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7-1-1961

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### Recommended Citation

Harry M. Rosen, *Contributory Negligence -- The So-Called Distraction Rule*, 15 U. Miami L. Rev. 424 (1961)

Available at: <http://repository.law.miami.edu/umlr/vol15/iss4/9>

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## CONTRIBUTORY NEGLIGENCE — THE SO-CALLED DISTRACTION RULE

The defendant contracted with the plaintiffs to build an addition to the plaintiffs' home. The defendant's workmen used sheetrock to block an archway connecting the addition to the home to protect the plaintiffs' children. During a *rain storm*, the plaintiff-wife was injured when she attempted to move the sheetrock in order to close the windows in the construction area. *Held*, the evidence before the trial court was insufficient to establish defendant's negligence but was sufficient to establish plaintiff-wife's contributory negligence; moreover, the facts did not warrant an instruction to the jury on the so-called *distraction rule*. *Bashaw v. Dyke*, 122 So.2d 507 (Fla. App. 1960).

As a general proposition, when a person knows or in the exercise of ordinary care should have known of a particular danger, and fails to avoid the danger, he is held to be contributorily negligent as a matter of law.<sup>1</sup> However, if the person's attention is distracted from the danger by a *sufficient cause*, the question of contributory negligence is one for jury determination.<sup>2</sup>

In various jurisdictions the question of what is a sufficient cause to divert or distract a person's attention from a known or obvious danger has been interpreted differently. The *distraction rule* has been applied primarily to cases wherein business invitees,<sup>3</sup> pedestrians,<sup>4</sup> or motorists<sup>5</sup> were

1. See, e.g., *Meng v. Penner*, 179 Kan. 789, 298 P.2d 246 (1956); see also 25 AM. JUR. *Highways* §§ 462, 466 (1940); 65 C.J.S. *Negligence* § 120 (1950).

2. See 25 AM. JUR. *Highways* § 468 (1940); 40 C.J.S. *Highways* § 270 (1944); HARPER & JAMES, *TORTS* § 16.5, at 910 (1956).

3. *Cheney v. S. Kann Sons & Co.*, 37 F. Supp. 493 (D.D.C. 1941); *Laird v. T. W. Mather, Inc.*, 51 Cal. 2d 210, 331 P.2d 617 (1958); *Hodge v. Weinstock, Lubin & Co.*, 109 Cal. App. 393, 293 Pac. 80 (1930); *Miller v. Bart*, 90 Ga. App. 755, 84 S.E.2d 127 (1954); *Warner v. Hansen*, 102 N.W.2d 140 (Iowa 1960); *Knight v. Travelers Ins. Co.*, 32 So.2d 508 (La. 1947); *Wear v. Fitchburg*, 110 Mass. 334 (1872); *Boyle v. Preketes*, 262 Mich. 629, 247 N.W. 763 (1933); *Anderson v. Sears, Roebuck & Co.*, 223 Minn. 1, 26 N.W.2d 355 (1947); *McDonald v. Heinemann*, 141 S.W.2d 177 (Mo. App. 1940); *Tehan v. Freed*, 261 App. Div. 969, 25 N.Y.S.2d 882 (1941); *Hallbauer v. Zarfoss*, 191 Pa. Super. 171, 156 A.2d 542 (1959); *Rogers v. Max Azen, Inc.*, 340 Pa. 328, 16 A.2d 529 (1940); *Zehren v. F. W. Woolworth Co.*, 105 N.W.2d 563 (Wis. 1960).

