

Municipal Corporations--Streets--Contributory Negligence-- Nuisance Originating in Negligence (McFarlane v. City of Niagara Falls, 247 N.Y. 340 (1928))

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to actions at law based upon rescission as well as to suits for rescission in equity.³ Since the proof required in the action at law does not differ from that required in the equity suit, there is no reason for a distinction.⁴ The rule in an action at law for damages based on fraud and deceit is that there must be proof of willful and fraudulent misrepresentation, knowingly made, resulting in damage.⁵ But as above indicated, the plaintiff in this case did not seek damages, but only the return of his money. It is well settled now in the light of this decision that there is no distinction between an action at law based upon rescission and the equity action seeking rescission, but that in either of these actions an innocent misrepresentation gives rise to a cause of action.⁶

MUNICIPAL CORPORATIONS—STREETS—CONTRIBUTORY NEGLIGENCE—NUISANCE ORIGINATING IN NEGLIGENCE.—Plaintiff, walking in the City of Niagara Falls, stumbled as she was stepping from the driveway to the walk. She caught her heel upon a fan-like projection where the cement had melted and run. The projection jutted out about sixteen inches and was irregular and slanting with declivities and hollows. The same conditions had existed since the construction of the walk two or three years previous. The plaintiff lived in the neighborhood. She had noticed the projection at other times, though she paid no particular attention to it. The accident occurred during an afternoon in late December after darkness had set in. The case was tried upon the theory of nuisance. The jury was instructed that a nuisance existed if the city maintained the walk in a dangerous condition and if they so found, the contributory negligence of the plaintiff was not a defense. A verdict for the plaintiff was unanimously affirmed by the Appellate Division. *Held*, judgment reversed. If 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.¹ *McFarlane v. City of Niagara Falls*, 247 N. Y. 340 (1928).

The Court of Appeals distinguishes between a nuisance which is the consequent of an originally wrongful act and one, as in the principal case, where the original act is lawful but negligently performed. The distinction is clear² and worthy of note.

Nuisance, as a concept of the law, has more meanings than one.³ Negligence is not an element of the term in its primary sense.⁴ However,

³ *Continental Ins. Co. v. Equitable Trust Co.*, 127 Misc. 45, 215 N. Y. Supp. 281 (1926); 2 *Williston on Sales*, 2d ed., § 632.

⁴ *Schank v. Schuchman*, 212 N. Y. 352, 106 N. E. 127 (1914).

⁵ *Reno v. Bull*, 226 N. Y. 546, 124 N. E. 144 (1919).

⁶ *Edtl.*, N. Y. L. J., Feb. 6, 1928, at 2202.

¹ *Junkerman v. Tilyou Realty Co.*, 213 N. Y. 404, 408 (1915); *Ugla v. Brokaw*, 117 App. Div. 586, 591 (1907); *Tusk v. Peck*, 132 App. Div. 426, 432 (1909); 199 N. Y. 546 (1910); *Hartman v. Lowenstein*, 90 Misc. 686, 689 (1915).

² *McFarlane v. City of Niagara Falls*, *supra*, at page 343.

³ *Ibid.*

⁴ *Heeg v. Ticht*, 80 N. Y. 579 (1880); In *McCarty v. Nat. Carbonic Gas Co.*, 189 N. Y. 40 (1907), it was held: "One who emits noxious fumes or

there are situations where what was lawful in its origin may be turned into a nuisance by negligence in maintenance.⁵ In such circumstances contributory negligence may be urged as a defense regardless of whether the theory of the action is nuisance or negligence.⁶ In earlier times a similar but broader rule was recognized in England⁷ and followed by decisions in this State.⁸ These decisions were somewhat restricted by later cases.⁹ The Court of Appeals, after distinguishing between nuisance which is absolute and that which is not, pointed out that there may be situations where even though the nuisance is absolute, contributory

gases day by day in the run of his factory may be liable to his neighbor though he has taken all available precautions; one who digs a hole in the highway will not be heard to say, if he dug it without license, that the guards placed about it were destroyed without his fault." *Congreve v. Smith*, 18 N. Y. 79 (1858); *Wolf v. Fitzpatrick*, 101 N. Y. 146 (1886); *Clifford v. Dam*, 81 N. Y. 52 (1880); *McGuire v. Spence*, 91 N. Y. 303, 305 (1883); *Cf. Mullins v. Siegel Cooper Co.*, 183 N. Y. 129, 138 (1905); *Jennings v. Van Schaick*, 108 N. Y. 530 (1888); 2 St. John's L. Rev., 91, 92.

⁵ In *Trustees of Canandaigua v. Foster*, 156 N. Y. 354 (1898), it was held that a coal hole built under a license may involve a liability for nuisance, if there is negligence in covering it. A tumbledown house abutting on a highway is transformed into an unlawful structure if its ruinous condition is a menace to the traveler. *Timlin v. Standard Oil Co.*, 126 N. Y. 514 (1891); *Pollock, Torts* [10th ed.], 1016.

