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NUISANCE CONTRIBUTORY NEGLIGENCE AS DEFENSE

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NUISANCE — CONTRIBUTORY NEGLIGENCE AS DEFENSE — Plaintiff brought action against the county for injuries sustained when his truck fell into an unlighted and unguarded excavation made by the county in the center of the highway for the purpose of repairing a culvert. *Held*, that defendant's act, though required by statute, was done in such a manner as to constitute active wrongdoing and a public nuisance, to which a plea of contributory negligence is no defense. *Hammond v. Monmouth County*, (N. J. S. Ct. 1936) 186 A. 452.

Many courts have laid down the general rule that contributory negligence is not a defense to an action for nuisance.[1] Statements by the text writers are to the same effect.[2] The reason for the alleged rule is commonly said to be that the action rests upon the wrong done and not upon the manner of doing it, and therefore that there can be no such thing as contributory negligence on the part of the plaintiff.[3] In fairness to these courts, it is to be noted that this holding is confined for the most part to cases involving injuries to the enjoyment of property—where an act by the plaintiff similar to that of the defendant could hardly be said to have contributed to his wrong—and it is largely qualified in the consideration of injuries to the person.[4] One of the cases most frequently cited in support of the proposition actually does not decide the point.[5]

[1] Clifford v. Dam, 81 N. Y. 52 (1880); Paddock v. Somes, 102 Mo. 226, 14 S. W. 746 (1890); Albee v. Chappaqua Shoe Mfg. Co., 62 Hun 223, 16 N. Y. S. 687 (1891); Missouri K. & T. Ry. v. Burt, 8 Tex. Civ. App. 406, 27 S. W. 948 (1894); Philadelphia & R. R. R. v. Smith, (C. C. A. 3d, 1894) 64 F. 679; City of Lebanon v. Twiford, 13 Ind. App. 384, 41 N. E. 844 (1895); Watson v. Town of New Milford, 72 Conn. 561, 45 A. 167 (1900); Bowman v. Humphrey, 132 Iowa 234, 109 N. W. 714, 6 L. R. A. (N. S.) 1111 (1906); Linzey v. American Ice Co., 131 App. Div. 333, 115 N. Y. S. 1129 (1909); Niagara Oil Co. v. Ogle, 177 Ind. 292, 98 N. E. 60 (1911); Town of Gilmer v. Pickett, (Tex. Civ. App. 1921) 228 S. W. 347; Worth v. Dunn, 98 Conn. 51, 118 A. 467 (1922); Wilks v. N. Y. Telegraph Co., 208 App. Div. 542, 203 N. Y. S. 665 (1924). See also 57 A. L. R. 7 (1928).

[2] JOYCE, NUISANCES, § 45 (1906); Winfield, "Nuisance as a Tort," 4 CAMB. L. J. 189 at 200 (1931), where the author says, "Contributory negligence is a defense appropriate to negligence, but not to nuisance; for negligence as a tort consists in lack of due care and, as that is never the primary question in nuisance, it is inaccurate to speak of the antithesis 'contributory' negligence in connection with it."

[3] Albee v. Chappaqua Shoe Mfg. Co., 62 Hun 223, 16 N. Y. S. 687 (1891); JOYCE, NUISANCES, § 44 (1906).

[4] JOYCE, NUISANCES, § 46 (1906); see also cases cited supra, note 1.

[5] Bowman v. Humphrey, 132 Iowa 234 at 238, 109 N. W. 714, 6 L. R. A. (N. S.) 1111 (1906). Two separate nuisances were involved here, and the only problem confronting the court was that of apportioning damages. The court says, inter alia, "In other words, a plaintiff in such an action is subject to the general rule that no person is entitled to recover from another, for damages which have been occasioned by his own act or his own neglect."

Other courts have just as bluntly said that contributory negligence is a defense to an action for nuisance.[6] The apparent inconsistencies in the cases may perhaps be attributed to the fact that the distinction between negligence and nuisance was not and is not yet clear.[7] The cases are complicated by the fact that a claim for relief for injury arising out of a nuisance is combined with one for simple negligence, and that the exact ground of recovery as between the causes of action is not made clear.[8] In *McFarlane v. City of Niagara Falls*[9] the New York Court of Appeals, speaking through Justice Cardozo, indicated a mode of escape from the confusion in which the courts found themselves; it expounded for the first time a theory of two distinct types of nuisance and held that, as to one of them at least, contributory negligence is a perfect defense.[10] A recent Connecticut case, *Hill v. Way*, applies the rule of the *McFarlane* decision to a situation where the plaintiff was responsible for the maintenance of a nuisance resulting from negligence, and holds that the defendant was under a duty to

[6] Smith v. Smith, 2 Pick. (19 Mass.) 621 (1824); Irwin v. Sprigg, 6 Gill (Md.) 200, 46 Am. Dec. 667 (1847); Baltimore v. Marriott, 9 Md. 160, 66 Am. Dec. 326 (1856); Crommelin v. Coxe & Co., 30 Ala. 318, 68 Am. Dec. 120 (1857); Pfau v. Reynolds, 53 Ill. 212 (1870); McEniry v. Tri-City Ry., 254 Ill. 99, 98 N. E. 227 (1912); Brown v. Alter, 251 Mass. 223, 146 N. E. 691, 38 A. L. R. 1036 (1925); see also 57 A. L. R. 7 (1928).

