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THE DOCTRINE OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW IN PENNSYLVANIA

In the recent case of McCreery v. Westmoreland Farm Bureau Co-operative Ass’n.¹ (1947), the Pennsylvania Supreme Court applied the doctrine of contributory negligence as a matter of law. In this case the Plaintiff, a business invitee, left some grain to be ground at the Defendant's plant. He left the plant for a short time and returned later. As his grain was not yet ready he wandered about the premises, with which he was familiar, and seeing what he thought was a pile of grain, but which in fact was a pile of concentrate, on the floor, reached down his hand and it was caught and injured in a grinder. The Plaintiff was familiar with the workings of the plant and heard the grinder in operation. He had reached down at least six inches into the pile of concentrate before his hand was caught. The Supreme Court held this Plaintiff guilty of contributory negligence as a matter of law. The court in doing so said, "The danger, such as it was, was obvious."

"As a consequence he, (the Plaintiff), must justly be held to have failed to exercise that degree of care to be expected of a person reasonably solicitous for his own safety and exercising due caution to that end."

There is no doubt that if this decision stands as authority for the doctrine of contributory negligence as a matter of law it is an extension of that doctrine in Pennsylvania.

The doctrine of contributory negligence as a matter of law is a relatively new doctrine in the law of negligence. The first mention of such an idea appears in the case of Metropolitan R. R. Co. v. Jackson² where a minority of the House of Lords held, in interpreting a previous case decided by the same court, that contributory negligence as a matter of law was a valid legal concept. The case which caused the controversy was Bridges v. North London R. R. Co.³ In this case it was said that it is the duty of the court to decide if there are sufficient facts from which the Plaintiff's negligence may be inferred to support a verdict of contributory negligence and that it is the duty of the jury to decide if those facts are sufficient facts from which the Plaintiff's negligence ought to call for such a verdict in this particular case. Justices Blackburn and Gordon in the Metropolitan R. R. Co. case dissented from the majority interpretation of the Bridges case and said that where the facts are "...beyond dispute..." from which negligence of the Plaintiff can be inferred the court is not usurping the function of the jury in declaring those acts contributory negligence as a matter of law. From this interpretation the doctrine began.

¹McCreery v. Westmoreland Farm Bureau Co-operative Ass’n. 55 A2nd 399 (1947)
²Metropolitan R. R. Co. v. Jackson 3 A.C. 193 (1877)
³Bridges v. North London R. R. Co. 7 H.L. 213 (1837)
Despite the growth of the doctrine it has received very little treatment by the authorities. Most of the texts on negligence are content with mentioning the fact that such a doctrine does exist, and with saying that it applies only when the facts relied upon to establish it are, "...distinct, prominent and decisive..."⁴, or, from which, "...the only rational inference is that the plaintiff was guilty of contributory negligence."⁵ Such explanations in effect tell us nothing and the only treatment of the subject which is anywhere nearly adequate appears in Beach On Contributory Negligence. Professor Beach says:

"When therefore, the facts of a given case are undisputed and the inferences, or conclusions to be drawn from the facts indisputable; when the standard of duty is fixed and defined, so that a failure to attain it is negligence beyond a cavil, then contributory negligence is a matter of law. In such a case there is nothing for the jury to decide. The case has decided itself, and it only remains to the court to declare the rule."⁶

Later Professor Beach continues:

"To take the case from the jury, negligence should not be a mere scintilla of plaintiff's negligence, but there should be proof of well defined negligence on the part of the plaintiff. Such negligence on the part of the plaintiff as to shock the mind of the ordinary prudent man."⁷

We do not dispute the theory that when there are no disputed facts to go to the jury, the court is not usurping the function of the jury. There is however, a danger in the doctrine of contributory negligence as a matter of law and it arises when the courts use the doctrine where the facts are, "distinct, prominent and decisive". In such cases is not the judge using his idea of what is reasonable in determining what would, "shock the mind of the ordinary prudent man"? The criticism of indiscriminate use of this doctrine is excellently set forth by Judge Cooly in Detroit etc. R. Co. v. Van Steinburg⁸ where he says:

"The case, however, must be a very clear one which would justify the court in taking upon itself this responsibility. For, when the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and measuring the plaintiff's conduct by that, turns him out of court upon his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that if the same question of prudence were submitted to a jury, collected from the different occupations of society, and, perhaps, better competent to judge of the common opinion,

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⁴Shearman and Redfield on Negligence. Vol. 1 p. 316
⁵Salmond on the Law of Torts. 8th edition p. 475
⁶Beach on Contributory Negligence. section 447 p. 565
⁷Ibid section 449 p. 568
⁸Detroit etc. R. R. Co. v. Van Steinburg 17 Mich. 99
he might find them differing with him as to the ordinary standard of proper care. The next judge, trying a similar case, may also be of a different opinion, and, hold that to be a question of fact which the first has ruled as a matter of law. Indeed, I think the cases are not so numerous as have been sometimes supposed in which a judge could feel at liberty to take the question of the plaintiff's negligence from the jury."

