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Insane Persons—Confinement in Penitentiary—Persons Insane at Time of Commitment—Statutory Provisions

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RECENT CASES

Insane Persons—Confinement in Penitentiary—Persons Insane at Time of Commitment—Statutory Provisions. *D* was acquitted of murder by reason of his insanity. The jury returned the statutory special verdict finding that his "insanity or mental irresponsibility" did not exist at the time of the trial but that there was such likelihood of a relapse or recurrence of the condition that *D* was not a safe person to be at large. *D* was committed to the state penitentiary as a criminally insane person. Soon after commitment he sought to be discharged from confinement under the procedure set out in RCW 10.76.070 [RRS § 6970; PPC § 133-11]. The prosecuting attorney petitioned for a writ of prohibition to prevent the superior court from proceeding with a jury trial for determining *D*'s entitlement to discharge pursuant to the terms of that statute. *Held:* Writ granted. *D*'s situation is not within the terms of RCW 10.76.070, and therefore the superior court is without authority to proceed with a jury trial on *D*'s petition for discharge. *State v. Tugas,* 139 Wash. Dec. 219, 234 P. 2d 1082 (1951).

The several statutes pertaining to criminal insanity are all contained in Wash. Laws 1907, c. 30. Section 3 of that act, RCW 10.76.030 [RRS § 2175; PPC § 133-5], requires that the jury be instructed to return special verdicts if a verdict of acquittal of the crime charged be returned. The special verdicts returned pursuant to that statute and the provisions of section 4, RCW 10.76.040 [RRS § 2176; PPC § 133-7], place a defendant found to have committed the crime but acquitted because of his insanity into one of three categories which the court in this case has labeled: (a) persons in whom the insanity still exists; (b) persons who before the trial have become sane, but are so liable to a relapse or recurrence of the insane condition as to be unsafe persons to be at large; and (c) persons who before the trial have become sane and are not liable to a relapse or recurrence of the insane condition and are safe persons to be at large. REM. REV. STAT. § 2176 provides that persons found by the jury to be in group (c) are to be released while persons in groups (a) and (b) are to be committed as criminally insane persons until discharged as thereafter provided. Section 6, RCW 10.76.070, provides the procedure by which a person "committed under the authority of this chapter" may secure a discharge. First, when a person so committed "shall claim to have become sane" and free from danger of relapse and safe to be at large, he shall apply to the physician in charge of the criminally insane for an examination of his mental condition. If the physician certifies that there is reasonable cause to believe that the person has "become sane since his commitment" and is a safe person to be at large, he is permitted to present a petition to the court that committed him. The petition must set up the facts leading to his commitment and assert that he "has since become sane" and is safe to be at large. The court is to set the cause down for a jury trial at which the sole issue is whether the petitioner has, "since his commitment, become a safe person to be at large . . ." The jury is required to find whether the petitioner "has become sane since his commitment" and is not liable to a relapse and is a safe person to be at large. If the jury so finds the petitioner is entitled to a discharge and if not he is remitted to custody.

The court, in the instant case, based its decision on the language quoted above, stating that a person sane at the time of the trial and at the time of commitment, but committed because of the likelihood of a relapse rendering him unsafe to be at large, *i.e.,* a person in group (b), is necessarily excluded by that language. The court's

reasoning is that having been adjudicated sane *at the time* of his commitment he cannot possibly have *become* sane *since* his commitment.

It would appear, however, that this construction of the statutes in question was not necessary. Rather, a holding which would have allowed the use of the procedure of RCW 10.76.070 to persons in group (b) could have been reached in two different ways.

First, even though a narrow construction is given to the phrase "has become sane since commitment," it could be construed to include a person in group (b) on the basis of the wording of RCW 10.76.040. After the three groups (a), (b) and (c) have been established by RCW 10.76.030 and 10.76.040, groups (a) and (b) are expressly combined under one heading by RCW 10.76.040. It states that the court is to order a defendant in *either* group (a) or (b) to be committed as a "criminally insane person." Therefore, when committed, it is not as a sane person, but by the express provision of the statute, as a criminally insane person. Having been criminally insane when committed, it is not impossible to have become sane since his commitment and the provisions of RCW 10.76.070 could apply to a person in group (b).

A different interpretation of the statutes in question could also be reached on the basis of a general rule of statutory construction. The question involved here has not arisen before in Washington and there appear to be no helpful decisions in other jurisdictions with comparable insanity provisions. The statutes in question need clarification, as is acknowledged by the court. There is no need of strict construction as the statutes in question are not penal. *State* ex rel. *Thompson v. Snell,* 49 Wash. 177, 94 Pac. 926 (1908). Therefore it would be proper to apply the general rule of statutory construction recognized in Washington. This rule is that effect should be given to the legislative intent as determined from the text of the act as a whole, in view of the general objective and purpose of the act. *In Re Horse Heaven Irr. Dist.,* 11 Wn. 2d 218, 118 P. 972 (1941); *Graffell v. Honeysuckle,* 30 Wn. 2d 390, 191 P. 2d 858 (1948).

