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Torts—Nuisance Per Se

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Nuisance Per Se. *Macy v. Chelan*¹ perpetuated the confusion which has long existed about the concept of nuisance per se.

In May, 1958, Macy went with some friends to a public park maintained by the defendant town. In conjunction with a park the town maintained a diving pier on Lake Chelan. Each year the lake varies in depth according to the amount of water taken by the local public utility district. The pier, 18 feet high, was safe for summer diving, but shallow water made its use unsafe during other parts of the year.

On the day of the accident the water beneath the pier was six feet deep. Macy's awareness of the danger was indicated by the questions he addressed to his companion about the safety of diving.

Judge Rosellini, speaking for the court, concluded that the pier was not a nuisance per se and, therefore, that governmental immunity was available to the city as a defense. Consequently the supreme court reversed the judgment which the trial court had entered on a verdict for the plaintiff.²

The lack of harmony in the court (which divided 3-2-3) prevents any positive statement of a holding, but the decision does raise a question concerning the propriety of the nuisance per se label. The nuisance concept as used in personal injury suits also deserves a re-evaluation with respect to its prevalent use to avoid governmental immunity and contributory negligence.

Nuisance per se is defined as "an act, thing, omission, or use of the property which in and of itself is a nuisance, and hence is not permissible or excusable under any circumstances."³ The difficulties in such a definition are manifest. Mr. Justice (then Judge) Cardozo recognized this fact when he said:

We think each case must depend on its own facts for classification as a nuisance at law, or in fact, or neither. . . . [I]f the natural tendency of the act complained of is to create danger and inflict injury upon person or property, it may properly be found a nuisance as a matter of fact; but if the act in its inherent nature is so hazardous as to make the danger extreme and serious injury so probable as to be almost a certainty, it should be held a nuisance as a matter of law. . . .

¹ 59 Wn.2d 610, 369 P.2d 508 (1962).

² The dissent argued that the defense of governmental immunity should be waived retroactively by virtue of the new statute, WASH. SESS. LAWS 1961, ch. 136. This note does not concern governmental immunity except to remark that the court has still not passed on the retroactivity of the new Washington statute. For a treatment of governmental immunity under the new Washington statute see Comment, *Abolition of Sovereign Immunity in Washington*, 36 WASH. L. REV. 312 (1961).

³ *Hardin v. Olympic Portland Cement Co.*, 89 Wash. 320, 325, 154 Pac. 450, 451 (1916), quoting from 21 AM. & ENG. ENCYC. LAW (2nd ed.), p. 683.

Locality, surroundings, methods of degree of danger, and the custom of the country are important factors. The firing of a cannon loaded with grape shot, if in a city or village would be a nuisance as a matter of law, if in a remote place far from habitations of man, it might be a nuisance as a matter of fact, and if against the face of a precipice, no nuisance at all.⁴

The current conflict in Washington cases⁵ indicates that Mr. Justice Cardozo's warning on the dangers of abstract classification has not been fully appreciated by the Washington court. A further result is that the Washington lawyer must contend with doctrinal distinctions among the three categories of nuisance given judicial recognition by the state court: nuisance per se,⁶ nuisance in fact (or per accidens)⁷ and negligent nuisance.⁸

As will be seen, the distinctions between the different categories of nuisance are often analytically unsound or even nonexistent. This does not mean, however, that the lawyer can ignore them, because the label attached by the court to the alleged nuisance in a given case affects significantly the burden of proof and what defenses are available.

It was early recognized by Mr. Justice (then Judge) Cardozo in *McFarland v. Niagara Falls*⁹ that the claim of nuisance based on negligence in a personal injury suit is subject to the defenses against negli-

⁴ *Meeker v. City of New York*, 190 N.Y. 481, 83 N.E. 565, 567 (1908). See *Denny v. United States*, 185 F.2d 108 (10th Cir. 1950); *Potashnick Truck Serv. v. City of Sikeston*, 351 Mo. 505, 173 S.W.2d 96 (1943), and *Cotton v. South Dakota Cent. Land Co.*, 25 S.D. 309, 126 N.W. 507 (1910).