[7] Winfield, "Nuisance as a Tort," 4 CAMB. L. J. 189 at 198 (1931): "As to nuisance and negligence, it might be said until quite recently that there was a hybrid action of nuisance and negligence. Sometimes it looks as if negligence were the substance of the action, and nuisance were an untechnical term; sometimes the exact reverse would be the truth, and then, again, 'negligent' has figured as a persistent term in the declaration which the Court persistently ignored in deciding on grounds of nuisance. Finally, there are judgments which must have gone on one ground or the other, but on which must remain a secret." See also the statement in Khoury v. County of Saratoga, 267 N. Y. 384 at 389, 196 N. E. 299 (1935).

[8] Worth v. Dunn, 98 Conn. 51 at 60, 118 A. 467 at 471 (1922); Parker v. Union Woolen Co., 42 Conn. 399 at 402 (1875). In the latter case the court assumes that the whistle which frightened the plaintiff's horse was a nuisance, and states, "If his [plaintiff's] own negligence essentially contributed to the injury it cannot be said, in a legal sense, that it was caused by the negligence of the defendant. Although this is not a case, strictly speaking, of contributory negligence, yet we think the same principle applies."

[9] 247 N.Y. 340, 160 N. E. 391, 57 A. L. R. 1 (1928); 6 N. Y. UNIV. L. REV. 81 (1928); 29 ILL. L. REV. 372 (1934).

[10] 247 N. Y. 340 at 347-349. If the substance of the nuisance is negligence, the plaintiff "is under a duty to show care proportioned to the danger. . . . We are not to be understood as holding by implication that where the nuisance *is* absolute, the negligence of the traveler is of no account. One of the earliest cases in the books on the subject of contributory negligence is *Butterfield v. Forrester*. . . . There was . . . a nuisance in the strictest sense. . . . Very likely the breadth of its pronouncement calls for revision and restriction. . . . In nuisance of that order, the fault that bars recovery is fault so extreme as to be equivalent to invitation of injury or, at least, indifference to consequences." A clue to the suggested "revision and restriction" of the rule in Butterfield v. Forrester may be found in Muller v. McKesson, 73 N. Y. 195 (1878), and Lynch v. McNally, 73 N. Y. 347 (1878)—both cases involving the keeping of vicious animals.

use reasonable care under the circumstances.[11] The dictum of the *McFarlane* case—that conduct amounting to an acceptance of the risk is a bar to an action in which the nuisance is absolute—was anticipated by a New Jersey case,[12] while the Connecticut court at a still earlier date said, obiter, that "wanton, wilful, or reckless misconduct which materially increased the probabilities of injury and contributed thereto will bar such a recovery." [13] The dictum is approved, but not squarely applied, in *Hoffman v. Bristol*.[14] The decision in the instant case is thus supported by the dicta, not only of its own court, but of two other reliable courts—at least if one accepts as correct the holding of the court that the nuisance was an absolute one. It seems possible to argue that the facts constitute a nuisance arising out of negligence, since the only wrong done by the defendant was in failing to guard and light the excavation. If that were true, the case would fall within the *McFarlane* rule and defendant's plea of contributory negligence would bar the plaintiff's action. In the light of other New Jersey decisions, however,[15] the court in the principal case feels justified in holding the nuisance to be absolute. It is submitted that the maintenance of a line of demarcation between absolute nuisances and nuisances resulting from negligence is sound as well as practical, and ought to be adhered to by the courts in their encounters with this confusing field of litigation. But even at this early date that distinction is existing not unchallenged.[16]

[11] 117 Conn. 359, 168 A. 1 (1933).

[12] Thompson v. Petrozzello, (N. J. 1927) 137 A. 835.

[13] Worth v. Dunn, 98 Conn. 51 at 62, 118 A. 467 at 471 (1922).

[14] 113 Conn. 386 at 393, 155 A. 499, 75 A. L. R. 1191 (1931). "In the present case, since the nuisance involved is not one grounded on negligence but within the class above characterized as 'absolute' it would seem that the applicable measure of such contributory negligence as would bar recovery would be that last specified." (That is, fault so extreme as to be equivalent to invitation of injury or indifference to consequences.) This would be a square application of the McFarlane dictum were it not for the fact that the court adds, "But even if the plaintiff were obligated to use reasonable care, his conduct could reasonably have been found to answer also the requirement of that test."

[15] Florio v. Jersey City, 101 N. J. L. 535 at 537, 129 A. 470 at 471 (1925), and cases cited therein.

[16] Curtis v. Kastner, (Cal. 1934) 30 P. (2d) 26 at 30. Plaintiff was found to have failed to use due care in an action brought to recover for injuries sustained when she struck her head against a rafter projecting from defendant's garage. The court cites the McFarlane case for the rule as to nuisances resulting from negligence, and states, "We are of the view that the same rule should prevail where the nuisance is absolute and exists without regard to the negligent acts or omissions of the defendant. Indeed, there may be stronger reasons in a given case for relieving the defendant of liability for injuries to which the plaintiff's conduct proximately contributed in case of an absolute nuisance, where defendant is liable, although he may have been free from negligence, than where the nuisance arises from negligent acts or omissions." See also the dictum in McKenna v. Andreassi, (Mass. 1935) 197 N. E. 879.