Guide Lines for Determining Tort Liability of Highway Agencies and Contractors

RICHARD K. ABRAHAMS, *Attorney, The Port of New York Authority*

• This discussion assumes the circumstance that sovereign immunity does not apply, for two reasons: (a) for many of us, sovereign immunity has been waived by legislation so that our agency must answer tort claims in the courts of general jurisdiction or in a court of claims; and (b) even if sovereign immunity still protects an agency against direct suits, the contractor is usually not so protected, and his risk of liability is reflected in bid prices.

In addition, this discussion assumes that a public agency, once it is no longer protected by sovereign immunity, will be subject to the same rules of tort liability as if it were a private corporation, because such exceptions and special rules regarding tort liability as do exist in favor of public agencies or their contractors vary widely from State to State and, at least in New Jersey and New York, the jurisdictions governing the Port Authority, will probably become narrower.

In the States of New York and New Jersey, the common law, and even most statutory, rules growing out of practice construction are applied equally to public agencies, with very few exceptions, and therefore this discussion also frequently cites cases involving private construction.

OWNER'S RESPONSIBILITY FOR INDEPENDENT CONTRACTORS' NEGLIGENCE

The familiar rule is that the owner is not responsible for an independent contractor's negligence unless (a) the owner has a nondelegable duty to those whom the contractor might injure or damage or (b) the work to be done is inherently dangerous to others or will be dangerous unless particular precautions are taken.[1] One of the more interesting recent applications of the rule appears in *Majestic Realty Associates, Inc. v. Toti Contracting Co.*, 30 N.J. 425 (1959).

Toti was demolishing buildings in a crowded downtown shopping and business area of the City of Paterson for the City Parking Authority, which planned to construct parking lots. Using a 3,500-lb steel ball swung from a crane, Toti was leveling the buildings when he came to a building just within the boundary of the parking lot site. Just beyond it and next to it was a building not to be demolished and still owned and occupied by the plaintiff. Toti removed the roof of the building to be demolished and the interior partitions and floors and the front and rear walls leaving a free standing sidewall next to Majestic's building and extending 20 ft above Majestic's wall. This was not good demolition practice according to expert testimony at the trial. It seems, however, that no harm might have come had Toti maintained the procedure, which he used at first, of knocking off a few bricks at a time from the top of the wall by swinging the demolition ball in a direction toward the inside of the parking lot site, and thus away from Majestic's building. Toti soon became impatient, however, and swung the steel ball against the bricks 15 ft below the top of the wall so that the physical reaction sent the top of the wall back over against

[1] PROSSER, TORTS, 2nd ed., 357-362.

Majestic's premises, seriously damaging Majestic's roof. When asked by the appalled occupant "What have you done to our building?", Toti gave the honest but unsatisfying reply: "I goofed." Majestic sued Toti and the Parking Authority and obtained a judgment against Toti, but the trial court dismissed the action against the Parking Authority on the ground that the work, while hazardous, was not a "nuisance per se." The Appellate Division reversed (2 to 1) as against the Parking Authority and ordered a new trial on the ground that "Where potential danger exists regardless of reasonable care on the part of the contractor, the landowner cannot, by contractual delegation, immunize himself against liability for negligence of the contractor which causes injury to a member of the public or to an adjoining property owner." The dissenter in the Appellate Division felt that the accident resulted from negligent failure to follow standard procedure, not from inherent danger, and that the owner is therefore not responsible for the independent contractor's negligence. The Supreme Court then proceeded to its own consideration.

The Supreme Court unanimously affirmed ordering a new trial as against the Parking Authority on the reasoning however that demolition work in a busy, built-up section of a city is inherently dangerous unless special precautions are taken and that, in such a situation, the contractee (owner) has a nondelegable duty toward the public to see that such precautions are taken. [The court noted that while the duty was absolute, it does not follow that the liability was. The meaning apparently is, judging from another section of the opinion, that so long as the activity in question is merely "inherently dangerous" and not "ultra hazardous," negligence must still be proved but once it is, the owner is not insulated from liability by the contract. On "ultra hazardous" activity, the court accepts the definition of the Restatement of Torts, Section 520, as one which (a) involves a serious risk of harm which cannot be eliminated by exercise of the utmost care and (b) is not a matter of common usage. Typical of ultra-hazardous activities would be the storage of explosives. The court remarks by dictum that liability is absolute in the case of ultra-hazardous activity.]

The holding relies on precedent cited from New York, Massachusetts, Alabama, Delaware, Louisiana, Missouri and Ohio. The decision impliedly overrules a rule appearing frequently in prior New Jersey decisions which bases the owner's liability or immunity on "nuisance per se" or absence thereof. The opinion examines the concept of nuisance per se and finds it lacking in clarity. The court expressly invites future cases to be tested rather by the "inherently dangerous" and "ultra hazardous" concepts.