⁵ The court in *Dumbar v. Dutton*, 147 Wash. 224, 265 Pac. 729 (1928), implied that a dead limb on a tree in a public park would be a nuisance per se. *Contra*, *Kilbourn v. City of Seattle*, 43 Wn.2d 373, 261 P.2d 407 (1953). Compare *Haan v. Heath*, 161 Wash. 128, 296 Pac. 816 (1931), and *Turtle v. Fitchett*, 156 Wash. 328, 287 Pac. 7 (1930), with *State v. Stubblefield*, 36 Wn.2d 664, 220 P.2d 305 (1950).

⁶ *State v. Boren*, 42 Wn.2d 155, 253 P.2d 939 (1933); *Puget Sound Traction, Light and Power Co. v. Grasmeyer*, 102 Wash. 482, 173 Pac. 504 (1918). Some jurisdictions use other terms in place of nuisance per se; *White v. Charter Oak Construction Co.*, 22 Conn. Sup. 368, 173 A.2d 509 (App. Div. 1961) (intentional nuisance); *Krauth v. Geller*, 54 N.J. Super. 442, 149 A.2d 271 (1959), *aff'd*, 31 N.J. 270, 157 A.2d 129 (1960) ("true nuisance"); *Meeker v. City of New York*, 190 N.Y. 481, 83 N.E. 565, 567 (1908) (nuisance as a matter of law); *Llewellyn v. Knoxville*, 33 Tenn. App. 632, 232 S.W.2d 568 (1950) ("absolute nuisance").

It should be noted that although different jurisdictions use the same label they do not necessarily use the same definitions. Compare *Potashnick Truck Service v. City of Sikeston*, 351 Mo. 505, 173 S.W.2d 96 (1943), and *McKenna v. Allied Chem. & Dye Corp.*, 8 App. Div. 2d 463, 188 N.Y.S.2d 919 (App. Div. 1959), and *Humble Pipe Line Co. v. Anderson*, 339 S.W.2d 259 (Tex. Civ. App. 1960), and *State v. Stubblefield*, 36 Wn.2d 664, 220 P.2d 305 (1950), with *City of Erie v. Gulf Oil Corp.*, 359 Pa. 383, 150 A.2d 351 (1959).

⁷ *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 348 P.2d 664 (1960); *Hardin v. Olympic Portland Cement Co.*, 89 Wash. 320, 154 Pac. 450 (1916).

⁸ *Goggin v. City of Seattle*, 48 Wn.2d 894, 297 P.2d 602 (1956); *Kilbourn v. City of Seattle*, 43 Wn.2d 373, 261 P.2d 407 (1953).

⁹ 247 N.Y. 340, 160 N.E. 391 (1928).

gence, e.g., contributory negligence. However, lawyers began using the nuisance concept in personal injury suits as a claim against governmental organizations to avoid the defense of governmental immunity.¹⁰ In Washington an additional requirement is imposed on plaintiffs who attempt to avoid the governmental immunity defense, i.e., the nuisance must not be one grounded in negligence, but must be a nuisance per se.¹¹ Thus the claim in the *Macy* case was that the pier was a nuisance per se.¹²

Similarly, several jurisdictions have stated that the defense of contributory negligence is not available against nuisance per se,¹³ but that assumption of the risk is a defense.¹⁴

The courts also hold that where a nuisance per se is shown to exist the burden of proof is shifted to the defendant.¹⁵ It should be noted here concerning the shift in burden of proof, that such shift should only take place where the suit involves an injunction as distinguished from damages for personal injury.¹⁶

¹⁰ E.g., *Kilbourn v. City of Seattle*, 43 Wn.2d 373, 261 P.2d 407 (1953).

