

Torts: Responsibility Without Fault: Public Contract Jobs

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TORTS—RESPONSIBILITY WITHOUT FAULT—PUBLIC CONTRACT JOBS.—The defendant contractor was building a bridge for the state. The plaintiff's dwelling was near the site of the proposed bridge. The defendant's workmen had to blast through solid rock to carry on their work. The plaintiff's house was severely shaken by the blasts, the walls and foundation were cracked. The plaintiff brought an action against the contractor relying on the local nuisance statute (Mason's Minnesota Stat. 1927, § 9580) to support recovery. After a verdict for the plaintiff, and on appeal from an order denying the defendant's motion for judgment, *Held*, the order denying the defendant's motion should be reversed; the nuisance statute could not be made effective against the state or its agents. *Nelson v. McKenzie-Hague Co.*, (Minn., 1934) 256 N.W. 96.

A property owner situated like the plaintiff in the instant case may have several probable bases upon which to support recovery against a defendant in the position of the contractor. He may be able to show that rocks and debris have been cast upon his premises by the blasting. In the opinion of some courts that is like a common law trespass. The plaintiff may recover substantial compensation from the contractor, and he does not have to show anything more to suggest fault on the part of the workmen. *Hay v. Cohoes Co.*, 2 N.Y. 159, 51 Am. Dec. 279 (1849); *Currier v. Essex Co.*, (Mass., 1934) 189 N.E. 35, where the court was willing to enjoin the blasting because of the probable consequences; cf. *Green v. General Petroleum Corp'n.*, 205 Cal. 328, 270 Pac. 952 (1928). The plaintiff in the instant case did recover some compensation because rocks were cast upon his premises and the defendant raised no objection thereto on the appeal.

The property owner may be able to get enough facts before the jury to permit them to find that the defendant's workmen have not done everything they might have done to protect persons and things in the neighborhood from the consequences of the blasts. If that is the plaintiff's case, he has shown that the workmen are at fault; the contractor is responsible because he is the employer. See, *Thompson-Caldwell Co. v. Young*, 294 Fed. 145 (C.S.A., 4th, 1923). Where the plaintiff-property-owner can show neither fault on the part of the workmen nor anything comparable to a physical trespass, he is without a remedy unless the court is willing to impose upon the defendant-contractor an absolute responsibility where no one personally has been at fault. Some courts are willing to go that far. *Landen v. City of Cincinnati*, 90 Ohio St. 144, 106 N.E. 970 (1914); *Fagen v. Silver*, 57 Mont. 427, 188 Pac. 900 (1920). To suggest that the contractor's operations constitute a "public" or "private" nuisance is to offer a figurative explanation for the imposing of an absolute responsibility. The dangerous nature of the work, the virtual impossibility of carrying it on without causing serious physical consequences to persons or things in the vicinity, the proximity of the property affected, are factors which the court may take into consideration when deciding to impose responsibility upon the defendant where there has been no showing of fault.

Where the defendant-contractor is engaged in public construction work the court may hesitate to impose an absolute responsibility upon him. That was the situation in the instant case. Cf. *Ockerman v. Woodward*, 165 Ky. 752, 178 S.W. 1100, L.R.A. 1916 A, 1005 (1915); *Benner v. Atlantic Dredging Co.*, 134 N.Y. 156, 31 N.E. 328, 17 L.R.A. 220, 30 Am. St. Rep. 649 (1892). Perhaps the court feels that the state is so interested in getting the job done that residents in the community must suffer the necessary consequences where no one has been personally at fault. Where the local residents have suffered a temporary inconvenience such a decision is understandable. Where these local residents have sus-

tained injuries to property interests like those sustained by the plaintiff in the present case the situation is different. Has the plaintiff's property been taken from him without compensation? Has he been denied due process? Does the record in a case like this present any federal question? It is submitted that the majority opinion, which follows accepted grooves of legal thinking, has overlooked the realities of the case to present an artificial analysis. The idea of nuisance is used (perhaps because of the plaintiff's own presentation) to cover the choice which the court in fact had to make, the fixing or refusing to fix responsibility upon the defendant when no one was at fault. That the job is a public contract job ought not be important if any other contractor in the position of the defendant would be held to this absolute responsibility.

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WORKMEN'S COMPENSATION ACT—RIGHT TO MAINTAIN COMMON-LAW ACTION.
—An employee in the course of his employment was injured by the discharge of a spring gun set by his employer. Compensation was awarded under the Workmen's Compensation Act. Subsequently the employee brought an action against the employer at common law for the same injury. The right to bring such an action is preserved where the injury is the result of deliberate intention of the employer. Oregon Code (1930) § 49-1828. The employer defended on the grounds that deliberate intention was not shown. The trial court found for the plaintiff. On appeal, *Held*, judgment affirmed. *Weis v. Allen*, (Ore., 1934) 35 P. (2d) 478.

Where the right to compensation under the Wisconsin Workmen's Compensation Act exists, [Wis. Stats., (1933) § 102.03], the Act purports to make recovery under it the exclusive remedy against the employer. *Milwaukee v. Althoff*, 156 Wis. 68, 145 N.W. 238 (1914). It is the exclusive remedy for injuries for which the employer might have been liable at common law by reason of his failure to exercise ordinary care or to comply with a safety provision as well as from the negligent acts of a fellow servant. See, *Knoll v. Schaefer*, 180 Wis. 66, 69, 192 N.W. 399 (1923). [Where the injury is traceable to a violation by the employer of a safety statute the award is increased 15 per cent. Wis. Stats., (1923), § 102.57.] Being under the Act does not affect the right of the employee to maintain an action in tort against any other party for an injury. Wis. Stats., (1933) § 102.29 (1) (a); *McGonigle v. Gryphan*, 201 Wis. 260, 229 N.W. 81 (1930). It is no defense to such an action to show that the plaintiff has received an award under the Act for the injury. *Sheban v. A. M. Castle Co.*, 185 Wis. 282, 201 N.W. 379 (1924). Where the Workmen's Compensation Act is silent as to the preservation of common law recovery for injuries resulting from the *deliberate intention* of the employer, (and it is silent in Wisconsin), it is no defense to an action, brought by an employe for assault committed on him by the employer, to assert that the employee's sole remedy is under the Act. *Boek v. Wong Hing*, 180 Minn. 470, 231 N.W. 233, 72 A.L.R. 108 (1930) (the court said that the relationship of employer and employee did not exist when the assault was perpetrated). In that case there was *dicta* to the effect that the employee must make an election either to be compensated under the Act or to rely on his common law action. Cf. Note L.R.A. 1916 F, 987 (assault by fellow employee, foreman, etc., compensable under the Act.).

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