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Torts—Subterranean Trespass

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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

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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).

recapitulating the New York law on the subject. Trespass is an intentional harm at least to the extent that the actor must intend the act which amounts to or results in an unlawful invasion. Such invasion must be a proximate or inevitable result of the actor's wilful act, or one which is done so negligently that it amounts to a wilful act.

The instant case was concerned with an alleged underground movement of noxious fluid (gasoline) from defendant's storage tank to plaintiff's water well. The only evidence adduced tended merely to prove that plaintiff's well water contained a heavy concentration of gasoline similar in type to that stored in defendant's tank on adjacent property.

The leading case in New York, and the first of its sort to be ruled on, is *Dillon v. Acme Oil Co.*[30] There, defendant oil company was exonerated from liability for the pollution of plaintiff's well on adjoining property caused by defendant's discharge on to its land of chemicals permeating the soil. Absent negligence and knowledge of subterranean water courses, there can be no liability if such courses became contaminated by a person's carrying on a legitimate business with care and skill.

The decision in the *Dillon* case as precedent precludes a finding of liability in the instant case, for in the latter there was not even a showing that defendant intentionally permitted gasoline to permeate the soil, while in the former, chemicals were intentionally discharged. Hence, the general rule in New York evolves, that excepting activities of an extra hazardous nature, an unintentional or non-negligent physical invasion of another's property will not subject the actor to liability for harm ensuing therefrom.[31]

XII. Workmen's Compensation

Course of Employment

The requirement of law that injuries, to be compensable, must arise "out of and in the course of the employment"[1] often has necessitated a searching analysis of questions of fact.[2] Several such cases were decided this term.

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30. 49 Hun 565, 2 N. Y. Supp. 289 (Sup. Ct. 1888).
31. Restatement, Torts, § 166; *N. Y. Steam Co. v. Foundation Co.*, 195 N. Y. 143, 87 N. E. 765 (1909).

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1. Workmen's Compensation Law § 10.
2. Such problems as frolic and detour, tests of re-entry, business v. pleasure, *inter alia*, have caused the courts some uneasiness. For recent discussions in this jurisdiction, see, *e. g.*, 3 Bflo. L. Rev. 167 (1953); Comment, *Diversionary Activities in Workmen's Compensation*, 17 Albany L. Rev. 283 (1953).