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NEGLIGENCE - CONTRIBUTORY NEGLIGENCE - STANDARD OF CARE - OBJECTIVE OR SUBJECTIVE?

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NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — STANDARD OF CARE — OBJECTIVE OR SUBJECTIVE? — While anchoring a guy wire for a hay carrier on his farm, plaintiff suffered injuries caused by contact between the guy wire and a high tension line owned by defendant. After an answer denying negligence and setting up the defense of contributory negligence on the part of plaintiff, defendant had a directed verdict. *Held*, that the alleged contributory negligence of plaintiff was a question of fact for the jury which was to be guided by the standard of care of the ordinary, careful, prudent man in the situation of the injured party in all respects, the court saying, "We think it well settled that, in determining whether a plaintiff in a particular case was guilty of contributory negligence, the knowledge and experience of such plaintiff and the appreciation which he should have had of the danger must be taken into consideration." *Aller v. Iowa Electric Light & Power Co.*, (Iowa, 1938) 283 N. W. 81 at 85.

Negligence on the part of a plaintiff sufficient to bar his recovery is primarily of the same nature as that which would give rise to a cause of action against a negligent defendant.[1] In the field of ordinary negligence the classic statement is that one is held to the standard of care which would be exercised by the "man of ordinary prudence." [2] This formula has been expanded to include the phrase, "under the same or similar circumstances." [3] This standard is declared to be an objective one, in keeping with the idea that negligence is unreasonably dangerous conduct rather than the product of a mental state.[4] However, it seems more exact to describe the formula as setting up not a purely objective standard but rather a standard partly objective and partly subjective.[5]

[1] HARPER, TORTS, § 133 (1933); 1 SHEARMAN and REDFIELD, NEGLIGENCE, 6th ed., 213 (1913); 1 THOMPSON, NEGLIGENCE 167 (1901).

[2] Vaughan v. Menlove, 3 Bing. (N. C.) 468, 132 Eng. Rep. 490 (1837).

[3] Grand Trunk Ry. v. Ives, 144 U. S. 408, 12 S. Ct. 679 (1892); 1 SHEARMAN and REDFIELD, NEGLIGENCE, 6th ed., 90 (1913); 1 THOMPSON, NEGLIGENCE 24 (1901); BEACH, CONTRIBUTORY NEGLIGENCE, 3d ed., 28 (1899).

[4] The Germanic, 196 U. S. 589, 25 S. Ct. 317 (1904); HARPER, TORTS, §§ 70, 71 (1933); Edgerton, "Negligence, Inadvertence, and Indifference; the Relation of Mental States to Negligence," 39 HARV. L. REV. 849 (1926).

[5] "That expansible and all inclusive phrase 'under the same or similar circumstances' is employed as a blanket for every pertinent factor, and the courts seldom undertake to enumerate these factors. Under this phrase, the 'ordinary prudent person' may be endowed if necessary with the very qualities of the party whose conduct is to be measured. If the party is blind, crippled, deaf, small, strong, nervous, experienced, aged, intelligent, stupid, or whatnot, this is but one of the circumstances under which the 'ordinary prudent person' must act. This personified standard sounds like an absolute one, but it turns out to be a variable. Nevertheless it enables the jury to pass judgment on the party's conduct in the light of the sort of person that party *is*. It is

A subjective standard is used in reference to physical characteristics, since the physically impossible cannot be required, while an objective test seems to be applied to intelligence and the moral qualities.[6] This standard of care formula has been made more subjective when carried over into the field of contributory negligence. The doctrine of contributory negligence [7] has never been a favorite of the law because of the harsh results reached in certain cases. It has been undermined by certain "sentimental exceptions," such as the doctrine that contributory negligence is no defense to wanton injury, nor to liability at peril, nor where the defendant had a last clear chance to avoid the accident.[8] To further restrict the doctrine, courts have made the standard of care more subjective, thus dealing more leniently with plaintiffs. In the case of children as plaintiffs, the ability and experience of the particular child is taken into account.[9] There is authority for allowing the sex of plaintiff to alter the standard of care.[10] As in the case of the negligent defendant, plaintiff is not required to do the physically impossible.[11] Weight is given to circumstances which divert the attention of plaintiff.[12] However, drunkenness on the part of the plaintiff is not a circumstance which can be used to allow a more subjective standard.[13] The wisdom of allowing a more subjective test in the field of contributory negligence is apparent when the real basis for the doctrine is considered. Various unsatisfactory theories are advanced to explain the doctrine; among these are the arguments of no contribution between joint tort feasors, lack of proximate causation, assumption of risk, and that plaintiff does not come into court with

thus an adaptable standard, and thereby a workable one. Whether this be objective or subjective perhaps no two people could agree, but neither is it necessary that they should." Green, "The Negligence Issue," 37 YALE L. J. 1029 at 1036-1039 (1928). "It would appear that there is no standardized man; that there is only in part an objective test; that there is no such thing as reasonable or unreasonable conduct except as viewed with reference to certain qualities of the actor—his physical attributes, his intellectual power, probably, if superior, his knowledge and the knowledge he would have acquired had he exercised standard moral and at least average mental qualities at the time of action or at some connected time." Seavey, "Negligence—Subjective or Objective?" 41 HARV. L. REV. 1 at 27 (1927).

[6] Seavey, "Negligence—Subjective or Objective?" 41 HARV. L. REV. 1 at 27 (1927).

[7] Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (1809).

[8] Lowndes, "Contributory Negligence," 22 GEO. L. J. 674 (1934).

[9] Shulman, "The Standard of Care Required of Children," 37 YALE L. J. 618 (1928); 32 HARV. L. REV. 434 (1919); HARPER, TORTS, § 141 (1933); Terry, "Negligence," 29 HARV. L. REV. 40 (1915); BEACH, CONTRIBUTORY NEGLIGENCE, 3d ed., 28 (1899); 14 L. R. A. (N. S.) 648 (1908).

[10] Snow v. Provincetown, 120 Mass. 580 (1876).

[11] 1 SHEARMAN and REDFIELD, NEGLIGENCE, 6th ed., 218-219 (1913); BEACH, CONTRIBUTORY NEGLIGENCE, 3d ed., 28 (1899); L. R. A. 1917C 120 at 126.

[12] Beuscher and Modrall, "The Definition of Negligence and the Standard of Due Care in Wisconsin," 5 WIS. L. REV. 209 (1929); Haven v. Chicago, Milwaukee, & St. Paul Ry., 188 Iowa 1266, 175 N. W. 587 (1920).

[13] 40 L. R. A. 131 (1898); 47 L. R. A. (N. S.) 731 (1914).

clean hands.[14] Contributory negligence really seems to be based upon the desirable policy of encouraging one to exert one's powers in the interest of self-preservation to the end that others may be freed from the duty of exercising extraordinary efforts to avoid injuring their fellows.[15] So it seems that the knowledge of the individual plaintiff should be an important factor in determining whether he acted reasonably to protect himself. The desirability of recognizing this factor is shown by the holding in the principal case.

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[14] Bohlen, "Contributory Negligence," 21 HARV. L. REV. 233 (1908); Lowndes, "Contributory Negligence," 22 GEO. L. J. 674 (1934).

[15] Ibid.