Volume 64 | Issue 2 Article 9

February 1962

Instructions--Binding Instruction on Contributory Negligence Need Note State Specific Acts of Negligence

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Finally, the state courts have recognized the federal position. *Taylor v. United States,* 224 Mass. 639, 88 N.E.2d 121 (1949), *cert. denied,* 338 U.S. 948 (1949). A state probate court had ruled a United States tax claim barred by a short state time statute. Reversing, the Supreme Judicial Court of Massachusetts held that the United States as a creditor of the alleged insolvent estate was not barred by the statute in a state court. The principal case would strengthen this holding and the federal government's position before state courts.

In summary, for reasons of public policy and the maintenance of a uniformity of laws, state time limitations do not apply to the federal government when reducing a perfected tax lien to judgment.

James Kilgore Edmundson, Jr.

Instructions—Binding Instruction on Contributory Negligence Need Not State Specific Acts of Negligence

P, a pedestrian, was struck and injured by an automobile operated by *D.* At the trial, the court, at the request of *D,* instructed the jury that it *must* find for *D* if it should believe that ". . . both plaintiff and defendant were guilty of negligence which combined and contributed to cause the accident. . . ." On cross-appeal, *P* averred that this instruction was erroneous. *Held,* instruction proper. It is not necessary for a binding instruction on contributory negligence to state specific acts of negligence by the plaintiff, disapproving *Walker v. Robertson,* 141 W. Va. 563, 91 S.E.2d 468 (1956). *Graham v. Wriston,* 120 S.E.2d 713 (W. Va. 1961).

The problem of phrasing instructions on contributory negligence has been the subject of much litigation in the West Virginia courts. In expressly disapproving the holding in *Walker v. Robertson, supra,* the West Virginia Supreme Court of Appeals has decisively settled any doubt concerning the requirements of such an instruction in this state. The *Walker* case disrupted a previously unbroken line of decisions in this state concerning contributory negligence, and the holding in the principal case has now removed that blemish from the law.

In the *Walker* case, the court instructed the jury that if it believed from the evidence that ". . . the plaintiff was guilty of

committing any act of negligence, however slight, which proximately contributed to causing the injuries . . . you *must* return a verdict for the defendant." (Emphasis added.) The trial court amended this instruction by striking out the word *must* and substituting the word *may,* thus changing it to a permissive instruction, rather than a binding one. The court, in a three to two decision, held that a binding instruction must state the acts or conduct constituting contributory negligence of which the plaintiff is allegedly guilty. This was not done and thus the instruction as amended was proper.

The court in the *Walker* case predicated its finding upon four prior West Virginia cases, viz., *Bragg v. C. I. Whitten Transfer Co.,* 125 W. Va. 722, 26 S.E.2d 217 (1943); *Lawson v. Dye,* 106 W. Va. 494, 145 S.E. 817 (1928); *Burdette v. Henson,* 96 W. Va. 31, 122 S.E. 356 (1924); *Woodell v. West Virginia Improvement Co.,* 38 W. Va. 23, 17 S.E. 386 (1893). The dissent, however, pointed out that these cases dealt with instructions which were incomplete because they were based upon certain enumerated facts, but omitted material facts supported by the evidence. These cases enunciate the rule that a binding instruction offered by the plaintiff, based upon certain enumerated facts supported by the evidence, must not omit any material facts, and must be complete in and of itself. However, both the *Walker* case and the principal case dealt with instructions offered by the defendant and not the plaintiff. The danger of incomplete instructions is that the jury will be misled into believing that only the facts enumerated in the instruction may properly be considered by them in arriving at a verdict. *Wiggin v. Marsh Lumber Co.,* 77 W. Va. 7, 87 S.E. 194 (1915). It is difficult to perceive how the cases relied on by the court support its holding in the *Walker* case, since no facts upon which a finding for the defendant would be justified were included in the instruction, and none were omitted which would prejudice the plaintiff.

In the instant case, the instruction is complete in and of itself, and could in no way mislead the jury since it is an accurate statement of the law of contributory negligence in West Virginia. It has long been recognized in this state that contributory negligence of the plaintiff, which proximately contributed to the injury, is an absolute bar to recovery. *Belcher v. Norfolk & W. Ry.,* 140 W. Va. 848, 87 S.E.2d 616 (1955); *Burr v. Curry,* 137 W. Va. 364, 71 S.E.2d 313 (1952); *Overby v. Chesapeake & O. Ry.,* 37 W. Va.

