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Torts--Contributory Negligence--Proximate Cause--"But For" Rule

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C. D. Herme, Inc. v. R. C. Tway Co.,¹² in which the Kentucky court accepted the *MacPherson* doctrine in negligence cases. Even though Kentucky has adopted the *MacPherson* doctrine, which might indicate a trend toward abolishing privity in the implied warranty cases, the federal court was required to apply the present Kentucky law.

Several recent decisions have held privity of contract not to be necessary to an action for breach of implied warranty.¹³ To what extent will Kentucky follow these decisions? Kentucky's adoption of the Uniform Commercial Code in 1960 removed the privity requirement under certain circumstances. The Code gives members of the family, household, or guests of the buyer a direct action against the seller.¹⁴ However, the manufacturer-consumer relationship of the principal case is not affected by this provision.¹⁵ Unless the complaining party can bring himself within a specific Code provision, he must satisfy the privity requirement under present Kentucky case law. Yet, present economic and social conditions indicate that the more enlightened view would be to drop the privity requirement. In this age of advertising, the consumer purchases goods in reliance upon the manufacturer's ability to produce them free of defects. Kentucky should extend the express or implied warranty not only to the buyer's family, household, and guests, but also to the subsequent buyer. The manufacturers would become more defect conscious and the public would be guaranteed safer products. Furthermore, manufacturers are more able to sustain loss and spread the loss throughout society as a cost of production.

Larry Garmon

TORTS — CONTRIBUTORY NEGLIGENCE — PROXIMATE CAUSE — "BUT FOR" RULE.—Plaintiff pedestrian brought an action against the defendant motorist to recover for injuries sustained by the plaintiff when struck by the defendant's automobile at an intersection. The trial court instructed the jury that if the plaintiff violated any of the duties imposed upon him and if such violation on his part caused or helped to bring about the accident and the resulting injuries, then the law in this case is for the defendant. On the basis of this instruction the jury found for the defendant. *Held*: Reversed. The use of an instruction

¹² 294 S.W.2d 534 (Ky. 1956).

¹³ *Spence v. Three Rivers Builders and Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1958); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

¹⁴ KRS 355.2-318.

¹⁵ Uniform Commercial Code § 2-318, official comment 3.

which did not advise the jury that negligence on the part of the plaintiff must have been a proximate cause of the accident was error. *Travis v. Hay*, 352 S.W.2d 209 (Ky. 1961).

The majority rule on this point is that the plaintiff will not be barred unless his negligence was the proximate cause of the injury.¹ The Kentucky court, however, has been astonishingly inconsistent on this point. For the most part, it has rejected the proximate cause test and stated that if the accident would not have occurred "but for" the plaintiff's negligence, regardless of whether it is the proximate cause, the plaintiff will be denied recovery.² On the other hand, the court has on occasion employed the proximate cause test without any mention of the "but for" rule.³ Nevertheless, the court declared in the *Travis* case: "It is the rule in this state that to constitute contributory negligence exempting the defendant from liability the plaintiff's negligence should be a proximate and not a remote cause, efficiently contributing to the injury or damage."⁴

The court asserted in the *Travis* case that standard procedure has been to point out to the jury the requirement that the plaintiff's negligence be proximate as contrasted to remote by the employment of the phrase that but for such negligence the injury would not have occurred. Although in an earlier decision the court expressly repudiated the "but for" rule, stating it was necessary that the plaintiff's negligence be a proximate cause of the injury,⁵ the court in the *Travis* case appears to have reverted to a modification of the "but for" rule in referring to the "standard procedure."

This "standard procedure" equates the "but for" and proximate cause rules by defining proximate cause in terms of the "but for" rule. This is precisely the impression the court gave in the *Travis* case when it said: "The use of the 'but for' clause in an instruction precludes a jury from finding against a plaintiff who has been negligent, but which negligence did not contribute as a proximate cause to the happening of the accident."⁶

The court is saying, in effect, that to determine whether the

¹ 2 Harper & James, Torts § 22.2 (1956); Morris, Torts 218 (1953).

² *Acres v. Hall's Adm'r*, 253 S.W.2d 373 (1952); *Louisville & N. Ry. v. Hyde*, 239 S.W.2d 936 (1951); *McCarter v. Louisville & N. Ry.*, 314 Ky. 697, 236 S.W.2d 933 (1951); *Norfolk & W. Ry. v. Bailey*, 307 Ky. 386, 211 S.W.2d 154 (1948); *Price v. T. P. Taylor & Co.*, 302 Ky. 736, 196 S.W.2d 312 (1946); *Smith's Adm'r v. Ford Motor Co.*, 202 Ky. 706, 261 S.W. 245 (1924).

³ *Allen v. Dillman*, 249 S.W.2d 23 (1952); *Chesapeake & O. Ry. v. Pope*, 296 Ky. 254, 176 S.W.2d 876 (1944); *Martin v. Chesapeake & O. Ry.*, 273 Ky. 32, 115 S.W.2d 306 (1938).