We quite agree with Judge Cooly, but feel that he could have concluded in a stronger tone and said that the cases should be very limited where a judge should take such liberty. We do not mean that there should be no such cases but that they should be limited to those cases of such a nature that continued reference of such a case to the jury has always resulted in a finding of contributory negligence. If no such limitation is placed upon the doctrine it could know no bounds and the decisions of one unreasonable judge could set precedents that could conceivably take the very meaning from negligence. The possibility of such an occurrence is not impossible. Mr. Joseph Madva in an article in the Pittsburgh Law Review quite clearly shows how it could be done. In the case therein discussed a blind man was held guilty of contributory negligence as a matter of law for going out without a cane. Mr. Madva points out how such a holding could be gradually extended until eventually a blind man would be denied the use of the public ways without assuming complete responsibility himself; how then the doctrine could be extended to the deaf etc. until the very right that the action of negligence protects would in many cases be abolished.

With this thought in mind let us examine some of the Pennsylvania cases which have held the plaintiff guilty of contributory negligence as a matter of law. The writer has found that with a few exceptions they may be classified as three types.

The first type is those cases where the plaintiff has failed to observe adequately a clear crossing at a railroad track. Where the plaintiff has failed entirely to stop he is of course by statute guilty of contributory negligence as a matter of law, and in such a case, of course, no problem arises. It is in the cases where the plaintiff claims that he has stopped, looked, and listened that the problem presents itself. The fact which seems to be of most importance in these cases is, just how far should one see before venturing upon the tracks. Of course on this point there is much conflict and confusion and there are usually other pertinent facts which have influenced the decision. To illustrate: in Fink v. Smith, it was held to be a jury question where the plaintiff had a clear view for four hundred feet, yet it was a matter of law in Reigner v. Pennsylvania R. R. Co., where the plaintiff could

9U. of Pitt. Law Review Vol. 8 p. 274
10Smith v. Sneller 24 A.2nd 61 (1942)
12249 Pa. 341 (1915)
13238 Pa. 257 (1917)
see for fifteen hundred feet. Conversely, in *Darbrinsky v. Pennsylvania Co.*\(^{14}\) it was held a jury question where the plaintiff could see for one half mile, while in *Lapinco v. Philadelphia and Reading R. R. Co.*\(^{15}\), it was a matter of law where the plaintiff's view was one hundred and sixty feet. From these illustrations it is quite clear that the distance one can see is not the real basis of the decision. Just what it may be is hard to determine for no other common feature could be found in any of these railroad cases upon which some could be held contributory negligence as a matter of law and some a jury question. Some happened at night\(^{16}\), some in the day\(^{17}\); some in fair weather\(^{18}\), some in foul\(^{19}\); and some happened at guarded crossings\(^{20}\), others at unguarded crossings\(^{21}\). There seems to be no real basis for the conflict in the cases other than the total of all the pertinent facts in the case; and these facts should be submitted to the jury. Until it is clear that in repeated cases of the same nature, a jury would find contributory negligence, then the court should not feel at liberty to take the case from the jury and declare the act contributory negligence as a matter of law. In these railroad cases the courts have held each type of case both ways, which makes it obvious that they have no guide at present. Our courts should be very much aware of the duty they are shouldering whenever they declare acts contributory negligence as a matter of law in railroad crossing cases, and in such cases should be very reluctant to make such declarations.

The second type of such cases in Pennsylvania is those where the plaintiff failed to use his natural senses. It is stated in *Bailey v. Alexander Realty Co.*\(^{22}\):

"If while in semi-darkness (or darkness) he does not use either his sense of sight or his sense of feeling, as a guide, but walks into an opening because he assumes that the elevator is at the floor, he is in law guilty of contributory negligence. If in semi-darkness he uses his sense of sight as carefully as he can and reasonably believe(s) he can 'see his way' and if his sense of sight deceives him, he may or may not be guilty of negligence and the question will be for the jury."

It is further stated in *Bartek v. Grossman*\(^{28}\):

"In other words, under all circumstances a man must use the senses that are available to him."