¹¹ *Ibid.*

¹² The claim in *Macy* would have to be on grounds of a public nuisance since the plaintiff is not alleging injury to land.

¹³ *White v. Charter Oak Const. Co.*, 22 Conn. Sup. 368, 173 A.2d 509 (App. Div. 1961); *Krauth v. Geller*, 54 N.J. Super. 442, 149 A.2d 271 (1959), *aff'd*, 31 N.J. 270, 157 A.2d 129 (1960); *Delaney v. Philhern Realty Holding Corp.*, 280 N.Y. 461, 21 N.E.2d 507 (1939).

¹⁴ *Beckwith v. Stratford*, 129 Conn. 506, 29 A.2d 775 (1942); *Hill v. Way*, 117 Conn. 359, 168 Atl. 1 (1933); *Krauth v. Geller*, 54 N.J. Super. 442, 149 A.2d 271 (1959), *aff'd*, 31 N.J. 270, 157 A.2d 159 (1960). The courts sometimes speak of gross contributory negligence as a defense but they are then using gross contributory negligence as synonymous with assumption of the risk.

Since one may recover regardless of contributory negligence when the injuring condition is nuisance per se, one can argue that in the *Macy* case the court held the pier not to have been a nuisance per se. The concurring opinion stressed the fact that contributory negligence should bar recovery, and the dissent was willing to remand the case for a determination on the question of negligence and contributory negligence. Therefore, unless the Washington court has taken a new approach to the defenses against a nuisance per se, the entire court in the *Macy* case agreed that the pier was not a nuisance per se. However, the authors of the concurring and dissenting opinions might have meant by contributory negligence what is normally called assumption of the risk. If this is what was meant, it was irrelevant whether the pier was a nuisance per se.

¹⁵ In a suit for injunction, the plaintiff who can show that the act or condition of which he complains is a nuisance per se thereby shifts to the defendant the burden of proving that the nuisance will not cause enjoined harm to the plaintiff. But if the plaintiff succeeds in showing only that the thing complained of is a nuisance in fact, then he must continue to carry the burden of proving that harm will result to him of the sort for which equity gives relief. *Bryson v. Ellsworth*, 211 Ark. 313, 200 S.W.2d 504 (1947). *But see Board of Education of Louisville v. Klein*, 303 Ky. 234, 197 S.W.2d 427 (1946).

¹⁶ In suits for injunction a distinction between "nuisance in fact" and "nuisance per se" is appropriate. Here the courts generally weigh the usefulness of the defendant's activity and the harm from enjoining it, against the harm to the plaintiff in allowing the condition to continue. See *Riter v. Keokuk Electro-Metals Co.*, 248 Iowa 710, 82 N.W.2d 151, 159-160 (1957), and RESTATEMENT, TORTS, §§ 933-943 (1939). When

Conversely as to the contributory negligence defense, nuisance per se is appropriately spoken of in personal injury suits and not in injunction suits.

A failure to recognize that the concept "nuisance per se" is used differently in the personal injury suit as distinguished from a suit for injunction results in confusion of the type with which Washington is now faced.

But the Washington definition of nuisance per se, as it now stands is entirely unworkable in suits both to recover damages for personal injuries and to enjoin injury to or interference with the use of land.

If labels must be attached to the various kinds of nuisance actions, it is obviously important that the labels be used consistently. The remainder of this note contains suggestions by which such consistency might be achieved without departing from the substance of Washington case law.

