger has been recognized by the Legislature.¹⁷ Whether or not ordinary care has been employed to combat such danger is a question to be determined by the test of foreseeability of risk.¹⁸ Little question arises as to the propriety of the State's liability under the facts of the instant case. Plaintiff need not, nor should he be held to prove active negligence on the part of the State or an unreasonable disregard for the safety of others. It is sufficient in any case that he prove facts from which the negligence of the State and causation of the accident by that negligence might be reasonably inferred.¹⁹

Wrongful Death

One who causes the death of another as a result of any wrongful act, neglect, or default is liable in damages to the executor or administrator of the decedent if he would have been so liable in an action brought by decedent had not death ensued.²⁰

In *Wank v. Ambrosino*,²¹ defendant stopped his automobile twice in an effort to discover the reason for a disturbing "bump" he felt while driving. Expecting a flat tire, defendant discovered the cause to be the presence of the body of plaintiff's intestate. The evidence adduced at the trial did not indicate how the body got under defendant's automobile, and defendant claimed he had not seen decedent before, nor heard any outcry. Testimonial evidence by disinterested witnesses indicated that there were "drag marks" seen extending some one hundred and seventy feet behind the defendant's car and terminating with it. The Court of Ap-

17. PENAL LAW § 1904(a), which provides that any person, firm or corporation owning or being in possession of land upon which there is located an abandoned well or cesspool must cover the same with suitable protection. This provision applies with equal force to the State by reason of General Construction Law § 37 providing in part that: ". . . when used to designate a party whose property may be the subject of an offense, the term person also includes the state . . ."

18. *People v. Sandgren*, 302 N. Y. 331, 98 N. E. 2d 460 (1951); *O'Neil v. City of Port Jarvis*, 253 N. Y. 423, 171 N. E. 694 (1930); *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928). "The risk reasonably to be perceived defines the duty to be obeyed." Cardozo, J. at 344. See also Note 59 A. L. R. 1263.

19. *LeBoeuf v. State*, 169 Misc. 372, 7 N. Y. S. 2d 621 (1938), *aff'd* 256 App. Div. 798, 12 N. Y. S. 2d 640 (4th Dep't 1939), *aff'd* 281 N. Y. 737, 123 N. E. 2d 550 (1939).

20. DECEDENT ESTATE LAW § 130.

21. *Wank v. Ambrosino*, 307 N. Y. 321, 121 N. E. 2d 246 (1954).

peals affirmed a dismissal of the complaint at the close of the plaintiff's case on the ground that the evidence was insufficient to support an inference of negligence, although recognizing that in a death action the plaintiff will not be held to as high a degree of proof as required in a case where the complainant may take the stand and personally recount his version of the accident,²² and noting that the burden of pleading and proving contributory negligence rests on the defendant in such an action.²³

A dissenting opinion by Judge Conway, in which Judge Froessel concurred, concluded that plaintiff had at least made out a *prima facie* case, and hence his complaint should not have been dismissed. The dissent pointed out that plaintiff need only show facts and circumstances from which defendant's negligence reasonably may be inferred,²⁴ and that if any possible hypothesis forbids imputation of fault to deceased, based on plaintiff's evidence, the dismissal of his complaint is reversible error.²⁵ The dissent further asserted that the existence of facts which indicate possibilities other than defendant's negligence as the cause of death of plaintiff's intestate does not dictate against the proposition that plaintiff has made out a *prima facie* case.²⁶

The instant decision is of primary value for its collection and delineation of various legal maxims, statutes, and rules of law applicable in wrongful death actions.

Subterranean Trespass

The law of trespass has remained relatively stable; and a trespass has been generally defined as the intentional (without consensual or other privilege), entrance upon the land in possession of another, or the causing of another person or thing to do so.²⁷ A trespass which is actionable under the general rule may be committed on, beneath or above the surface of the earth.²⁸

In *Phillips v. Sun Oil Co.*,²⁹ the Court of Appeals in a unanimous opinion affirmed a dismissal of a count in trespass, briefly

22. *Noseworthy v. City of N. Y.*, 298 N. Y. 76, 80 N. E. 2d 744 (1948) (subway death).

23. DECEDENT ESTATE LAW §§ 119, 131.

24. *Ingersoll v. Liberty Bank of Buffalo*, 275 N. Y. 1, 14 N. E. 2d 828 (1938); *LeBoeuf v. State*, *supra* note 19.

25. *Klein v. Long Island R. Co.*, 289 N. Y. 283, 45 N. E. 2d 445 (1942) (death at a railroad crossing).

26. *Ingersoll v. Liberty Bank of Buffalo*, *supra* note 24; *Faber v. City of N. Y.*, 213 N. Y. 411, 107 N. E. 755 (1915); *Scantlebury v. Lehman*, 305 N. Y. 713, 112 N. E. 2d 784 (1953).

27. RESTATEMENT, TORTS § 158.

28. *Id.* § 159.

29. 307 N. Y. 328, 121 N. E. 2d 249 (1954).