Reference is made in the opinion to the argument that it is unfair to hold an owner to responsibility for taking precautions in inherently dangerous work since, by the very nature of such work, it is so specialized that it should not and cannot be performed by the owner himself but must be let out to a contractor, and for the owner to reserve control would be inappropriate and of no avail. The court replies that the rights of the innocent injured party demand protection, however, and that placing an absolute duty on the owner will induce him to be the more careful in selecting a competent contractor.

Thus, inherently dangerous activity is in effect found to be one example of the category of "nondelegable duty." I would venture to guess that the description "nondelegable duty" is really not a helpful term to define an exception to the rule of no responsibility of an owner for negligence of an independent contractor and that the nature of the exception usually given this general description is actually to be found only in specific examples appearing in the case law such as "inherently dangerous" activity and "duty to

passersby on a public way."[2] In other words, the judicial process tends to be first to find that there is a good reason to hold the owner responsible in a particular set of circumstances and then to find that for this reason there is a nondelegable duty, rather than to see if a particular situation fits into a predefined category known as nondelegable duties.

One other interesting point was raised by the court decision, however, being expressly reserved because not necessary to the disposition of the case: is choice of a financially responsible contractor a failure to choose a competent contractor within the exception to the general rule? The opinion explicitly finds that such is not yet the law in New Jersey. Also brought out is the fact that liability insurance can readily be obtained by demolition contractors and could be required by the owner. However, says the court, in any case, the issue would not be important unless and until the contractor were negligent in the first place.

The Majestic opinion logically leads to another common example of inherently dangerous activity—blasting.[3] While blasting in a quarry may be a nuisance and therefore actionable without proof of negligence,[4] temporary blasting to improve property is not a nuisance.[5] It is safe to assume however that blasting is inherently dangerous and that therefore a public agency must be concerned about its contractor's competence and the precautions he takes. As of today, at least, New York and New Jersey follow what I believe is the minority rule that concussion damage from blasting is not actionable, unless negligence be shown.[6] (Trespass occurs however if matter is actually thrown on the plaintiff's land by the blasting and is actionable without proof of negligence.) This rule has had a remarkably hardy existence in spite of much criticism and in spite of the majority view to the contrary, but we in New York and New Jersey can feel the breezes, if not winds, of change. Recently, the New York Court of Appeals, while holding in *Schlansky v. Augustus V. Riegel, Inc.*, 9 N.Y.2d 496 (1961) that a retrial should be had of a dismissed complaint of blasting damage alleging negligence, since a prima facie case of negligence was made out, also took the occasion to observe that for this reason it was not reconsidering the New York rule on concussion damage, in language suggesting that the rule is no longer unquestionably accepted by the court:

> Plaintiffs-appellants press for a "reexamination and reappraisal" of the New York case law which imposes strict liability for blasting damage when there is physical trespass but insists on proof of negligence in the blasting when no flying debris is cast onto a plaintiff's premises. Were the question properly before us we would have to decide whether the present New York rule should be modified so as to conform to the more widely (indeed almost universally) approved doctrine that a blaster is absolutely liable for any damages he causes, with or without trespass. [Citing decisions in Wisconsin, Illinois, Connecticut, Pennsylvania, and the Second Circuit] (pp. 496-7).

Judge Van Voorhis, in a special concurring opinion urged no change in the present New York rule. He felt that imposing absolute liability would have the effect of giving to the first landowner who built on his property in a neighborhood the right to prevent building by others if blasting is necessary. He would however recognize qualifications in the rule (already stated in the leading New York

[2] See Delaney v. Philhern Realty Holding Corp., 280 N.Y. 461, 467 (1939); and Bechefsky v. Newark, 59 N.J. Super. 487, 493 (App. Div. 1960).

[3] The Restatement and a number of jurisdictions, probably the majority, regard blasting as cause for absolute liability and therefore in a category of stricter rules than those applying to "inherently dangerous" activities, but for purposes of this discussion blasting is treated as merely "inherently dangerous."

[4] Dixon v. New York Trap Rock Corp., 293 N.Y. 509 (1944).

[5] Shemin v. City of New York, 6 App. Div 2d 668 (N.Y. 1958).

[6] The leading case is Booth v. Rome, Etc. R.R.Co., 140 N.Y. 267 (1893).

Booth case requiring use of other means than blasting if "practicable, in a business sense . . . although at a somewhat increased cost" or "if less powerful blasts might have been used" which would have avoided or lessened the damage.