In a personal injury action the injurious conduct is either ultra-hazardous, intentional, negligent, or non-negligent. Some plaintiffs attempt to establish nuisance as an additional avenue for recovery in order to avoid the defense of contributory negligence in what would properly be considered a negligence action. This gambit has not always succeeded.¹⁷ Where the conduct causing the injury is what we normally call intentional, then the courts speak of a form of nuisance, whether it be called "intentional," "absolute" or "per se," against which contri-

an injunction is sought, courts are likely to find a nuisance per se if there is great likelihood of harm to the plaintiff, or if the harm feared would be exceedingly great. *Humble Pipe Line Co. v. Anderson*, 339 S.W.2d 259 (Tex. Civ. App. 1960). Courts are also more likely to find a nuisance per se if the condition complained of is illegal. See *Delaney v. Philhern Realty Holding Corp.*, 280 N.Y. 461, 21 N.E.2d 507 (1939); *Parker v. Fort Worth*, 281 S.W.2d 721 (Tex. Civ. App. 1955); *State v. Boren*, 42 Wn.2d 155, 353 P.2d 939 (1953). Compare *Motor Car Dealers' Ass'n of Seattle v. Fred S. Haines Co.*, 128 Wash. 267, 222 Pac. 611 (1924). But if the condition is legal, and especially if the legislature has provided for it, courts will be more likely to think that the condition is necessary to society and will be reluctant to grant an injunction (although damages might be given). See *Ackerman v. Port of Seattle*, 52 Wn.2d 903, 329 P.2d 210 (1958) (airport). *But see Pennsylvania Co. for Ins. v. Sun Co.*, 290 Pa. 404, 138 Atl. 909, 911 (1927).

Thus in a suit for an injunction the court must take into account the surrounding circumstances in order to say that a condition is a nuisance per se. See text accompanying note 7 *supra*. This is the very process which Washington repudiates in its definition. *State v. Stubblefield*, 36 Wn.2d 664, 220 P.2d 305 (1950).

As a consequence, the condition must be otherwise unlawful before the Washington court will hold it to be a nuisance per se. *State v. Boren*, 42 Wn.2d 155, 253 P.2d 939 (1953); *Puget Sound Traction, Light & Power Co. v. Grossmeyer*, 102 Wash. 482, 173 Pac. 504 (1918). Thus an otherwise lawful business can never be or become a nuisance per se. *State v. Stubblefield*, 36 Wn.2d 664, 220 P.2d 305 (1950); *Hardin v. Olympic Portland Cement Co.*, 89 Wash. 320, 154 P.2d 450 (1916).

The Washington court in injunction suits should redefine nuisance per se so that it takes into account the circumstances in which the condition operates.

¹⁷ *McFarland v. Niagara Falls*, 247 N.Y. 340, 160 N.E. 391 (1928).

butory negligence is not a defense.¹⁸ But contributory negligence is not a defense against intentional conduct anyway.¹⁹

Similarly, the Washington practice of using "nuisance per se" to avoid the sovereign immunity defense is unnecessary and confusing. The court indicates it will allow recovery on the basis of an activity which is "inherently dangerous."²⁰ But this type of activity is included within the common tort term, "ultrahazardous."²¹

Nor should the nuisance per se concept be applied in a personal injury suit merely because the defendant has violated a statute. Only where the violation of the statute precludes the defense of contributory negligence might one say that such a concept as nuisance per se would provide any benefit. But the existence of such a statute would suggest that its violation involved extrahazardous activity or harmful intentional conduct. Consequently the defense of contributory negligence would probably be unavailable anyway. Thus it is readily seen that the nuisance concept adds nothing to personal injury litigation except confusion.

If the courts desire to use the term "nuisance" in personal injury suits they should refer at most to only two categories—intentional and negligent nuisance. "Intentional nuisance" is generally used to mean a condition created and/or maintained by the defendant from which injury to the plaintiff is intended or substantially certain to follow.²² "Negligent nuisance" would embrace all other nuisances causing personal injury. The Washington definition of "nuisance per se," as used in the *Macy* case, excludes all reference to either the intent of the defendant or to surrounding circumstances from which the existence of an ultrahazardous activity might be inferred. As a consequence of the restricted definition the Washington court has evidently never

¹⁸ See text accompanying note 13 *supra*.

