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Torts—Statute of Limitations on Negligence Claim Applicable

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bind an infant. It is not permissive in the sense of allowing tortfeasors and others, against whom an infant may have a claim, to use it, *or* some alternative device to obtain a binding settlement with that infant.

The lone dissenting judge of the Appellate Division expressed the opinion that the decision in *Delafield v. Barrett*[91] compelled them to hold the present indemnity agreement enforceable against the parent. The Court of Appeals discussed the *Delafield* case and concluded that it was not controlling. That case involved an indemnity agreement designed to protect a brokerage firm from liability for investing funds belonging to the indemnitor's wards in securities that were not on the officially approved list.[92] As a result of general market declines in 1929, the infants' funds were lost. Their mother, the indemnitor, brought suit on their behalf to recover their money from the brokerage firm. The broker counterclaimed on the indemnity agreement, and it was held to be valid. This case is distinguishable because the conduct with which the defendant was charged in the *Delafield* case was not tortious as in the instant case and because the indemnity agreement was not necessarily to the infants' detriment but could have benefited them by producing a larger return on their funds. In the *Valdimer* case, the indemnity agreement kept the infant from the custody and protection of the courts which was patently to their disadvantage.[93]

The holding of the *Valdimer* case, that indemnity agreements executed by parents in non-judicial infant tort claim settlements are invalid as against public policy, will undoubtedly cast a heavier burden on the courts and insurance companies. The Supreme Court of Oregon, deciding a similar case, reasoned that the additional costs to insurance carriers would be offset by adjustment of premium rates and the burden on the court system was amply justified by the nature of the interests to be protected.[94]

D. G. M.

STATUTE OF LIMITATIONS ON NEGLIGENCE CLAIM APPLICABLE

The case of *Lorberblatt v. Gerst*[95] presented a question of the applicable period of limitations for a personal injuries action. The plaintiff claimed that his cause of action was either one created by statute or, in the alternative, one

91. N.Y. Civ. Prac. Act § 1320:
When application may be made: In any instance in which an infant may have a claim for damages for personal injuries, injury to property, or breach of contract, an application for approval of a compromise or settlement of such claim may be made to any court or a judge of any court in which an action could have been brought to recover the amount of the proposed settlement. No application shall be made under this article if an action has been commenced on behalf of the infant to recover such damages.

92. 270 N.Y. 43, 200 N.E. 67 (1936).

93. N.Y. Dec. Est. Law § 111.
Infants are the wards of the courts, and our rules of practice abound in provisions of ancient origin designed to safeguard their legal rights.
Greenburg v. New York Central & Hudson R.R. Co., 210 N.Y. 505, 509, 104 N.E. 931, 934 (1914).

94. Ohio Casualty Ins. Co. v. Mallison, 354 P.2d 800 (1960).

95. 10 N.Y.2d 244, 219 N.Y.S.2d 40 (1961).

based upon nuisance, for both of which a six-year limitation is set.[96] The plaintiff, a tenant in the defendant's apartment building, suffered a fall on an icy stairway, the condition being caused by ice and snow being blown upon the stairway of the building through an open door leading to the roof, which door was not the self-closing variety required by statute to protect tenants in case of fire. The Appellate Division[97] had dismissed plaintiff's complaint, holding that the applicable limitation was the three-year period set for personal injuries due to negligence.[98]

The Court of Appeals first decided that the plaintiff's action was not one created by statute, since a common law duty was owed by the landlord to his tenant to properly maintain the stairway free of any icy hazard, and, moreover, even if the statute were applicable it would amount merely to a definition of the degree of care required in performing the existing duty, rather than the creation of a new duty. In reaching this conclusion the Court was careful to distinguish the present action from an action based upon injuries suffered by a person who is prevented by the prohibited type of door from escaping a fire. No opinion was expressed as to whether or not an action based upon injuries suffered in the event of fire would be an action created by statute.