It seems to me that absolute liability for blasting concussion damage is too severe and I fear it would wreak havoc with public and private construction costs. Perhaps the answer lies in exceptions such as cited by Judge Van Voorhis, but exceptions such as these and their exact extent are better promulgated by statute than by case law evolution. The rules as to "how much increased cost" a builder is obligated to incur and how much he must "lessen" damage, if they are to be useful guides, must be precise and by their technical nature they should admit of more precision than do most judge-made rules. Moreover, a potentially staggering liability must be risked by a construction agency if it must wait for each individual situation to be decided by an actual damage suit.

Incidentally, the blasting contractor in this case attempted to shield himself from liability for negligent blasting by the simple device of denying under oath that any records of the blasting had been kept. This may have been a factor leading to the holding that a prima facie case on behalf of the plaintiff should be inferred from (a) expert testimony that an inspection of the site showed that more explosive powder was used than was necessary and (b) testimony by the plaintiffs of deafening noises, terrifying blasts, and large cracks in their houses immediately following certain blasts.

Also, in a decision issued a month before the New York trial court applied the exceptions in the Booth rule by holding liable a blasting subcontractor for damage caused to adjacent property, the ground being that alternate means such as "chipping and feathering" could have been used but were not even after the blaster was made aware of damage occurring to the plaintiffs' property.[7] No comment appears in the opinion as to the comparative cost of chipping and feathering. Another application of a Booth rule exception appears in the unusual situation of the State using blasting charges to determine by seismic readings the depth of bed rock after, according to the court, the State had already ascertained the depth by borings. It was therefore concluded that the State "made an unreasonable use of its property under the circumstances herein which constituted a legal wrong for which the claimants have a right to recover. . . ."[8] The opinion does not seem to rely on any showing of negligence.

THIRD PARTY BENEFICIARIES

The blasting cases seem to form the bulk of the third party beneficiary decisions also. The leading case in New York of *Coley v. Cohen,* 289 N.Y. 365 (1942) makes a third party beneficiary clause out of such language as that the contractor shall be "responsible" for claims arising from blasting and for defense of actions arising from such causes. Apparently important to the decision was the fact that the owner was a public agency, the Buffalo Sewer Authority, which might therefore be assumed to desire to protect the public against damage for which ordinarily it would have no recourse under the Booth rule.[9] (The interpretation was also

[7] Ryback v. Godwin Construction Co., 28 Misc 2d 1060 (N.Y. 1961). The court dismissed the action as against the general contractor and the owner who hired him on the ground that "blasting work in and of itself not being inherently dangerous but the danger instead arising from the manner in which it was performed—no duty devolved upon either the owner or general contractor upon which liability could be based." This seems inconsistent with *Majestic* (supra) and I question how closely this theory would be followed in New York.

[8] Scully v. State of New York, 12 Misc.2d 298 (N.Y. Ct. of Claims, 1958).

[9] This policy is assumed again in Weinbaum v. Algonquin Gas Transmission Co., 20 Misc.2d 276 (1954), *affirmed* 285 App. Div. 818, N.Y.

influenced strongly by the fact that other separate clauses of the contract already provided for indemnity from the contractor to the Sewer Authority on account of third party claims generally.)

In New York at least, we therefore have to be on the alert constantly against similar language slipping into our contracts. Engineering specification writers have a habit of inserting in the specifications broad language that the contractor shall be responsible for many things on the general theory that we should make sure that he does a complete job. In addition, I would recommend a provision such as now appears as a separate clause in Port Authority construction contracts that no third party rights are created by the contract unless the specific words "benefit" or "direct right of action" are used. This clause was added, not because of *Coley v. Cohen*, which I thought never applied to our contracts because of the difference in language, but because of a casual conversation I happened to have a few years ago with an insurance broker representing a number of large contractors. The broker advised that attorneys for contractors and their liability insurance companies were often not sure that third party rights could not be founded on many public agency contracts and that liability insurance premiums, included in the bids, were being established on the assumption that such rights might exist, leading to an additional premium cost of $10,000 in one case of a contract we had recently let in the amount of $2,000,000.

While the Coley-Cohen rule and other possible bases for founding third party rights can cause trouble if not kept in mind, an express provision negating such rights or some other indication of no intent to create such rights should be quite effective, notwithstanding a supposed public policy to protect the public against damnum absque injuria.[10] But as an indication of the subtle and unexpected ways in which you may create third party rights without knowing it until the court tells you so, consider *Corbetta Construction Co. v. Consolidated Edison Co. of New York, Inc.*, 227 N.Y. Supp.2d 290 (Sup.Ct. 1962). The contractor constructed a section of the New York State Thruway under specifications reserving to the State Engineer the right to limit blasting charges to less than 10 lb. When the Edison Company warned that blasting in progress would damage its nearby electrical lines and that Edison would sue for such damage, the State Engineer did limit the charges to less than 10 lb, resulting in an additional expense claimed by the contractor to be $158,000. The contractor, after failing to collect in court from the State, sued Edison. In this decision, the court found that, since the contract, as bid, put the contractor on notice that small charges and therefore more cost might be required, its price already reflected this cost and Edison could not be held liable for the same cost but that if the specifications had merely said that charges shall be limited to 10 lb, without mentioning smaller charges, the contractor's "bid and the contract payment would be based on such assumption and any additional limitation would then be chargeable to and payable by the utility protected." (This decision explicity found that the New York Thruway relocation statute requiring reimbursement to utility companies for relocation did not apply here.)