First, consideration should be given to the object and purpose of the legislature in providing the sections of the act involved in this case. Defendants in all three groups established have been acquitted of the crime with which they were charged. However, only those persons in group (c) are to be immediately released. Persons in the other two groups are to be confined. Such confinement is not in the nature of punishment, since such persons are guilty of no crime; rather, they are confined because they are not safe persons to be at large. It would appear that the intention of the legislature was that, when the condition of a person so confined has changed so that such person is neither insane nor is there any likelihood of a relapse or recurrence of such condition, he is to be released, being in the same position as a person in group (c), i.e., a safe person to be at large. It would seem RCW 10.76.070 was intended to provide a procedure by which those persons confined under RCW 10.76.040 because they were not safe to be at large could be heard by a jury to determine whether their condition had so changed that they had become safe persons to be at large.

It will also be noticed that REM. REV. STAT. § 2176 provides that a defendant in either group (a) or (b) is to be committed "until such time as he shall be discharged as hereinafter provided." Inasmuch as RCW 10.76.070 contains the only procedure "hereinafter provided" for the discharge of those committed as criminally insane this would appear to be further evidence that the legislature intended that procedure to apply to defendants in group (b) as well as to those in group (c). [Note that REM. REV. STAT. § 2176 has been cited rather than RCW 10.76.040. This was done because the phrase "hereinafter provided" does not appear in the RCW citation purporting to be the same section.]

The court suggests, as all judicial remedy cannot be denied to *D*, that the proper recourse should be to habeas corpus. See *State v. Durham,* 139 Wash. Dec. 721, 724, 238 P. 2d 1201, 1203 (1951). It is submitted, however, that the statutory remedy should be available to persons in group (b) and such persons should not be required to invoke the already overworked remedy of habeas corpus.

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Negligence—Last Clear Chance—Emergency Rule. *P* was helping to push *F*'s car out of a ditch and while standing beside the car he failed to see the approach of *D*'s auto over the crest of a hill 250 feet behind him. *D* saw *F*'s automobile partially blocking the road and tried to stop or avoid it, but his car went out of control, slid broadside down the slippery road and struck *P*, pinning him between the two cars as they collided. The trial court gave the jury an instruction on last clear chance, apparently for the reason that although *D* was unable to stop his car, as a reasonable man he might have been able to blow his horn, which would have warned *P*. Judgment for *P*. On appeal, *Held:* Reversed; new trial granted. Last clear chance is inapplicable, because although *P*'s clear chance to get out of the way might have been imputable to *D* for his failure to blow his horn, under the "emergency rule" *D* was not negligent as a matter of law. *Bergstrom v. Ove,* 139 Wash. Dec. 73, 234 P. 2d 548 (1951).

The last clear chance doctrine, which operates to bar the defense of contributory negligence when the defendant has a superior opportunity to avoid the harm, is recognized in two forms in Washington: the "unconscious" form and the "conscious" form. *Leftridge v. City of Seattle,* 130 Wash. 541, 228 Pac. 302 (1924). Under the "unconscious" form the plaintiff's contributory negligence is not a defense if (1) the plaintiff, by his own negligence, was in a helpless and inextricable position of peril; (2) the defendant had a duty to watch out for the plaintiff; and (3) the defendant injured the plaintiff due to his failure to watch out for him. *Thompson v. Porter,* 21 Wn. 2d 449, 151 P. 2d 433 (1944); *Zettler v. City of Seattle,* 153 Wash. 179, 279 Pac. 570 (1929); PROSSER, TORTS § 54 (1941). Clearly this form of the doctrine could not apply in the instant case, because *P* was merely inattentive, and not in a helpless position of peril. *Thompson v. Porter, supra.* Under the "conscious" form of the doctrine a defendant is held liable for his negligence despite the plaintiff's contributory negligence, provided the defendant (1) actually saw the plaintiff and realized (or should have realized) his peril in time to avoid the injury, and (2) failed to exercise reasonable care to avert the harm after discovering the plaintiff's peril. Under this form the plaintiff's negligence may consist of mere inattention, and he need not be in a helpless position. *Mosso v. Stanton Co.,* 75 Wash. 220, 134 Pac. 941 (1913); *Leftridge v. City of Seattle, supra;* PROSSER, TORTS § 54 (1941); RESTATEMENT, TORTS § 280 (1934).

It is submitted that the situation presented by the instant case clearly calls for an instruction to the jury on the latter form of the doctrine. However, the court ruled it out, and began their analysis by asking the following question: "In this factual situation, is [*P*'s] clear chance to get out of the way *imputable* to [*D*]?" (Italics added.) Apparently this was the court's way of asking whether *D* was negligent for failing to blow his horn, since *P* could have jumped out of the way had he been warned.. The use of "imputable" in this context seems curious because the term is ordinarily used to ascribe liability to a person because of an agency or other close relationship. Its use in this case suggests an innovation in the doctrine of last clear chance by charging one person with another's ability to escape harm, and obscures the vital question to which the court should address itself; *viz.,* "Did *D* see *P* and realize his peril in time to avoid the injury by blowing his horn?" It is submitted that the court's analysis of the