University of Miami Law Review

Volume 11
Number 4 *Miami Law Quarterly*

Article 16

7-1-1957

Torts -- Contributory Negligence

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The Florida Supreme Court, in the instant case, does *not* articulate on the question of whether peaceful picketing that meets the "lawful prerequisites" will be permitted if (1) it is conducted by employees who are members of a union (2) who are not the employees of the picketed employer and (3) when the picketing has not been previously authorized by a majority of the employees who would be governed by the picketing. Instead, the court *implies* that such action would be unacceptable.[9] Such an implication, if utilized, would give rise to a legal policy inconsistent with the weight of legal precedents and the logical, imperative interpretation of the constitutional guarantees of free speech.

The prerequisites to peaceful, lawful picketing established by statute and by the court are reasonable and can be adhered to by individuals and unions desiring to inform the public and their fellow employees of disputes between themselves and employers, whether the employers employ union members or not. It is hoped that when the Florida Supreme Court is squarely faced with a situation involving peaceful, lawful picketing by members of a union, as such, who are not the employees of the subject employer, it will act to eliminate this undesirable implication.

LAWRENCE C. PORTER

TORTS — CONTRIBUTORY NEGLIGENCE

The defendant ice company delivered a block of ice to the defendant purchaser, depositing it on a public sidewalk adjacent to the defendant's store. Plaintiff, an employee of the purchaser, brought an action for injuries sustained when she slipped and fell in the water resulting from the melting ice. *Held*, that as a matter of law, plaintiff's contributory negligence was a complete bar to recovery. *Chambers v. Southern Wholesale, Inc.*, 92 So.2d 188 (Fla. 1956).

The common law rule that contributory negligence is a defense and will bar recovery developed at a comparatively late date in the law of negligence.[1] It has been widely accepted and prevails in all but a few

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9. Fontainebleau Hotel Corp. v. Hotel Employees Union, Local No. 255, 92 So.2d 415 (Fla. 1957). ". . . Nothing contained herein shall be construed as prohibiting any number of employees less than a majority from engaging as individuals (as distinguished from representatives of a labor union) in lawful picketing . . . ." In this decision, and in others, the Florida Supreme Court has pointed out that a majority approval of the employees to be governed by the activity is not necessary prior to the undertaking of picketing. Whitehead v. Miami Laundry Co., 36 So.2d 382 (Fla. 1948); Johnson v. White Swan Laundry Co., 41 So.2d 874 (Fla. 1949).

1. The earliest reported case involving contributory negligence is Butterfield v. Forrester, 103 Eng. Rep. 926 (1809).

jurisdictions.[2] The majority of the courts state the rule in terms of "want of ordinary care" and "proximate causation,"[3] but the true reason for the rule probably lies in the inability to devise an acceptable method of apportioning damages between a negligent defendant and a plaintiff whose negligence is a concurring cause of his injury.[4] Until such a method is devised, the law must continue to deny any recovery to a negligent plaintiff[5] in those jurisdictions which have not adopted some form of comparative negligence statute.[6] The harshness of this result has led to a growing reluctance on the part of courts to determine the existence of contributory negligence as a matter of law.[7]

The courts apply substantially the same standards in determining a plaintiff's negligence as those used in judging the negligence of the defendant. As a general rule, negligence is the failure to exercise such care as the ordinarily prudent person would under the same or similar circumstances.[8] Where contributory negligence is in issue, the question to be determined in each case is whether the plaintiff has met the requirements of this standard of conduct established for this reasonably prudent person

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2. Mississippi and Arkansas are the only two states that have established apportionment as a general rule. In these two jurisdictions the plaintiff's negligence is to be considered only in apportioning damages. See ARK. ACT. 1955, No. 191; MISS. CODE § 1454 (1942). Nebraska and South Dakota divide damages subject to the limitation that the negligence of the plaintiff must be "slight" as compared with that of the defendant. See NEB. REV. STAT. § 25-1151 (1943); S.D. LAWS c. 160 § 184 (1941). Georgia allows recovery if the plaintiff's negligence is found to be "less" than that of the defendant. See GA. CODE § 105-603 (1936); Wisconsin allows recovery if the plaintiff's negligence is "not as great as" that of the defendant. See WIS. STAT. § 331.045 (1955).

3. 38 AM. JUR., *Negligence* § 174, 848 (1941).

4. "Obviously any estimate that 40% of the total fault rests with the pedestrian who walks out into the street in the path of an automobile, and 60% with the driver who is not looking and runs him down, represents nothing resembling accuracy based on demonstrable fact." Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 475 (1953).