INDEMNITY CLAUSES AND LIABILITY INSURANCE

Because of the uncertainties of the independent contractor rule and because the Port Authority reserves to its engineers such broad powers with regard to supervising the work that

[10] Costa v. Callanan Road Improvement Co., 15 Misc.2d 198 (N.Y. 1958); Fleetash Realty Co., Inc. v. Mount Vernon Contracting Corp., 5 App.Div.2d 687, *affirmed* without opinion, 5 N.Y.2d 854 (1958).

we might not come even within the protection of the basic rule, we in the Port Authority have for many years included in our construction contracts a clause imposing on contractors the obligation to indemnify against third party claims. The usual form of the clauses presently reads as follows:

> The Contractor assumes the following distinct and several risks whether they arise from acts or omissions (whether negligent or not) of the Contractor, of the Authority, or of third persons, or from any other cause, and whether such risks are within or beyond the control of the Contractor, excepting only risks which arise solely from affirmative acts done by the Authority subequent to the openings of Proposals on this Contract with actual and wilful intent to cause the loss, damage and injuries described in subparagraphs (a) through (c) below:
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> (b) The risk of claims, just or unjust, by third persons against the Contractor or the Authority on account of injuries (including wrongful death), loss or damage or any kind whatsoever arising or alleged to arise out of or in connection with the performance of the Contract (whether or not actually caused by or resulting from the performance of the Contract) or out of or in connection with the Contractor's operations or presence at or in the vicinity of the construction site or Authority premises, whether such claims are made and whether such injuries, damage and loss are sustained at any time both before and after the rendition of the Certificate of Completion. . . .
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> The Contractor shall indemnify the Authority against all claims described in subparagraph (b) above and for all expense incurred by it in the defense, settlement or satisfaction thereof, including expenses of attorneys. If so directed, the Contractor shall at his own expense defend against such claims, in which event he shall not without obtaining express advance permission from the General Counsel of the Authority raise any defense involving in any way jurisdiction of the tribunal, immunity of the Authority, governmental nature of the Authority or the provisions of any statutes respecting suits against the Authority.

From time to time, we receive indignant complaints from contractors that it is outrageous to seek indemnity for one's own negligence, and several years ago we were approached by a delegation from the General Contractors Association in our area asking for a change. We have resisted any substantial change in this aspect of the clause and, we believe, properly so, on the ground that virtually the entire control of the job, insofar as opportunity to prevent injury and damage claims is concerned, rests with the contractor. If the owner is held legally liable for a third party claim on the basis of his "negligence" it is almost always vicarious negligence or negligence consisting merely of failure to observe and have corrected a dangerous condition created by the contractor. The owner's negligence often consists simply of failing to carry out a nondelegable duty to those on a public way. Therefore, while vis-à-vis the third party claimant, the agency and the contractor are joint tort feasors and equally liable to the claimant, as between themselves, the agency is morally less blameworthy than the contractor and therefore ought to receive complete indemnity from the contractor. If, however, the common law rules of contribution between joint tort feasors were allowed to take their course, the agency would have to pay an equal share of the judgment along with the other more culpable tort feasors. (In fact, under the peculiar New York procedure, if the plaintiff chooses to sue only the agency and not the other joint tort feasors, the agency would be stuck with the whole judgment, unless it could demonstrate that it was only "passively" negligent as contrasted with the contractor's "active" negligence.) While it is true that under the common law rules complete indemnity is obtainable by a "passively" negligent tort feasor against an "actively" negligent joint tort feasor, failure to perform a nondelegable duty is not merely passively negligent even though passive in the ordinary sense of the word. For example, one is actively negligent if, as an owner, he fails to observe and have corrected a condition created by the contractor dangerous to passers-

by on a public way. Since the law of contribution among joint tort feasors does not recognize differing degrees of culpability (except when the active-passive negligence rule applies) contribution is usually but a rough form of justice among joint tort feasors.

