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Negligence--Liability of Automobile Driver Injuring Others After Sudden Physical or Mental Incapacitation

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commissioner to whom the cause was referred found for *D* on the basis that *W*'s leaving *D* was unjustified. The trial chancellor entered a decree affirming the findings of the commissioner, which decree is appealed. *Held,* that the commissioner's and the trial chancellor's findings of fact that *W* deserted *D* without justification and that *W* was sane at the time she did so are warranted by the evidence and are not clearly wrong or against the preponderance of the evidence, and therefore, the decree of the trial chancellor is affirmed. *Snyder v. Lane,* 89 S.E.2d 607 (W. Va. 1955).

In an earlier consideration of this case on the pleadings only, the court held that insanity of the deserted party cannot be asserted by the wrongdoer as a ground for demurrer to a bill of complaint by a committee on behalf of the wronged party for separate maintenance on the ground that the commissioner is not a proper party. *Snyder v. Lane,* 135 W. Va. 887, 65 S.E.2d 483 (1951).

The principal case is noteworthy since few cases have passed on the effect of insanity on the necessary intent to abandon in the case of desertion. The principal case shows clearly that in a suit for separate maintenance, based on W. VA. CODE c. 48, art. 2, § 29 (Michie 1955), a showing that the plaintiff was the deserter and was sane at the time of the abandonment is a sufficient defense, even though the plaintiff may later become insane. In *Fisher v. Fisher,* 54 W. Va. 146, 46 S.E. 118 (1903), the court held that insanity of the defendant *after* the passage of the requisite desertion period was no defense to a bill of complaint for a divorce. As has been pointed out, the *Fisher* case clearly intimates that, had the insanity occurred *before* the passage of the requisite desertion period, the insanity would be a defense, because of the impossibility of entertaining the requisite intent. Colson, *West Virginia Divorce Law,* 43 W. VA. L.Q. 203, 208 (1937). In the principal case, the court indicates that if the plaintiff had been insane at the time of the separation, the fact that the plaintiff left the defendant would have been no defense, for the plaintiff in such case could not have the requisite intent to abandon.

H. R. A., Jr.

NEGLIGENCE—LIABILITY OF AUTOMOBILE DRIVER INJURING OTHERS AFTER SUDDEN PHYSICAL OR MENTAL INCAPACITATION.—*X*, driving his automobile, suddenly lost control thereof, and the automobile ran onto a sidewalk and hit *P*. At the time of the accident, or within

seconds afterwards, *X* was unconscious, and he died of a massive cerebral hemorrhage before reaching the hospital. In an action brought by *P* against *X*'s estate, testimony indicated that *X* had appeared in normal and good spirits minutes before the accident. However, there was conflicting testimony as to *X*'s prior medical history. The issue of whether operation of an automobile by *X*, in view of his physical condition and background, was sufficient to constitute negligence was one of first impression in West Virginia.

P offered only one witness whose testimony would be indicative that *X* could have foreseen or anticipated that he would have a sudden attack. This witness, a medical doctor, stated that in 1944 [eleven years prior to the accident] he told *X* "that he was seriously ill, that the findings [of a heart condition] were of a progressive nature, and he could shorten his life by excessive physical activity; he should limit himself entirely to a more or less sedentary life, should not participate in any unnecessary physical exertion, including driving an automobile". The court said, "A careful analysis of the statement, . . . shows that [*X*] was not informed that if he operated an automobile he might have a sudden attack of some kind which would result in serious consequences to himself or others". The court then noted that *P* did not offer any evidence to show that *X*, prior to the date of the accident, had had a stroke, fainting spell, or any other type of attack rendering him dizzy or unconscious.

Held, that "where the driver of a motor vehicle suddenly becomes physically or mentally incapacitated without warning, he cannot be held liable for any injury resulting from the operation of his vehicle while he is so incapacitated, but that where a prima facie case of negligence has been established by the plaintiff, the burden is upon the defendant to show the sudden illness or attack, and to further show that the illness or attack was unanticipatable and unforeseen". As the defendant met this requirement and *P* failed to rebut it, the lower court should have sustained the defendant's motion for a directed verdict. *Keller v. Wonn,* 87 S.E.2d 453 (W. Va. 1955).

This decision follows the general rule in the United States. See, e.g., 5 AM. JUR., *Automobiles* 179 (1936); Annot., 28 A.L.R.2d 35 (1953).

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