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NEGLIGENCE - CONTRIBUTORY NEGLIGENCE AS A DEFENSE TO CHARGE OF NUISANCE

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NEGLIGENCE — CONTRIBUTORY NEGLIGENCE AS A DEFENSE TO CHARGE OF NUISANCE — Defendants were engaged in excavation work, which required the use of compressed air. The air was conducted from a compressor in the street across the sidewalk through a two-inch pipe. A permit had been obtained for crossing the sidewalk (but apparently there was some question as to whether its terms included crossing by the use of a pipe). This obstruction was flanked by two planks, two inches thick and twelve inches wide, beveled away from the pipe. One of the planks became tilted. Plaintiff stepped on it and it slipped under her weight, causing her to fall. In an action for the resulting injuries, the case was submitted on the theories of negligence and nuisance. The trial judge charged: "From the point of view of the claim that it was a nuisance . . . any obstruction like this which is allowed to become loose or otherwise so that it did tilt up and become a subject of danger to a pedestrian, constitutes a nuisance, and then the question of contributory negligence would not enter like it does on the theory of negligence only." *Held*, that so much of the charge as pertained to nuisance was error. Where the gravamen of the complaint is a nuisance which arises out of negligence, then contributory negligence is a defense; but where the gravamen is an absolute nuisance or a nuisance per se, plaintiff's actions must amount to a willing encounter with knowledge of the danger. *Delaney v. Philhern Realty Holding Corp.*, 280 N. Y. 461, 21 N. E. (2d) 507 (1939).

When the present case is stripped of the term "nuisance," two distinct grounds of liability are disclosed. First, if the permit did not cover crossing the sidewalk by means of a pipe, then the action of the defendant is unlawful. Second, if the permit did include crossing by means of a pipe, then defendant's actions were lawful, but done in a negligent manner. Both of these are familiar fact situations, in which the substantive law is well settled. In the first, to bar recovery, plaintiff's actions must amount to a wilful assumption of the risks, which is embraced in the maxim *volenti non fit injuria*.[1] The second is the usual case of injuries resulting from negligent action, in which the contributing negligence of the plaintiff would be a defense. The indiscriminate application of the term "nuisance" to both of these situations should not so affect the substantive rights of the parties as to preclude the use of contributory negligence as a defense in the latter.[2] While it is true that "To try to distinguish between the different kinds of nuisance or the degree of nuisance, and the cases where

seasonable hours, and under such conditions that the danger of scattering offensive matter in the streets may be reduced to a minimum. These objects can be more readily secured if the matter is under the exclusive control of the city. . . . proper control can only be secured by close and careful inspection, which becomes more and more difficult as the number of places and persons to be watched increases." Atlantic City v. Abbott, 73 N. J. L. 281 at 282, 62 A. 999 (1905).

[1] For an excellent discussion of this doctrine, see Warren, "Volenti Non Fit Injuria in Action of Negligence," 8 HARV. L. REV. 457 (1895).

[2] ". . . whenever a nuisance has its origin in negligence, one may not avert the consequences of his own contributory negligence by affixing to the negligence of the wrongdoer the label of a nuisance. . . ." Cardozo, C. J., in McFarlane v. City of Niagara Falls, 247 N. Y. 340 at 344-345, 160 N. E. 391 (1928).