4. *City of Birmingham v. Monette*, 241 Ala. 109, 1 So.2d 1 (1941); *Racine Tire Co. v. Grady*, 205 Ala. 423, 88 So. 337 (1921); *Blodgett v. B. H. Dyas Co.*, 4 Cal. 2d 511, 50 P.2d 801 (1935); *City & County of Denver v. Maurer*, 47 Colo. 209, 106 Pac. 875 (1910); *Deane v. Johnston*, 104 So.2d 3 (Fla. 1958); *Clover v. City Council*, 83 Ga. App. 314, 63 S.E.2d 422 (1951); *Bender v. Incorporated Town of Minden*, 124 Iowa 685, 100 N.W. 352 (1904); *Mathews v. Cedar Rapids*, 80 Iowa 459, 45 N.W. 894 (1890); *Merchants' Ice & Cold Storage Co. v. Bargholt*, 129 Ky. 60, 110 S.W. 364 (1908); *City of Maysville v. Guilfoyle*, 110 Ky. 670, 62 S.W. 493 (1901); *Le Beau v. Telephone & Tel. Constr. Co.*, 109 Mich. 302, 67 N.W. 339 (1896); *Goldman v. City of Columbia*, 211 S.W.2d 541 (Mo. 1948); *Cates v. Evans*, 142 S.W.2d 654 (Mo. 1940); *Jackson v. City of Jamestown*, 33 N.D. 596, 157 N.W. 475 (1916); *Strack v. City of Milwaukee*, 121 Wis. 91, 98 N.W. 947 (1904); *Crites v. City of New Richmond*, 98 Wis. 55, 73 N.W. 322 (1897).

injured. The degree of attention required of the plaintiff will depend on the circumstances; the greater the possible danger, the greater the attention required.<sup>6</sup> For example, a business invitee is not required to exercise as high a degree of attention as a pedestrian; nor must a pedestrian exercise as much attention while walking as a motorist while driving.<sup>7</sup>

In some circumstances a mere subjective distraction has been held sufficient, while in others an external diversion has been required. Since a motorist is required to exercise a high degree of attention, the courts have required that the distraction be an external force that threatens danger.<sup>8</sup> In *Dreyer v. Otter Tail Power Co.*,<sup>9</sup> the court succinctly stated the law of distraction in motorist cases when it said:

Ordinarily distracting circumstances will be found to consist of an object moving or movable [children or other vehicles] which in and of itself threatens or reasonably may be thought to threaten danger.<sup>10</sup>

However, some courts have permitted the question of a pedestrian's or business invitee's contributory negligence to go to the jury when the distracting cause was plaintiff's concentration on some absorbing thought or conversation.<sup>11</sup> In *West Ky. Tel. Co. v. Pharis*,<sup>12</sup> the plaintiff knew of

5. *Call v. City of Burley*, 57 Iowa 58, 62 P.2d 101 (1936); *Dreyer v. Otter Tail Power Co.*, 205 Minn. 286, 285 N.W. 707 (1939); *Dasnau v. Oswego*, 204 App. Div. 189, 198 N.Y. Supp. 226 (1923); *Schawe v. Levendecker*, 269 S.W. 864 (Tex. Civ. App. 1925); *City of Radford v. Calhoun*, 165 Va. 24, 181 S.E. 345 (1935).

6. See, e.g., *City of Knoxville v. Cain*, 128 Tenn. 250, 159 S.W. 1084 (1913); see also 65 C.J.S. *Negligence* § 120 (1950).

7. *Rogers v. Max Azen, Inc.*, 340 Pa. 328, 16 A.2d 529 (1940); *Hallbauer v. Zarfoss*, 191 Pa. Super. 171, 156 A.2d 542 (1959).

8. See note 5 *supra*.

9. 205 Minn. 286, 285 N.W. 707 (1939).

10. *Dreyer v. Otter Tail Power Co.*, 205 Minn. 286, 290, 285 N.W. 707, 709 (1939).