It therefore seems only fair that the agency should have complete indemnity by contract against its own negligence when the claim arises out of the performance of the contract, and such an express indemnity is necessary if the common law rule on contribution and indemnity is to be varied.[11] The right to contract in this manner is recognized in numerous cases.[12] In the absence of an explicit indication that a contract indemnity is intended to cover the indemnitee's own negligence, the contract gives no more indemnity rights than are already available at common law. Admittedly, circumstances are conceivable under which the agency could be more culpable than the contractor. To provide, in advance, for these circumstances, however, is an impossible task of definition. Such concepts as "sole negligence" or "primary negligence" give little guidance in concrete situations.

The moral question involved in indemnity against one's own negligence is really avoided however when liability insurance is provided for. If the construction contract calls for the contractor to procure liability insurance with a contractual liability endorsement covering the contract indemnity to the agency, the contractor does not bear the risk (except perhaps a comparatively small residue of risk not insurable) and all bidders will include the premium cost in their bids. In other words, the agency has simply purchased a form of insurance for itself. Another way of achieving the same result is for the agency to purchase or to have the contractor purchase insurance with the agency as a name insured.

One additional caution is in order about imposing on the contractor indemnity for third party claims, which however the landlubber States among us need not be concerned with. Under admiralty rules of law and Federal statutes found in 33 U.S.C.A., Ch. 9 and 46 U.S.C.A., Ch. 8, which apply on navigable waters, a vessel owner has the right to limit his tort liability in admiralty for damage caused by the vessel to the value of the vessel after the accident. This right is well protected by law and is considered waived only by a clear expression of intent to waive. In fact, we have felt the only safe interpretation of the cases is that a contractor's assumption of a contract indemnity is not necessarily a sufficiently clear expression of intent to waive limitation of liability under admiralty law, and consequently we use additional provisions of waiver of such rights in our bridge and other contracts involving use of watercraft by the contractor.

TEMPORARY INTERFERENCE WITH ACCESS

The topic of temporary interference with access is fairly uncomplicated, though of importance to any highway agency. No attempt in this discussion to touch on permanent loss of access is made. The rule on temporary interference can be stated, with more assurance than most rules of law, as follows: While a landowner abutting a public street or highway has a permanent easement of access, this easement gives him no right of action for temporary interference with access by authorized construction for highway purposes or, probably, for other legal use of the highway such as installation of public utilities. *Farrell v. Rose,* N.Y. 73 (1930) illustrates the principle well. By reason of a city contractor's work in maintaining a street retaining wall, plaintiff garage owner was blocked from using the street en-

[11] Thompson-Starrett Co. v. Otis Elevator Co., 271 N.Y. 36 (1936).

[12] See *e.g.*, Jordan v. City of New York, 3 App. Div.2d 507, *affirmed* without opinion, 5 N.Y.2d 723 (1958); Cozzi v. Owens Corning Fibre Glass Corp., 63 N.J. Super. 117 (App. Div. 1960).

trance to his garage for a period of 17 months—12 months longer than the time allowed in the contract for performance of the work. The court found that the plaintiff's right to use the street in front of his premises was "subject at all times to the reasonable control and regulation of the municipal authorities, and to work in the street necessary for its repair and maintenance, or for the construction of other public utilities." Exceptions were found to apply only "if the city or a contractor interferes with the highway without authority; or, if acting legally, prolongs the work unnecessarily or unreasonably." While granting a new trial to plaintiff to prove application of the exceptions, the court also reminded him that mere showing of an overrun in contract time was insufficient to show unreasonable delay, and the opinion indicates that unforeseen contingencies had already been found cause by the city for extending the contractor's time.

Several other New York decisions have followed the same rule.[13] Decisions allowing recovery for temporary interference with access are distinguishable on the ground of unreasonable time of two years[14] or on the ground of action in a proprietary, rather than governmental capacity.[15]

Meyers v. District of Columbia, 17 F.R.D. 216 (District of Columbia, 1955) also applies this rule relying on Farrell, as well as on an old U.S. Supreme Court decision.[16] The opinion, however, contains a curious bit of reasoning which might give us pause. The construction involved was an underpass for Connecticut Avenue beneath DuPont Circle in Washington, D.C. While finding no negligence by the contractor in prosecution of the work and therefore dismissing the complaint, the court also remarks that the project is "in a sense a change of grade in the street" and then states that it is well settled in the District of Columbia that damages to abutting land owners for change of grade are not allowable. The latter rule is no doubt well settled in most jurisdictions, except, however, and this is the troublesome point, that special statutes do permit or require change of grade compensation by some agencies. There is, for example, a statute authorizing (not necessarily requiring) The Port of New York Authority to pay change of grade compensation and the reasoning of the court in Meyers might have therefore changed the result in one interesting claim we had several years ago.

