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Contributory Negligence--Instructions

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CASE COMMENTS

CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.—*A*, a jaywalking pedestrian, was struck and injured by an automobile operated by *B*. In the ensuing trial, *A* offered the following instruction:

> "The court instructs you that contributory negligence is the doing of a negligent act by a plaintiff which proximately contributes to causing the damages of which she complains. Therefore, you are instructed that if you find from the evidence that the plaintiff was guilty of committing any act of negligence, however slight, which proximately contributed to causing the injuries of which she complains, then you are not permitted to weigh the degree or amount of negligence of each of the parties, but you must return a verdict for the defendant."

The trial judge amended it by striking out the word "must" and substituting the word "may". The jury found for *A*. *Held*, that the instruction as offered was a binding instruction and should have stated the negligent acts or conduct allegedly committed by the plaintiff as constituting contributory negligence, and there was no error in amending the instruction to make it permissive. Two judges dissented. *Walker v. Robertson*, 91 S.E.2d 468 (W. Va. 1956).

There is some feeling among West Virginia attorneys that this case is a step in the direction of discarding the doctrine of contributory negligence in favor of a doctrine of comparative negligence. On its face, it does not appear to go that far. It is, however, a definite departure from the rule, well established in this state, that contributory negligence on the part of a plaintiff is an absolute bar to re-

covery. *Belcher v. Norfolk & W. Ry.*, 87 S.E.2d 616 (W. Va. 1955); *Burr v. Curry*, 137 W. Va. 364, 71 S.E.2d 313 (1952). Judge Brannon, in *Carrico v. W. Va. C. & P. Ry.*, 39 W. Va. 86, 97 (1894), ably contrasts the two doctrines while stating the West Virginia view.

> ". . . [W]hen the plaintiff's negligence in any degree helps in causing that [sic] injury, though the defendant's negligence also helps, we set the negligence of one against the negligence of the other as equal, and tell the plaintiff that he cannot recover, because we do not apply the rule of comparative negligence in this state, by apportioning between the plaintiff and defendant the effect of the negligence of each in producing the injury and finding in favor of the less negligent."

The instruction as offered and also as given effectively negatived the idea of comparative negligence in that it told the jury that they were not permitted to weigh the degree or amount of negligence of the parties. If anything, the instruction as given goes a step beyond comparative negligence in that it permitted the jury to ignore completely the defense of contributory negligence. The direct effect of changing it from a binding to permissive instruction was to allow the jury to find for the plaintiff notwithstanding a finding of contributory negligence on the part of the plaintiff. This is certainly contrary to the mass of cases in this state holding that contributory negligence is a bar to recovery. Either the instruction incorrectly states the law or the court has, without directly deciding, changed the law of contributory negligence in West Virginia.

In *Workman v. Wynne*, 94 S.E.2d 665 (W. Va. 1956), decided just seven months after the decision in the principal case, the same court applied the rule of contributory negligence with all its force and held that the plaintiff could not recover. In the *Workman* case, the plaintiff was found to be guilty of contributory negligence as a matter of law, whereas, in the principal case it was a matter for jury determination. In attempting to distinguish the two cases, it must be concluded that where contributory negligence exists as a matter of law, it is a complete bar to recovery, but is not such a bar when it is a jury question. It is an absurd result and one not likely to have been intended by the court.

The court in the principal case held that a binding instruction based on contributory negligence must specifically state the acts or conduct of the plaintiff constituting contributory negligence. In this, it appears that the court has made new law. As correctly pointed out in the dissenting opinion, the cases relied upon by the majority