Actually, the Court presented three arguments against the plaintiff's contention that his action was one created by statute. First, the Court said that the gist of plaintiff's action was negligence, of the ordinary common law variety. Next, the Court said that the statute, which is directed at fire prevention, was not intended to guard against the risk of an icy condition being created on the stairway. Actions based upon violations of statute have traditionally required that, "The harm which has occurred is of the type which it (the statute) was intended to prevent."[99] Finally, the Court reasoned that even if the particular harm which has occurred came within the purview of the statute, that harm was still only caused by negligent conduct, except that the negligence is tested by a different standard. As a practical matter it seems doubtful whether the plaintiff in the present case, granting for the purpose of the period of limitations problem that the action was one created by statute, could have successfully taken his case to the jury on the asserted theory of a violation of statute.

The Court also decided against the plaintiff's second contention, that his action was one based upon nuisance. The Court stated:

> If the cause of action consists in the creation by a defendant of a dangerous condition in the nature of a nuisance, as by the dangerously faulty design of a structure, the six-year statute applies, but the three-year limitation controls if the gist of the cause of action is negligence in failure to remove a dangerous condition which has been created by accident or, at least, not by the act or design of the party to be

96. N.Y. Civ. Prac. Act § 48 (2)(3).
97. Lorberblatt v. Gerst, 11 A.D.2d 782, 204 N.Y.S.2d 982 (2d Dep't 1960).
98. N.Y. Civ. Prac. Act § 49 (6).
99. Prosser, Torts 154 (2d ed. 1955).

> charged. . . . The dangerous condition claimed is not alleged to have been created by defendants but by the actions of the elements. In such instance the three-year Statute of Limitations applicable to negligence applies (Civ. Prac. Act. § 49, subd. 6).[1]

In the important case of *McFarlane v. City of Niagara Falls*[2], to which the Court refers, Chief Judge Cardozo carefully reviewed the various meanings of the concept of nuisance, including nuisance arising from negligence:

> Other situations there are, however, where what was lawful in its origin may be turned into a nuisance by negligence in maintenance. The coal hole, built under a license, may involve a liability for nuisance, if there is negligence in covering it. . . . In these and like situations, the danger being a continuing one, is often characterized as a nuisance, though dependant upon negligence.[3]

The Court approaches the present case by reasoning that the nuisance alleged by the plaintiff was not one which grew out of some positive act on the part of the defendant, which was later changed into a nuisance by defendant's negligence. Here, the original act was not due to defendant's conduct, since the elements caused the accumulation of snow and ice on the stairway. Defendant's conduct then became operative, *i.e.*, his failure to remove the snow and ice after sufficient time had passed for him to have had notice of the condition. Perhaps, if the defendant had built his apartment house with an open entrance to the roof and the accumulation of ice and snow on the stairway kept recurring, the defendant might have been found liable for creating a nuisance. Otherwise, the first wrongful conduct on the part of the defendant was his simple failure to remove the snow and ice or, in other words, his negligence.

Thus the Court found that the personal injuries suffered by the plaintiff were due to defendant's negligence, if anything, and governed by the three-year limitation, because a clear cause of action based upon negligence was discernible, while only minor aspects of an action based upon statute or nuisance were apparent from the facts of the case.

D. P. S.

LIBERAL CONSTRUCTION OF RULE ENACTED UNDER LABOR LAW PROTECTS CONSTRUCTION WORKERS

In *Conte v. Large Scale Development Corp.*, the Court of Appeals held that under Rule 23-35.1 passed by the State Board of Standards and Appeals a general contractor and an owner of property are responsible for providing protective guards and supports for an *earthen* ramp used in excavation work by several subcontractors on the job.[4]

While operating a tractor-type earth moving machine, the plaintiff, em-

1. Lorberblatt v. Gerst, supra note 95 at 248, 219 N.Y.S.2d at 43.
2. 247 N.Y. 340, 160 N.E. 391 (1928).
3. Id. at 343-344, 160 N.E. at 392.
4. 10 N.Y.2d 20, 217 N.Y.S.2d 25 (1961).