The claim arose for temporary interference with access when a cut and cover excavation in 38th Street, Manhattan, for a section of the Lincoln Tunnel Third Tube interfered with use of the 38th Street truck loading bay of a large industrial laundry plant. The laundry's attorney vigorously pressed his claim with us but in view of the law and the fact that no change of grade occurred and the very short period when access was blocked, we felt we had no authority even to settle.

UTILITIES IN HIGHWAYS

Responsibility for cost of relocating utilities on account of highway construction has been definitively covered in the Highway Research Board's Special Report 21 (1955). Although it is the weight of common law authority that the utility owner must bear such expense, statutes have changed this rule in some jurisdictions, and judicial decisions have, in turn, invalidated some of these statutes on constitutional grounds. There is, to say the least, a wide di-

[13] Fries v. City of New York & Harlem Railroad Co., 169 N.Y. 270 (1901); Veronica Realty Corp. v. Cranford-Locher, Inc., 149 Misc. 428 (N.Y. Sup. Ct., 1933); Syracuse Grade Crossing Commission v. Wellin Oil Co., 268 App Div. 627 (N.Y. 1944), *affirmed* without opinion, 295 N.Y. 738 (1946).

[14] Ogden v. City of New York, 141 App. Div. 578 (N.Y. 1910).

[15] Sinsheimer v. Underpinning & Foundation Co., 178 App. Div. 495 (N.Y. 1917), *affirmed* without opinion, 226 N.Y. 646 (1919).

[16] Northern Transportation Co. of Ohio v. Chicago, 99 U.S. 635, 25 L.Ed. 336 (1879).

vergence of treatment of this question among the States and even within a single State. In New York and New Jersey, for example, the New York State Thruway Authority and the New Jersey State Highway Authority, respectively, are required by statute to pay utility relocation costs,[17] while no such statute applies generally so far as I have been able to determine to the New York Department of Public Works or the New Jersey Highway Department or to municipalities.

Two recent decisions[18] (one in New York and one in New Jersey) have reaffirmed the common law rule fully annotated in HRB Special Report 21 to the effect that a utility company which maintains facilities in the public streets and highways, even by virtue of legislation permitting it to do so without charge, has no vested right to maintain its facilities in any specific location in the streets or highways, its right being conditioned on its obligation to remove and relocate the facilities from one place to another at its own expense when the public convenience or necessity requires.

Our practice in the Port Authority was some years ago when we first asserted our right under this rule to execute a no-prejudice agreement with the utility companies by which we assumed the cost in the first instance, reserving our right to sue the company for reimbursement. Now that we have obtained decisions directly establishing application of the common law rule to the Port Authority, we are requesting the utility companies to pay in the first instance and, if they wish, to reserve their right to sue, since appeals may still be prosecuted by the companies.

When utility companies carry the fight to the legislature for statutes requiring that they be reimbursed for relocation expenses, different questions are raised. The utility company's position is ordinarily that, as between the large segment of the public who would pay in the form of increased rates if the utility companies should be charged and the highway users who would pay in the form of tolls or taxes, the highway users should pay because it is for their benefit that the relocation is performed. This argument loses sight, however, of the basic reason for the common law rule—that highways are primarily for highway use, not utilities, and the original permission to locate a utility line in a highway is therefore always to be considered subject in the first place to an obligation to relocate without expense to the highway. The distribution of the cost burden should not depend simply on who constructed first. Nor is the rule made inapplicable by the fact that the highway is supported by tolls rather than taxes.[19] Such statutes in any case raise the further constitutional question of a gift of public funds.

An interesting variant of the relocation problem, on which I have no citations at this time, is the need for temporary protection of utility lines in place during construction when change in location is not required. The utility companies might maintain that they are entitled to protection to the same degree as any adjoining property owner; *i.e.*, that they have a right to lateral support or to sue for blasting damage. But is their position really the same as that of an adjoining owner? If, as the common law rule has established, the utility companies are in the highway on a bare license subject to an obligation to relocate, if necessary, for highway construction and reconstruction, then a fortiori protection in place during construction and reconstruction should be the obligation

[17] New York Public Authorities Law, Section 359(3); New Jersey Highways Law, 27 N.J.S.A. 12B-6.

[18] The Port of New York Authority v. Hackensack Water Co., N.J. Super. (March 23, 1962); The Port of New York Authority v. Consolidated Edison Company of New York, Inc., 25 Misc.2d 45 (N.Y. Sup.Ct., 1960).

[19] New York City Tunnel Authority v. Consolidated Edison Co. of New York, Inc., 295 N.Y. 467 (1946).

of the utility companies.[20] The only difference I can see is a practical one: It may often be easier to adjust construction methods to minimize the need for protective measures than it is to adjust highway design to avoid the necessity for relocation. This is significant because, as a caveat to the common law relocation rule, we should keep in mind the possibility that a court may always qualify the right of a highway agency by an obligation to use reasonable alignment and grades to avoid, if practicable, greater relocation expense than necessary. If such a rule has been or should be established, however, I would hope that a wide administrative discretion would be allowed to the highway agency.