⁴ 352 S.W.2d 209, 211 (Ky. 1961).

⁵ *Chesapeake & O. Ry. v. Pope*, 296 Ky. 254, 176 S.W.2d 876 (1944).

⁶ 352 S.W.2d 209, 211 (Ky. 1961).

plaintiff's negligence was a proximate cause of the accident, it must be determined if the accident would not have occurred but for his negligence. This only compounds the confusion. Undoubtedly contributing to the use of the "but for" clause is Commissioner Stanley's approved instruction for contributory negligence cases, which also combines the proximate cause and "but for" tests.⁷

Apparently, the court is uncertain of the definition of proximate cause in contributory negligence cases. Should it be defined in terms of the "but for" rule as the court most frequently does? An argument against its use is that the "but for" test breaks down where there are two contributing causes. This is precisely the situation in all contributory negligence cases. If two independent causes concur to produce a result which either of them alone would have produced, each is a cause in fact of the result though it would have happened without either cause.⁸ There are situations, to be sure, where the plaintiff's negligence is the sole cause of the injury, but in such a case there is neither need nor room for the doctrine of contributory negligence. If the plaintiff's negligence is the sole cause, the defendant would not be negligent, since causation is a requisite for negligence. Contributory negligence is invoked only when the negligence of both the plaintiff and defendant are contributing proximate causes of the injury.⁹ Likewise, the plaintiff's negligence should not be regarded as the proximate cause merely because the plaintiff was the last wrongdoer or the last acting efficient cause.¹⁰ Each of these theories is incorrect, and in most instances works an injustice on the plaintiff.

Therefore, it is strongly urged that the court discard the "but for" rule outright, and in all contributory negligence cases determine whether: (1) the plaintiff's negligence is a contributing factor in producing the injury; and, if so, (2) if it is a proximate cause of the injury.

As long as the contributory negligence doctrine is to prevail, it should be applied properly and uniformly.¹¹ With that in mind, it is recommended that the "but for" rule be deleted from the approved instruction in the *Travis* case, and a new instruction be promulgated and approved, patterned rigidly on the proximate cause test in terms

⁷ 2 Stanley, Instructions to Juries in Kentucky § 602 (2d ed. 1957).

⁸ 2 Harper & James, Torts § 20.2 (1956).

⁹ *Id.* at § 22.2.

¹⁰ *Id.* at § 20.6.

¹¹ A few jurisdictions have adopted the comparative negligence doctrine, where the degrees of negligence of both parties are taken into consideration, and the plaintiff's recovery decreased proportionately if his negligence is correspondingly less than the defendant's negligence. A number of attempts have been made to adopt the comparative negligence doctrine in Kentucky, but all have failed.

of risk theory. Therefore, the plaintiff would not be barred unless his injury was a possible result within the risk to which the plaintiff had subjected himself. This is a more exact method of determining the plaintiff's negligence, and would give the trial judge and jury more precise standards by allowing them to weigh the plaintiff's act in relation to the risk created.

William G. Kohlhepp

CRIMINAL PROCEDURE—SEARCH PRIOR TO ARREST.—The defendant was walking down a deserted street in the heart of New York City at 3:15 a.m., carrying a shotgun. When questioned about the gun by two police officers, he replied that he was going hunting. The officers, after discovering that the gun was loaded, ordered the defendant to accompany them to the police station for further questioning. While putting the defendant into the patrol car, one of the officers touched the defendant's clothing, and felt an object about the size of a pistol. A formal search revealed that the defendant had in his possession a pistol, a tear gas gun, and two knives. He was then arrested and two charges were filed against him, one relating to the shotgun, the other to his possession of concealed weapons. The charge relating to the shotgun was dismissed. The defendant moved to suppress the evidence that was taken from him on the ground that it was obtained by an illegal search before the arrest. *Held*: Motion denied. Since the officers had probable cause to believe that a criminal act was being committed in their presence, they were "authorized to arrest the defendant or to search his person incidental to such an arrest." *People v. Salerno*, 235 N.Y.S.2d 879 (1962).

The United States Constitution¹ and all state constitutions² have provisions which afford protection against unreasonable searches and seizures. To give effect to this protection, the Supreme Court has ruled that all federal³ and state⁴ courts must exclude evidence obtained by such unreasonable searches. Thus, the issue in the principal case was whether a search made by officers prior to an arrest, upon probable cause that a crime was being committed in their presence, was unreasonable.

¹ U.S. Const. amend. IV.

² *E.g.*, Ala. Const. art. 1, § 5; Alaska Const. art. I, § 14.

³ *Weeks v. United States*, 232 U.S. 383 (1914).

⁴ *Mapp v. Ohio*, 367 U.S. 643 (1961).