the negligence of the plaintiff would or would not bar recovery, has led the courts into a maze," as Justice Crane said,[3] the panacea would not be to allow contributory negligence as a defense in all actions for nuisance, except where it is a case of absolute nuisance of extreme danger, as he suggests. Rather, the solution would seem to be in recognizing that the so-called "negligent nuisance" is but an old friend with a new name. It must be noted that the "negligent nuisance" was not known as a nuisance during the time the law of contributory negligence was developing, but is a product of modern jurisprudence.[4] Blackstone said: "A third species of real injuries to a man's lands and tenements is by *nuisance*. Nuisance, *nocumentum*, or annoyance, signifies anything that worketh hurt, inconvenience, or damage . . . private nuisances . . . are . . . any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another." [5] In referring to this definition, Justice Cooley said: "By hurt or annoyance here is meant, not a physical injury necessarily, but an injury to the owner or possessor thereof, as respects his dealing with, possessing, or enjoying them." [6] It would seem then, that in the time of Blackstone, a nuisance had a reasonably confined application; viz., injuries affecting the enjoyment of some interest in land. Contributory negligence is held not to be a defense to injuries from such a nuisance.[7] It is properly a part of the law of nuisance as a defense only so far as the concept of nuisance has expanded so as to include injuries resulting from negligent actions.[8] Recognizing, then, that in modern law nuisance has such a broad meaning,[9] the distinction drawn in this case between the negligent nuisance on one hand, and an absolute nuisance or a nuisance per se

[3] Separate concurring opinion of Crane, C. J., principal case, 280 N. Y. 461 at 468.

[4] While it is true that the first case allowing the defense of contributory negligence, Butterfield v. Forrester, 11 East. 60, 103 Eng. Rep. 926 (1809), involved what would now be classed as a nuisance, it should be noted that the court did not talk in the terms of "nuisance" nor "contributory negligence," and it is likely that the obstruction which the defendant negligently left in the road would not have been designated a nuisance as it was understood at that time.

[5] 3 BLACKSTONE, COMMENTARIES 216 (first published 1756).

[6] 3 COOLEY, TORTS, 4th ed., 85 (1932).

[7] HARPER, TORTS, § 153 (1933); Bowman v. Humphrey, 132 Iowa 234, 109 N. W. 714 (1906), stream polution; Risher v. Acken Coal Co., 147 Iowa 459, 124 N. W. 764 (1910), dirt dump from a mine; Vogt v. City of Grinnell, 133 Iowa 363, 110 N. W. 603 (1907), stream pollution; Town of Gilmer v. Pickett, (Tex. Civ. App. 1921) 228 S. W. 347, septic tank; also cf. cases cited in 57 A. L. R. 7 (1928).

[8] Curtis v. Kastner, 220 Cal. 185, 30 P. (2d) 26 (1934), noted 19 MINN. L. REV. 249 (1935), allowing the defense of contributory negligence where the nuisance was not of negligent origin, apparently because of a failure to recognize that the modern "nuisance" includes more than did the common-law concept, appears to be out of line with the modern authority. In accord with the principal case: Jager v. First Nat. Bank, 125 Conn. 670, 7 A. (2d) 919 (1939); Campbell v. Pure Oil Co., 15 N. J. Misc. 723, 194 A. 873 (1937).

[9] For definitions of the term "nuisance," see 29 CYC. 1152 (1908); 46 C. J. 645 (1928); 20 R. C. L. 380 (1918); 21 AM. & ENG. ENCYC. LAW, 2d ed. 682 (1902); WORDS AND PHRASES; WEBSTER, NEW INTERNATIONAL DICTIONARY, 2d ed., (1935).

on the other, would seem to be not only proper but necessary if the substantive rights of the parties, hitherto considered as settled in each of these general type-situations, are to be maintained.[10]

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[10] For an interesting case dealing with the relationship between the negligent-nuisance and negligence, see Hill v. Way, 117 Conn. 359, 168 A. 1 (1933), where the usual situation was reversed, plaintiff maintaining a negligent nuisance and sustaining injuries through the act of the defendant. The case is noted in 82 UNIV. PA. L. REV. 181 (1933); 47 HARV. L. REV. 536 (1934); 14 BOST. UNIV. L. REV. 212 (1934); 11 N. Y. UNIV. L. Q. REV. 482 (1934); 2 DUKE B. A. J. 67 (1934).

The principal case has been noted in 18 TEX. L. REV. 103 (1939) and 17 N. Y. UNIV. L. Q. REV. 302 (1940).