NOISE, DUST AND OTHER INTERFERENCES WITH THE PUBLIC

Decisions on noise, dust, and other interferences with the public, in the Port Authority's jurisdictions, tend to be scarce, and, when existing, to be lower court decisions. There is usually no point in a plaintiff taking the time to go to court or especially to appeal regarding temporary construction interferences since they are often over before a ruling can be obtained. (I speak primarily of interferences which residents near the construction would wish merely to enjoin as an annoyance, damages being difficult or impossible to prove.)

In *Modugno v. Merritt-Chapman Scott Corp.*, 17 Misc.2d 679 (N.Y. Sup. Ct., 1959), residents near the construction of the Throggs Neck Bridge in Long Island sued to enjoin pile driving between 7 PM and 6 AM, the hours which the New York City Administrative Code prohibits unreasonable, loud, disturbing, and unnecessary noise. The decision involved a motion for a temporary injunction. The contractor, the only defendant, replied that it was constructing a public project authorized by the State legislature under a contract imposing a severe time schedule with liquidated damages of $2,500 per day for delay.

The court granted the temporary injunction, however, with the following interesting observation:

> The fact that a public project is here involved does not entitle it to preferential treatment when a case of nuisance detrimental to human life and comfort is as clearly made as in the case at bar.

The situation suggests a subsidiary question of what effect should be given to local municipal codes on the standards of allowable noise or other interferences. In many cases, a State agency is not subject to these codes and its contractor therefore should not be so if the State agency is not to be indirectly subjected to the code. We cannot escape the fact, however, that the courts may regard the code provisions as reasonable standards to which the contractor should be held in any event.

Some times, fortunately, construction nuisances can be reduced to an acceptable point. About two years ago, we awarded a bridge approach contract entailing a great deal of rock excavation. The contractor began to set up a rock-crushing plant on the job site to reduce the cost of trucking away the excavated rock and to process it for his concrete aggregate business. The nearby residents became alarmed at the possibility of noise and dust going on for a period of at least a year and threatened an injunction suit based on nuisance. It was difficult to predict just what the degree of annoyance would be, prior to the start of the crusher operation, but we could not afford to risk a delay in construction and felt that if the residents could convince the court that it was potentially a nuisance, the contractor would be enjoinable notwithstanding the public nature of the project. The fact that the Port Authority could not be enjoined would be of no help. We therefore invoked a clause of the specifications requiring the contractor to

[20] Cf. Corbetta Construction Co., Inc., v. Consolidated Edison Co. of New York, Inc., *supra.*

operate with equipment which would reduce annoyance to the public. The contractor installed soundproofing and a spray device on the crusher and everyone was happy.

The question of continuous annoyance caused by highway traffic, which differs somewhat from the question of tort based on construction, is of interest at this point. We have in New York a rather uncertain situation arising out of the decision in a suit against the New York State Thruway Authority by residents of the Village of Pelham Manor, complaining of noise and glaring headlights from trucks and buses at night along the highway section running directly through the village next to plaintiffs' houses. The complaint asked for an injunction compelling the Thruway Authority to prohibit use of the highway by trucks, buses, and tractor-trailers through the village between the hours from 8:00 PM to 8:00 AM. The Appellate Division ordered dismissal of the complaint,[21] first on the ground that the State's waiver of sovereign immunity on behalf of the Thruway Authority did not go so far as to permit injunction suits, and secondly, on the ground that in any event the complaint did not show

> (1) that the noises emanating from the normal operation of the Thruway adversely affect plaintiffs more than any other property owners similarly situated; or (2) that such noises subject plaintiffs to a greater share of the common burden of incidental damage cast upon all those living in the vicinity.

This suggestion that a cause of action could possibly be made out but for sovereign immunity is disturbing enough to highway agencies, but action of the Court of Appeals leaves us still wondering, because though the court affirmed[22] the Appellate Division it did so by merely stating that the affirmance was on the authority of a companion case decided the same day, which held only that sovereign immunity had not been waived as to injunctions as to the Thruway Authority.

By thus pointedly avoiding any endorsement of the second ground advanced in the Appellate Division's opinion, I am not clear whether the Court of Appeals was only trying to avoid comment on a moot question or was suggesting that it would go even further than the Appellate Division in entertaining an injunction suit for annoyance or possibly that it would not entertain such a suit even if special effects on the plaintiffs can be alleged and proven.