are no authority for the proposition for which they are cited. In *Bragg v. C. I. Whitten Transfer Co.*, 125 W. Va. 722, 728, 26 S.E.2d 217, 221 (1943), cited by the court, there is language which seems to state the rule laid down here. "An instruction which directs a finding for a litigant should submit to the jury a complete hypothesis sufficient in itself to support the conclusion which the jury is conditionally authorized to reach." The statement is much broader than was warranted by the decision in that case, since the instruction there involved presented to the jury a fact situation upon which it was directed to render a verdict, but omitted certain material facts which made the instruction incomplete. *Lawson v. Dye*, 106 W. Va. 494, 145 S.E. 817 (1929), cited by the court, involved a similar instruction. In *Wiggin v. Marsh Lumber Co.*, 77 W. Va. 7, 16, 87 S.E. 194 (1915), not mentioned in the principal case, it is said that "a binding instruction should always comprehend all the facts proved in the case in which it is given." Here the word "all" should be taken to mean "all" as contrasted with "part", since the statement was directed at an instruction which contained only part of the material facts.

The obvious danger in giving such incomplete instructions is that the jury will be misled into believing that only the facts enumerated in the instruction may be properly considered by them in arriving at a verdict, when a consideration of the omitted facts might require a different verdict. See *Wiggin v. Marsh, supra.* Where the instruction, as in the principal case, states no specific facts, but refers the jury to the evidence, it is difficult to see how they would be misled in that respect.

An instruction in substantially the same form as the one in the principal case was considered in *Mercer Funeral Home v. Addison Bros. & Smith*, 111 W. Va. 616, 163 S.E. 439 (1932), and said to be abstract. It was held misleading because it did not contain a qualification as to the natural and probable consequences of the plaintiff's conduct. Though considered bad practice, it is not reversible error to give an abstract instruction unless it is misleading. *Parker v. Building & Loan Ass'n.*, 55 W. Va. 134, 46 S.E. 811 (1905). Nor is it error to refuse such an instruction even though it correctly states the law. *Thrasher v. Amere Gas Utilities Co.*, 138 W. Va. 166, 75 S.E.2d 376 (1953); *Morrison v. Roush*, 110 W. Va. 398, 158 S.E. 514 (1931). Perhaps the objection as to abstractness can and should be directed at the instruction in controversy. Essentially, the instruction as offered stated a correct rule of law which the jury was to

apply should they find from the evidence any facts to which it was applicable. Though not necessarily misleading, it placed upon the jury the responsibility of applying the law, which is rightly the duty of the court. *Parker* case, *supra.*

Upon this theory, there would have been no error in refusing the instruction as offered. But in changing it from a binding to a permissive one, the court not only failed to remove the objection, but permitted it to misstate the principle of law it was intended to set forth. Upon any theory, the instruction deprived the defendant of the defense of contributory negligence and the court should have taken notice of that fact.

L. L. P.

FUTURE INTERESTS—FEE SIMPLE ABSOLUTE OR FEE SIMPLE SUBJECT TO A CONDITION SUBSEQUENT OR FEE SIMPLE DETERMINABLE.—In 1904 property was conveyed to *P* "upon condition that the same shall be held and possessed by the party of the second part only *so long as* the said property shall be used for school purposes." A school building was erected on the property, and was continuously used for school purposes until March, 1956. *D* contracted to purchase the property from *P*, then declined to accept a tendered deed on the ground that *P* could not convey a fee simple title. *Held,* affirming lower court, that the language did not impose rigid restrictions upon the title or create a condition subsequent, but indicated the motive and purpose of the transfer, as no power of termination or right of re-entry for condition broken was expressed. *Washington City Board of Educ. v. Edgerton,* 94 S.E.2d 661 (N.C. 1956).

The court in the principal case apparently considered only the question of whether a fee simple subject to a condition subsequent was conveyed to the grantee. An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple; and provides that upon the occurrence of a stated event the conveyor or his successors in interest shall have the power to terminate the estate so created. *Ohm v. Clear Creek Drainage Dist.,* 153 Neb. 428, 431, 45 N.W.2d 117, 119-120 (1950); *Queen City Park Ass'n. v. Gale,* 110 Vt. 110, 115, 3 A.2d 529, 531 (1939). The interest remaining in the grantor after such a conveyance has been termed a power of termination. RESTATEMENT, PROPERTY § 155 (1936). It has also been called a right of entry or a right of re-entry. See 1 AMERICAN