\(^{14}\)247 Pa. 177 (1915)  
\(^{15}\)257 Pa. 344 (1917)  
\(^{19}\)Hauser v. Central R. R. of N.J. 147 Pa. 440, (1892)  
\(^{21}\)Darbrinsky v. Pennsylvania Co. Ibid  
\(^{22}\)342 Pa. 362, (1941)  
\(^{23}\)356 Pa. 522, (1947)
Fortunately these cases are much more in accord with each other than the railroad crossing cases. The fact situation in each is also very similar. With few exceptions the plaintiff has entered an unfamiliar room, which was in a darkened condition making it difficult or impossible to see clearly within the room. Despite this situation the plaintiff has entered the room and fallen into a trapdoor\textsuperscript{24}, an open elevator shaft\textsuperscript{25}, or down a pair of steps\textsuperscript{26}. There has been little doubt that in each case the plaintiff was negligent and would have been held negligent by any jury. The cases continually present the same or very similar facts. The result has always been the same. In these cases then the court can more freely assume the responsibility of declaring the same or very similar acts contributory negligence as a matter of law. Reasonable men have been tried here and have failed to differ; the courts can justly accept their reason.

The third and final type of such cases in Pennsylvania are those cases where the acts of the plaintiff have been obviously negligent but such acts have been committed by an infant. Where, as stated in Rice v. Kring\textsuperscript{27}:

"...under these circumstances, it is clear that a man could not have recovered for the injuries sustained...our question then is:

Does that rule apply to the minor plaintiff?"

Here again the decisions have been in accord with each other and there is seemingly no conflict if the infant is fourteen years of age or older:

"at fourteen an infant is presumed to have sufficient capacity and understanding to be sensible of danger, and to have the power to avoid it."\textsuperscript{28}

Of course such rule is subject to the fact that the infant has the normal intelligence of a fourteen year old:

"...this presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years of age."\textsuperscript{29}

In every case then of normal infants of fourteen years of age or older, where their acts have been clearly negligent to the extent that a man under the same circumstances would be held guilty of negligence, the courts have held them guilty of contributory negligence as a matter of law. Here, as in the cases involving the

\textsuperscript{26}McVeugh v. Bass 110 Pa. Sup. 379, (1933)
\textsuperscript{27}310 Pa. 550, (1933)
\textsuperscript{28}Nagle v. Allegheny Valley R. R. Co. 88 Pa. 35, (1879)
\textsuperscript{29}88 Pa. 35, Ibid
use of ones senses, the courts can more readily apply the doctrine, noting of course
the infants mental capacity. Again reasonable men have decided; their reason can
be freely accepted.80

It is true that the doctrine of contributory negligence as a matter of law should
apply to all cases where the facts are such that reasonable men could not differ as
to their result, but we must first know whether reasonable men will differ on these
facts or not.81 There is but one way to determine this and that is to continually
submit these facts to a jury of reasonable men until we are sure that they will
not differ, and then, and only then, to apply their conclusions, but never should
their conclusions be anticipated by one man’s opinion of what he feels is reasonably
prudent. The courts should be cautious about applying the doctrine in the types of
cases where it has been applied before by making certain that the facts are the
same or very similar. The courts should be naturally reluctant to take from reason-
able men their right to say what is reasonable and should therefore be very hesitant
about extending the doctrine of contributory negligence as a matter of law.

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80There are no cases directly dealing with the doctrine as applied to infants under fourteen
years of age; but by analogy to the law of negligence, it seems that they too could be guilty of con-
tributory negligence as a matter of law. In such cases however the courts should be extremely cau-
tious and should not depart from the ordinary rules applicable to such infants. Cf. D’Ambrosio et al.
v. City of Philadelphia 147 A. 2nd 256 (1946); see 51 D.L.R. 79

81There are a few cases in Pennsylvania which do not fall into any of the types set forth
in this article but they are not numerous and usually stand alone. (Throne v. Phila. Rapid Transit
Co. 237 Pa. 20, Plaintiff stood on a pile of dirt to board trolley and slipped and had her foot
injured under the wheel.) (346 Pa. 43, Plaintiff alighting from incline plane car tripped over
raised platform.) (310 Pa. 521, Plaintiff in broad daylight stepped into obviously visible hole in
street.)

In addition there are some few others, but upon close observation they more closely resemble
obvious danger cases than contributory negligence cases. If by calling these cases those to which the
doctrine of contributory negligence as a matter of law applies and then for this reason applying
the doctrine this writer feels the courts are in error for as stated, this doctrine should be cautiously
applied and should never be the basis for its own extension.