PATENT INFRINGEMENT

We have probably all had the experience of being threatened with a patent infringement suit on account of a device used in a project. The Port Authority contracts ordinarily contain a fairly sweeping patent clause requiring indemnity from the contractor in the event of such a suit, on the theory that the contractor has the opportunity to ascertain before bidding whether a patent dispute exists regarding a certain article and to guard against suit by buying from the patent holder, or by obtaining himself an indemnity agreement from the competing supplier. Any other course would render a fixed price bid indefinite. An exception is made in the case of items completely detailed in our contract drawings or specifications, these being typically items we have designed ourselves and feel we should not ask for indemnity for, particularly since, under these circumstances, the items would not be of common manufacture.

In actual practice, we have little problem or even comment on this aspect of our patent clause, the only exception being a very peculiar and bothersome one. A favorite device used by holders of doubtful or disputed patents is to threaten prospective bidders during the bidding period with a patent infringement suit if they use an article specified in the contract documents. Ordinarily, bidders cannot afford to take a chance.

[21] Mathewson v. New York State Thruway Authority, 11 App. Div.2nd 782 (N.Y. App. Div., 1960).

[22] 9 N.Y.2d 788 (1961).

and under the pressure of preparing a bid, they have no time to investigate the validity of the claim. This is exactly why the threat is timed for the bidding period. The result is usually that the bidders play it safe by buying from the patent claimant at a higher price than would be paid to a competing supplier (or by buying off the claimant), so that the agency pays the bill in the contract price. In some cases, an extremely tenuous or even synthetic patent claim has been parlayed in a manner that would be impossible if the claim could be tested in a full patent infringement suit.

There is one way of combating this tactic. When we hear of such a threat being circulated, we obtain a quick opinion from patent counsel and if he believes no infringement exists, we reverse our position on patent immunity and we guarantee to the bidders that we will indemnify them against the threatened claim. This has worked well and, so far, at least, we have never been called on to indemnify.

DISCUSSION

LEONARD I. LINDAS, *Chief Counsel, Oregon State Highway Commission, Presiding*

Netherton.—Concerning what Mr. Abrahams said about the highway department actually paying the bill for tort liability of a highway project contractor, I am wondering whether some of these injuries and annoyances to landowners may not be reflected in the prices that are paid for right-of-way, perhaps in negotiations for purchase and back in the jury room when the condemnation award is being determined. Do any of the State highway counsel suspect that this may be the case?

Thomson.—In Iowa it is quite frequent, where we are relocating a highway or widening a highway so that lanes are made closer to residences, and this sort of thing, the landowner quite frequently adds an item of damage due to increased proximity of the highway, the added noise and dust. He does this as an item of damage affecting the value of the remainder. Certainly a real argument can be made, and quite frequently it has merit.

Netherton.—I know we all wonder what goes on in the minds of the jurors when they get into the jury room, and I suspect that the fact that there is sovereign immunity for tortious injury so that the landowner cannot have recourse directly against the State through customary actions for liability may lead to "taking care of the landowner" in the award of damages for condemnation.

Lindas.—I am quite sure that in our State juries resort to this. We do not know that they have done it, but we feel that they have compensated landowners for things that perhaps they have been instructed to ignore completely by the court. But this is something that you cannot handle. The matter of proximity damage I am sure is considered by them and they have sweetened the award by items that he otherwise could not receive damages for.

Lehmann.—We are troubled with the business of proximity damage. Where a highway comes close to developed property inevitably the appraiser will put a percentage of damage based on proximity, and when he is cross-examined on what this means he will say it is because of dirt and dust, and so on. We have heard something about how light can be measured and perhaps converted into something visual that can be placed before a jury, and I am wondering if anyone has any idea on how noise can be measured, and how noise can be decreased by screening, how this could be measured and then translated into visual aid.

Lindas.—We are anticipating a suit due to noise affecting a high-rise apartment, and I understand you can measure noise by a decibel meter. But how you relate that to market value and the tolerance people build up for it after a while I do not know.

G. A. Williams.—We have a situation in Wyoming where we are not bothered with blasting because of the dust and dirt, but we have a more sensitive neighbor called SAC, the Strategic Air Command, which is responsible for the Atlas missile bases. Recently we were doing some blasting for the Interstate System, and we had calls that this blasting was disturbing SAC's instruments, and they asked us to stop the blasting. Well, our contractor already had several miles primed and ready to go with heavy charges. The only thing we could do was to reduce the charges, take a good deal longer in this contractor's work, and see if the Bureau would participate in the added cost this would entail. Have any of the other States been bothered by this sort of thing in connecting with your blasting? And, what do you do about it because we have the same situation Mr. Abrahams mentioned in that our contractor is under a $2,500 a day penalty and he needed these extra blasting hours to meet his deadlines, and we needed the work done.