¹⁹ PROSSER, TORTS § 51 (2d ed. 1955).

²⁰ *Kilbourn v. City of Seattle*, 43 Wn.2d 373, 261 P.2d 407 (1953) (dictum).

²¹ PROSSER, TORTS § 335 (2d ed. 1955). Cf. Freedman, *Nuisance, Ultrahazardous Activities, and Atomic Reactor*, 30 TEMPLE L.Q. 77 (1957).

²² For the definition of "intentional," compare *De Lahunta v. City of Waterbury*, 134 Conn. 630, 59 A.2d 800 (1948), with *White v. Charter Oak Construction Co.*, 22 Conn. Sup. 368, 173 A.2d 509 (App. Div. 1961).

Applying the definition of intentional nuisance to the facts of the *Macy* case the question would be whether the striking of the lake bottom by the plaintiff was substantially certain to follow from the building and maintenance of the diving pier. If so, the act of building and maintaining the pier with the consequential injury was intentional and the nuisance was an intentional nuisance or a nuisance per se in the sense in which it should be used in personal injury suits. One can say at most that at certain times of the year, when the water is low, an injury might be anticipated. If the pier were used properly, *i.e.*, used only at high water level, one cannot say that the injury was substantially certain to follow. Thus, the Washington court, in regard to the question of nuisance probably reached the correct result in the *Macy* case.

found the existence of a nuisance per se in a personal injury suit. It is suggested that the label serves no purpose whatever in personal injury cases, and its use there should be discontinued. Actually, in such cases the only relevant issues are those of ultrahazardous, intentional, or negligent misconduct. To refer to nuisance at all is superfluous and might well be dispensed with.

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Prenatal Injury. *Seattle-First National Bank v. Rankin*¹ is the first Washington case allowing recovery for injuries suffered before birth because of negligence. By recognizing a cause of action for prenatal injuries, this jurisdiction joins the trend of recent decisions in the area.

The suit was based on a malpractice claim brought by the Seattle-First National Bank as guardian ad litem for the minor plaintiff against a Seattle physician. The plaintiff's mother had employed the defendant to attend her during pregnancy and ultimate delivery. The plaintiff was born with permanent brain damage and resulting cerebral palsy. The complaint alleged that this brain damage was the proximate result of the defendant's negligence, in that he failed (1) to discover (2) to ascertain from the mother's pelvic measurements the difficulty or impossibility of a normal delivery, and (3) to perform a Caesarean section in sufficient time to save the plaintiff from injury. (Instead the defendant had attempted a natural delivery.) The trial court gave judgment in accordance with the jury verdict in favor of the plaintiff. On appeal, the Washington Supreme Court affirmed.

Acknowledging that the issue of tort recovery for prenatal injuries had never been presented in this jurisdiction, the court cited a number of recent decisions from other jurisdictions permitting such a cause of action,² and chose to follow what it termed "the clear trend of recent decisions."³ Quoting from the New York case of *Woods v. Lancet*,⁴ which sets forth the proposition that a viable fetus has a separate existence which should be recognized by the law, the Washington court reasoned that its "holding does not collide with any unyielding theoretical barrier."⁵ The court determined that the difficulties of

¹ 59 Wn.2d 288, 367 P.2d 835 (1962).

² The court, *id.* at 291, 367 P.2d at 838, cites five recent cases in the area. *Keyes v. Constr. Serv. Inc.*, 340 Mass. 633, 165 N.E.2d 912 (1960); *Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958); *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960); *Sinkler v. Kneale*, 401 Pa. 267, 164 A.2d 93 (1960); *Wendt v. Lillo*, 182 F.Supp. 56 (N.D. Iowa 1960).

³ 59 Wn.2d 288, 291, 367 P.2d 835, 838.

⁴ 303 N.Y. 349, 102 N.E.2d 691 (1951).

⁵ 59 Wn.2d 288, 291, 367 P.2d 835, 838.