11. *Miller v. Bart*, 90 Ga. App. 755, 84 S.E.2d 127 (1954) (business invitee was sufficiently distracted by conversation); *City of Maysville v. Guilfoyle*, 110 Ky. 670, 62 S.W. 493 (1901) (pedestrian was sufficiently distracted by thoughts of her brother-in-law's sick child); *West Ky. Tel. Co. v. Pharis*, 25 Ky. L. Rep. 1838, 78 S.W. 917 (Ct. App. 1904) (pedestrian was sufficiently distracted by thoughts of her sick sister); *Weare v. Fitchburg*, 110 Mass. 334 (1872) (pedestrian was sufficiently distracted by thoughts of her children who were in danger); *Le Beau v. Telephone & Tel. Constr. Co.*, 109 Mich. 302, 67 N.W. 339 (1896) (pedestrian was sufficiently distracted by construction workers); *Strack v. City of Milwaukee*, 121 Wis. 91, 98 N.W. 947 (1904) (pedestrian was sufficiently distracted by thoughts of her sick friend); *Cumisky v. City of Kenosha*, 87 Wis. 286, 58 N.W. 395 (1894) (timid pedestrian was sufficiently distracted by workmen whom she was attempting to avoid); *Wheeler v. Town of Westport*, 30 Wis. 392 (1872) (pedestrian was sufficiently distracted by conversation); *Merchants' Ice & Cold Storage Co. v. Bargholt*, 129 Ky. 60, 75, 110 S.W. 364, 369 (1908). In this case the pedestrian was sufficiently distracted by a building in the process of construction. The court stated: "We are aware that in some jurisdictions a contrary rule is held, notably Pennsylvania, and a distinction is there made between subjective cases and cases external or objective, but no such distinction is made in this State, and the same rule applies whether the distracting cause is some external object or the concentration of the plaintiff's mind and thought upon some absorbing topic or question." *Contra*, *Racine Tire Co. v. Grady*, 205 Ala. 423, 88 So. 337 (1921) (pedestrian was not sufficiently distracted by thoughts of money matters); *Bender v. Incorporated Town of Minden*, 124 Iowa 685, 100 N.W. 352 (1904) (pedestrian was not sufficiently distracted by conversation); *Jackson v. City of Jamestown*, 33 N.D. 596, 157 N.W. 475 (1916) (pedestrian was not sufficiently distracted by conversation);

a telephone wire on the sidewalk, but momentarily forgot it because her mind was distracted by the sickness of a member of her family. The court held that the distraction was a circumstance which authorized submission of the case to the jury. However, in *Racine Tire Co. v. Grady*,<sup>13</sup> the plaintiff relied on the fact that he was thinking of money matters while going to the bank as an excuse for his forgetfulness; the court refused to submit the question of plaintiff's negligence to the jury.

The "external diversion" cases involving business invitees have focused usually upon engrossing advertisements. An attractive display of merchandise has been held sufficient to distract a customer's attention from a known or obvious danger. A storekeeper intends to attract his customer's attention to his merchandise displays. Therefore, a proprietor should not be heard to complain of contributory negligence when a customer injured on the premises looked at "eye-catching" displays instead of where he was going, and thus failed to see what would otherwise be an obvious danger.<sup>14</sup> The Pennsylvania courts speak of attractive displays of merchandise as "attention arresters," and there are an increasing number of cases that give credence to this form of distraction.<sup>15</sup> It has been held that even a menu which was conspicuously displayed above a lunch counter could be a sufficient distraction.<sup>16</sup> However, in *Subasky v. Great Atlantic & Pacific Tea Co.*<sup>17</sup> the court refused to permit the question of plaintiff's contributory negligence to go to the jury when the distraction was no more than an ordinary display of oranges and grapefruit.

The attempted application of the so-called *distraction rule* in the instant

*City of Birmingham v. Monette*, 241 Ala. 109, 113, 1 So.2d 1, 4 (1941). In this case the pedestrian was not sufficiently distracted by thoughts of getting to her car. The court said: "Her inattention or concentration upon some other thought is not sufficient, unless stimulated by some exterior immediate circumstance tending to distract her attention."

12. 25 Ky. L. Rep. 1838, 78 S.W. 917 (Ct. App. 1904).

13. 205 Ala. 423, 425, 88 So. 337, 338 (1921): "[I]f absorption of thought upon money matters were to be recognized as an excuse for forgetfulness, then certainly no adult male person with a family to support in these strenuous times could ever be charged with negligence as a matter of law. . . ." For a similar view, see *Goldman v. City of Columbia*, 211 S.W.2d 541, 543 (Mo. 1948): "To excuse forgetfulness of, or inattention to a known danger, some fact, condition, or circumstance must exist which would divert the mind or attention of an ordinary prudent person, and mere lapse of memory is not sufficient."

14. *Warner v. Hansen*, 102 N.W.2d 140 (Iowa 1960); *Hallbauer v. Zarfoss*, 191 Pa. Super. 171, 156 A.2d 542 (1959).