5. Heller v. St. Louis-San Francisco Ry., 324 Mo. 38, 23 S.W. 2d (1929); Wood v. North Carolina Public Service Corp., 174 N.C. 697, 94 S.E. 133 (1918); Spiller v. Griffin, 109 S.C. 78, 95 S.E. 133 (1918).

6. See note 2 *supra*.

7. 43 A.B.A.J. 52 (1957).

8. Gallagher v. Delaware & H. R. Corp., 130 F. Supp. 35 (M.D. Pa. 1955); U. S. v. McHugh, 103 F. Supp. (W.D. Pa. 1952); Johnson v. Coleman, 179 Ark. 1087, 20 S.W.2d 186 (1929); Stedman v. O'Neil, 82 Conn. 199, 72 Atl. 923 (1909); Beck v. Artesian Water Co., 8 Terry 405, 91 A.2d 545 (1952); State v. Arnold, 3 Terry 47, 27 A.2d 81 (1942); Southern Ry. v. Harpe, 223 Ind. 124, 58 N.E.2d 346 (1944); Brooks-Calloway Co. v. Carroll, 235 Ky. 41, 29 S.W.2d 592 (1930); Grummel v. Decker, 294 Mich. 71, 292 N.W. 562 (1940); Peterson v. Minneapolis St. Ry., 226 Minn. 27, 31 N.W.2d 905 (1948)! Beckman v. Kinder, 237 Mo. App. 52, 165 S.W.2d 311 (1942); Mundy v. Davis, 154 Neb. 423, 48 N.W.2d 394 (1952); Hempstead v. Robinson, 1 N. J. 31, 61 A.2d 583 (1948); Miheal v. Pendleton, 237 N. C. 690, 75 S.E.2d 756 (1953); Gedon v. East Ohio Gas Co., 128 Ohio St. 335, 190 N.E. 924 (1934); Lanni v. Pennsylvania Ry., 371 Pa. 106, 88 A.2d 2887 (1952); Thomas v. Casey, 149 Dec. 13, 297 P.2d 614 (Wash. 1956).

for his own protection.[9] Ordinarily, the test is to be applied by the jury,[10] but in those cases where reasonable men could draw only one conclusion from the facts, and that conclusion clearly establishes negligence on the part of the plaintiff, the court should so declare it as a matter of law.[11]

The plaintiff is required to use his faculties to discover danger and conditions of danger, and if he is injured as a result of his failure to do so, he will be barred from recovery by his contributory negligence.[12] However, if there is a dangerous condition, it must be so obvious that a person using due care under the same or similar circumstances would avoid it.[13].

In the instant case, the court determined that the plaintiff was contributorily negligent as a matter of law. This decision is justified within the prevailing rule,[14] and is in accord with previous decisions of the court.[15] The plaintiff's failure to use due care was the proximate cause of the injury.[16] The plaintiff stated she could have avoided the risk.[17] Knowledge of the danger could be imputed to her.[18] Under these circumstances the court was justified in holding the plaintiff contributorily negligent as a matter of law.

The solution to the problem of the contributory negligence rule does not lie in an endless discussion of whether the plaintiff's negligence is a matter of law or fact. It is submitted that the rule itself is basically wrong. It places the entire burden of the loss caused by the negligence of two parties upon the plaintiff alone. Any general requirement such as exists in Arizona[19] and Oklahoma[20] providing that all questions of contributory

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9. RESTATEMENT, TORTS, § 463 (1934).

10. U. S. Consumers Power Co. v. Nash, 164 F.2d 657 (S.D. Mich. 1947); Wicker v. Roberts, 91 Ga. App. 490, 86 S.E.2d 350 (1955); Smith v. American Oil Co., 77 Ga. App. 463, 49 S.E.2d 90 (1948); McMaman v. Johns-Manville Products Corp., 400 Ill. 423, 81 N.E.2d 137 (1948); Ryan v. Griffin, 241 Minn. 91, 62 N.W.2d 504 (1954); Kilmer v. Bean, 48 Wash. 2d 848, 296 P.2d 992 (1956).

11. Lasko v. Meier, 394 Ill. 71, 67 N.E.2d 162 (1946); Gillett v. Mich. United Tractor Co., 205 Mich. 410, 171 N.W. 537 (1919); Miller v. Borough of Exter, 366 Pa. 306, 77 A.2d 396 (1951); Dauks v. Pittsburgh Ry., 328 Pa. 356, 195 Atl. 16 (1937); Lohr v. Payne, 115 Wash. 691, 196 Pac. 655 (1921).

12. U. S. Gypsum Co. v. Balfan, 193 F.2d 1 (5th Cir. 1951).

13. Grubb v. Illinois Terminal Co., 366 Ill. 330. 8 N.W.2d 934 (1937); Lebanon v. Groves, 178 Ky., 749, 199 S.W. 1064 (1918); Gillison v. Osborne, 200 Minn. 122, 19 N.W.2d 1 (1945); Smith v. Manning's, Inc., 12 Wash. 2d 573, 126 P.2d 44 (1942).