524, 16 S.E. 813 (1893). The holding in the *Walker* case has not been followed in negligence cases. In fact, later decisions reaffirm the rule that contributory negligence is an absolute bar to recovery. *Crum v. Ward,* 122 S.E.2d 18 (W. Va. 1961); *Workman v. Wynne,* 142 W. Va. 135, 94 S.E.2d 665 (1956). Therefore, a permissive instruction on contributory negligence is definitely erroneous, for a jury could find for the plaintiff irrespective of the fact that his negligence proximately contributed to his injury.

The majority decision in the *Walker* case has been criticized as misapplying the law. Comment, 59 W. VA. L. REV. 278 (1957). The writer expressed the view that by changing the binding instruction to a permissive one the defendant was deprived of the defense of contributory negligence. In addition, he stated that the court was making new law by requiring specific acts of negligence to be embodied in a contributory negligence instruction. It is interesting to note that the commentary, in effect, predicted that the dissent was the correct law. The holding in the principal case has verified this prediction.

The instruction in the instant case, as well as in the *Walker* case, was an abstract instruction in that it did not incorporate specific acts of negligence predicated upon the evidence. A well recognized rule is that the mere giving of abstract instructions, independently of whether they do or do not state correct rules of law, does not constitute reversible error unless prejudice is shown, or the jury was misled. 88 C.J.S. *Trial* § 379 (1955). West Virginia follows this rule, with the addition of other requisites which must be fulfilled. The instruction must be complete in and of itself, and must be a correct statement of the law. *Davis v. Fire Creek Fuel Co.,* 144 W. Va. 537, 109 S.E.2d 144 (1959); *Butcher v. Stull,* 140 W. Va. 31, 82 S.E.2d 278 (1954). The instruction must not tend to mislead or confuse the jury. *Overton v. Fields,* 117 S.E.2d 598 (W. Va. 1960); *Hartley v. Crede,* 140 W. Va. 133, 82 S.E.2d 672 (1954). Lastly, there must be some evidence upon which to predicate a finding by the jury under such an instruction. *Dangerfield v. Akers,* 127 W. Va. 409, 33 S.E.2d 140 (1945); *Neely v. Cameron,* 71 W. Va. 144, 75 S.E. 113 (1912).

In the instant case, the instruction was a complete and accurate statement of the law of contributory negligence in West Virginia. The instruction as given would not mislead the jury, for it was a general rule of law which the jury was to apply should it find from

the evidence any facts to which it was applicable. It is within the discretion of the trial court to determine whether sufficient evidence has been adduced to support a theory propounded by the instruction. *Rowan & Co. v. Hull,* 55 W. Va. 335, 47 S.E. 92 (1904); 10 M.J. *Instructions* § 20 (1950).

The rule in West Virginia concerning an abstract instruction on contributory negligence, offered by the defendant, is that it does not constitute reversible error if it is a correct statement of the law, does not mislead the jury, and the theory it enunciates is supported by the evidence. The principal case reaffirms this view by disapproving the holding of the *Walker* case, thus eradicating any variance from our deep-rooted law on the doctrine of contributory negligence.

David Mayer Katz

Torts—Private Hospitals—Liability For Refusal to Provide Emergency Treatment

P's four month old child had been suffering from diarrhea. *P* knew that the child's physician was not in his office on Wednesdays, so they took the child to the emergency ward of *D* hospital for medical assistance. The nurse refused to give treatment because of the danger that the hospital's medication might conflict with that of the attending physician. The nurse did not examine the child, but the child was not in convulsions and was not crying or coughing. The child died later that afternoon. In an action for wrongful death the trial court refused *D's* motion for summary judgment. *D* appealed. *Held,* affirming the trial court, that a private hospital maintaining an emergency ward is liable for refusal of medical care in case of an unmistakable emergency. *Wilmington Gen. Hosp. v. Manlove,* 174 A.2d 135 (Del. 1961).

The principal case represents a new concept in the liability of private hospitals. Formerly the courts held that a private hospital had no duty to accept anyone whom it did not desire. In other cases under similar circumstances, the courts have not even considered the duty to admit patients. In these cases liability hinged on whether the person had been admitted as a patient and then negligently discharged. The principal case, however, has broadened the range