15. *Rogers v. Max Azen, Inc.*, 340 Pa. 328, 16 A.2d 529 (1940); *Hallbauer v. Zarfoss*, 191 Pa. Super. 171, 156 A.2d 542 (1959); *Cheney v. S. Kann Sons & Co.*, 37 F. Supp. 493 (D.D.C. 1941); *Laird v. T. W. Mather, Inc.*, 51 Cal. 2d 210, 331 P.2d 617 (1958); *Hodge v. Weinstock, Lubin & Co.*, 109 Cal. App. 393, 293 Pac. 80 (1930); *Clover v. City Council*, 83 Ga. App. 314, 63 S.E.2d 422 (1951); *Warner v. Hansen*, 102 N.W.2d 140 (Iowa 1960). *Contra*, *Blodgett v. B. H. Dyas Co.*, 4 Cal. 2d 511, 50 P.2d 801 (1935); *Knight v. Travelers Ins. Co.*, 32 So.2d 508 (La. 1947); *Boyle v. Preketes*, 262 Mich. 629, 247 N.W. 763 (1933); *Cates v. Evans*, 142 S.W.2d 654 (Mo. 1940); *Tehan v. Freed*, 261 App. Div. 969, 25 N.Y.S.2d 882 (1941).

16. *Johnson v. Rulon*, 363 Pa. 585, 70 A.2d 325 (1950).

17. 161 Pa. Super. 90, 53 A.2d 840 (1947); see *Anderson v. Sears, Roebuck & Co.*, 223 Minn. 1, 26 N.W.2d 355 (1947).

case<sup>18</sup> was factually unique,<sup>19</sup> as the injury was not to a pedestrian, business invitee, or motorist, but to a plaintiff in her home. The trial court had instructed the jury as follows:

If you believe that Mrs. Dyke . . . should have had knowledge of the condition which created the peril, you may still find [her] free from contributory negligence if you believe that her attention was diverted or distracted away from the sheetrock . . . by a cause sufficient to distract or divert an ordinarily prudent woman under the same circumstances. . . .<sup>20</sup>

The First District Court of Appeal found that the diversion allegedly caused "by the rain blowing into [plaintiffs'] home through the open windows of the den, and by a sense of urgency to close the windows against the elements"<sup>21</sup> was insufficient to warrant an instruction on the so-called *distraction rule*.

*Deane v. Johnston*<sup>22</sup> was cited as "apparently the only Florida case in which the distraction rule has been applied. . . ."<sup>23</sup> The plaintiff, in attempting to get to her employer's car, and home as quickly as possible to avoid an approaching hurricane, tripped over a scale on the sidewalk. The *traffic light* in her path diverted her attention from the scale. The Florida Supreme Court held that there was a sufficient distraction to permit the jury to decide the question of plaintiff's contributory negligence.

Throughout the principal case the court treated distracting circumstances as creating "an exception to the general rules governing negligence,"<sup>24</sup> rather than as a mere element to be considered in determining contributory negligence.

Although other jurisdictions have applied the *distraction rule* when the diversion was less than in the instant case, even when merely subjective, it is believed that the court was correct in requiring a stronger distraction. However, it would seem that to treat distracting circumstances as a "so-called rule," however hesitantly, serves only to confuse the already complicated jurisprudence of negligence. It would appear preferable to treat distracting circumstances as merely another element to be considered in determining whether the plaintiff acted as a reasonable prudent person under the circumstances.

HARRY M. ROSEN

18. *Bashaw v. Dyke*, 122 So.2d 507 (Fla. App. 1960).

19. For other unique factual situations in which the so-called distraction rule was applied, see *Flattery v. Goode*, 38 N.W.2d 668 (Iowa 1949); *Dennis v. City of Albemarle*, 242 N.C. 263, 87 S.E.2d 561, *on rehearing* 243 N.C. 221, 90 S.E.2d 532 (1955); *Burmek v. Miller Brewing Co.*, 107 N.W.2d 583 (Wis. 1961).

20. *Bashaw v. Dyke*, 122 So.2d 507, 510 (Fla. App. 1960).

21. *Id.* at 511.

22. 104 So.2d 3 (Fla. 1958).

23. *Bashaw v. Dyke*, 122 So.2d 507, 511 (Fla. App. 1960); compare *Brandt v. Van Zandt*, 77 So.2d 859 (Fla. 1955). The court refused to apply the distraction rule and seemed to indicate stricter requirements for the application of the rule. See also *Sinitz v. Shapiro*, 100 So.2d 458 (Fla. App. 1958).

24. *Bashaw v. Dyke*, *supra* note 23, at 511.