14. See note 11 *supra*.

15. Becksted v. Riverside Bank of Miami, 85 So.2d 130 (Fla. 1956); Brant v. Van Zandt, 77 So.2d 858 (Fla. 1955); Pettigrew v. Nite Cap, Inc., 63 So.2d 492 (Fla. 1953); Bowles v. Elkes Pontiac Co., 63 So.2d 769 (Fla. 1952); Breau v. Whitmore, 59 So.2d 748 (Fla. 1952).

16. 38 AM. JUR., *Negligence*, § 174, 848 (1941)

17. "She testified that she saw the water just about the time she stepped in it but that there was nothing to prevent her seeing it from the time she got out of the car." Chambers v. Southern Wholesale, Inc., 92 So.2d 188, 189 (Fla. 1956).

18. "The puddle of water was plainly visible. She knew as well as the defendants the extent to which water may render a concrete sidewalk slippery." Chambers v. Southern Wholesale, Inc., 92 So.2d 188, 189 (Fla. 1956).

19. ARIZ. CONST. Art. XVIII, § 5.

20. OKLA. CONST. Art. XXIII, § 6.

negligence must be submitted to the jury would merely have a tendency to shift the burden from the plaintiff to the defendant. This would not solve the problem. What is needed is legislation which would establish an equitable method of apportioning damages. This could be accomplished by statutes which would allow the jury to render special verdicts as to the amount of damages recoverable if they find no contributory negligence, and establish the amount by which such damages should be diminished if they find otherwise.[21]

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TORTS — SURVIVAL OF ACTIONS — ILLEGITIMATE CHILD

Plaintiffs, the natural parents of an illegitimate son, brought suit for the wrongful death of their child under Article 2315 of the Louisiana Civil Code, which provides for the survival of actions for wrongful acts. *Held,* illegitimates are not included within the meaning of the act; thus action for the wrongful death of an illegitimate child does not survive in favor of natural parents. *Cheeks v. The Fidelity & Casualty Co. of New York,* 87 *So.2d* 377 (*La.* 1956).

A group of American courts[1] has held that death statutes modeled on Lord Campbell's Act,[2] and using the words "mother," "father," and "child," include only legitimates. This was the view expressed by Chief Baron Pollock soon after the original law.[3] The rationale of the rule was that legislation must be presumed to be enacted in the light of the common law and does not give rights denied by the common law to a class separated from the common mass, without express intention.[4] The reasoning rested upon the doctrine that a bastard is *nullius filius* and has no ancestor.[5] On that basis, an illegitimate was not allowed to recover for the wrongful death of its father.[6] nor was a mother allowed to recover

21. Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 508 (1953).

1. *Ga.*: Robinson v. R. & Banking Co., 117 Ga. 169, 43 S.E. 452 (1903); *Ind.*: McDonald v. Pittsburg C. C. & St. L. Ry., 44 Ind., 159, 43 N.E. 447 (1896); *La.*: Lynch v. Knoop, 118 La. 611, 43 So. 252 (1907); *Md.* State v. Hagerstown & Frederick Ry., 139 Md. 78, 114 Atl. 729 (1921); *Miss.*: Alabama & V. Ry. v. Williams, 78 Miss. 209, 28 So. 853 (1900); *N.Y.*: Hiser v. Davis, 234 N.Y. 300, 137 N.E. 596 (1922); *Ohio*: Bonewit v. Weber, 95 Ohio App. 428, 120 N.E.2d 738 (1952); *Pa.*: Molz v. Hansell, 115 Pa. Super. 338, 175 Atl. 880 (1934); *S.C.*: McDonald v. Southern Ry., 71 S.C. 352, 51 S.E. 138 (1905); *Vt.*: Good v. Towns, 56 Vt. 410, 48 Am. Rep. 799 (1883).

2. Lord Campbell's Act, 1846, 9 & 10 Vict. 1, c. 93.

3. Dickinson v. The North Eastern Ry., 2 Hurl. & C. 735, 159 Eng. Rep. 304 (Exch. 1863), "But beyond all doubt in the construction of this Act of Parliament the word 'child' means legitimate child only."

4. Alabama & V. Ry. v. Williams, 78 Miss. 209, 28 So. 853 (1900).

5. 1 BLACKSTONE, COMMENTARIES 458 (10th ed. 1787), ". . . for he [bastard] can inherit nothing, being looked upon as the son of nobody. . . ."

6. Bonewit v. Weber, 95 Ohio App. 428, 120 N.E.2d 738 (1952).