⁶ *Junkerman v. Tilyou Realty Co.*, *supra*, note 1; *Ugglv v. Brokaw*, *supra*, note 1; *Tusk v. Peck*, *supra*, note 1; *Hartman v. Lowenstein*, *supra*, note 1: "The snow and ice suffered by a municipality to remain upon a walk, is one wrong, and one only, whatever the traveler may call it." *Williams v. City of N. Y.*, 214 N. Y. 259 (1915). In *Nolan v. King*, 97 N. Y. 565, 571, 572 (1885), a temporary bridge had been laid over a walk while the work of building was under way. The bridge, though put up under a permit, was said to be insufficient. The Court held that a passenger was not at liberty to cross with as little heed and care as upon a completed pavement. *Kelly v. Doody*, 116 N. Y. 575 (1889), was a case of an excavation in a street. Plaintiff, who lived nearby, had knowledge of the trench, for which a permit had been issued. A charge that a recovery would not be affected by contributory negligence, was held to be erroneous. "The action does not belong to that class of actions where the obstruction in a street is without authority and wholly wrongful, such as the case of *Clifford v. Dam* and cases there cited." *Weston v. City of Troy*, 139 N. Y. 281 (1893); *Whalen v. Citizens' Gas Light Co.*, 151 N. Y. 70 (1896); *Hymor v. Barrett*, 224 N. Y. 436, 439 (1918).

⁷ *Butterfield v. Forrester*, 11 East. 60 (1809), was a case where a pole had been placed across a highway. Plaintiff, riding violently, ran into the pole and was hurt. The Court held that the contributory negligence of the plaintiff was a good defense. 1 *Beven on Negligence* [2nd ed.], 169; *Pollock, Torts* [10th ed.], 487; *Salmond on Torts* [3d ed.], 34, 36.

⁸ *Harlow v. Haniston*, 6 Cow. (N. Y.), 189, 191 (1826); *Dygart v. Schenck*, 23 Wend, 446 (1840); *Cf. Congreve v. Smith*, *supra*, note 4; *Corcoran v. City of New York*, 188 N. Y. 131, 140 (1907); *Smith v. Smith*, 2 Pick. 621 (1824); *Hill v. Seekonk*, 119 Mass. 85 (1875).

⁹ *Muller v. McKesson*, 73 N. Y. 195, 201 (1878); *Lynch v. McNally*, 73 N. Y. 347 (1878).

negligence may be considered in arriving at a verdict.¹⁰ It appears, therefore, that the plaintiff's contributory negligence would be a bar to recovery if the jury found that such negligence existed.¹¹

NEGLIGENCE—MASTER AND SERVANT—SHIPS AND SHIPPING—ASSUMPTION OF RISK.—Plaintiff, a stevedore, sued his employer in a State court to recover for personal injuries. Defendant's liability was claimed to have its basis in general maritime law unaffected by statute. Plaintiff, with other men, was sent down into the hold of a vessel lying in New York harbor. He found some spots of grease or oil scattered over the floor for a space of about a yard square. He called to the gangwayman to notify the "boss" and have the condition remedied. He had previously been advised to send word in this way whenever necessary. The gangwayman told him to go ahead and that he would notify the "boss." The condition was not remedied. The plaintiff slipped upon the grease, fell and broke his leg. The jury's finding for the plaintiff was unanimously affirmed by the Appellate Division. On appeal the defendant urged that if there was any negligence, it was that of a fellow servant concerning a detail of the work and that plaintiff assumed, as a matter of law, the risks incident to his employment. *Held*, judgment reversed and complaint dismissed. The correction of the danger was not merely a detail of the work. The master owed the duty to the servant to use reasonable care in supplying a safe place to work.¹ However, the plaintiff assumed the risk. The danger was obvious. Not only obvious but the plaintiff marked and understood it. He knew that there was no pathway to his work except across the path of danger. In going on with the work he made the risk his own. *Yaconi v. Brady & Gioe, Inc.*, 246 N. Y. 300 (1927).

The Court of Appeals distinguishes the principal case from an epochal decision of the United States Supreme Court,² bringing steve-

¹⁰ In the principal case at page 349, Chief Judge Cardozo said: "Behavior so reckless as to indicate indifference to peril on the part of a person of normal understanding may turn out in a given instance to be only contributory negligence, as where a drunken man, unable to measure the risk, drives madly through a crowded street. We have never yet held that fault so extreme can co-exist with a right of action for damages, however absolute the nuisance. (*Cf. Chisholm v. State*, 141 N. Y. 246 (1894); *Morrell v. Peck*, 88 N. Y. 398 (1882); *Minick v. City of Troy*, 83 N. Y. 514 (1881); cases of unguarded openings in streets and bridges.)"

¹¹ The distinction here made is important in the application of the Statute of Limitations, actions to recover for nuisance being maintainable within six years, while negligence actions must be commenced within three years. N. Y. Civ. Prac. Act, §§ 46, 49.

¹ *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52 (1914).

² *International Stevedoring Co. v. Haverty*, 272 U. S. 50 (1926).