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Torts -- Contributory Negligence -- Standard of Care Required of Persons under Physical Disability

Donald Leon Moore

do is rest each case upon its own peculiar facts and hope that a more consistent policy will develop.[26]

GERALD CORBETT PARKER

Torts—Contributory Negligence—Standard of Care Required of Persons under Physical Disability

In the principal case[1] the plaintiff, a 76-year-old blind man, was suing for injuries sustained when he slipped and fell on the unfinished curbing of a street being repaired in the city of Winston-Salem. The trial court granted a nonsuit on the ground of contributory negligence because the plaintiff knew that the road was being repaired and was thus under notice of its dangerous condition. On appeal before the supreme court the nonsuit was affirmed.

The plaintiff in this case was nonsuited because he failed to use due care. Just what the words due care mean in regard to any given set of circumstances is often difficult to determine. The interpretation becomes even more difficult when applied to circumstances involving a person under physical disability. However, the court states in its opinion that due care is "that standard of care which the law has established for everybody."[2]

In regard to standard of care the *Restatement of Torts* has this to say:

> "Unless the plaintiff is a child or an insane person, the standard of conduct to which he should conform is the standard to which a reasonable man would conform under like circumstances."[3]

One widely accepted authority in the field of torts gives this insight into the problem:

> "The standard required of an individual is that of the supposed conduct, under similar circumstances, of a hypothetical person, the reasonable man of ordinary prudence, who repre-

consistency a great soul has simply nothing to do. He may as well concern himself with his shadow on the wall." THE WORKS OF RALPH WALDO EMERSON 58 (E. E. Emerson ed. 1883).

[26] Decisions, 14 BROOKLYN L. REV. 137, 140 (1947). Cole v. Koonce, 214 N. C. 188, 191, 198 S. E. 637, 638 (1938), cited in Note, 29 N. C. L. REV. 301, 305 (1951) in passing upon the conduct of the plaintiff and his ability, by the exercise of due care, to avoid the consequences of defendant's negligence, the court said: "where the factors of decisions are numerous and complicated ... and estimates of witnesses play a prominent part ... practically every case must 'stand on its own bottom.'"

[1] Cook v. Winston-Salem, 241 N. C. 422, 85 S. E. 2d 696 (1954).

[2] *Id.* at 431, 85 S. E. 2d at 702.

[3] RESTATEMENT, TORTS, § 464 (1) (1934).

sents the community ideal of reasonable behavior. The characteristics of this imaginary person include:

a. The physical attributes of the actor himself.
b. Normal intelligence and mental capacity.
c. Normal perception and memory, and a minimum of experience and information, common to all in the community.
d. Such superior skill and knowledge as the actor has, or holds himself out as having, when he undertakes to act."[4]

Corpus Juris Secundum summarizes the situation in the following language:

> "A person under any physical disability is required to exercise ordinary care to avoid injury, and, if he fails to do so and such failure contributes proximately to the injury, he is guilty of contributory negligence. . . . Ordinary care in the case of such a person is such care as an ordinarily prudent person with a like infirmity would have exercised under the same or similar circumstances."[5]

American Jurisprudence states:

> "There is no higher or different standard of care for one who is aged, feeble, blind, halt, deaf, or otherwise than for one in perfect physical condition."[6]

The few authorities quoted above serve only to show the wide divergence of legal thought in regard to the standard of care required of a person under a physical disability. The terms due care, ordinary care, the standard of a reasonable man under similar circumstances, and a standard of care no different from that of one in perfect physical condition are attempts to formulate an objective standard for instructions to juries by which they may be guided; however, the differences in the use of language may tend to confuse rather than to clarify any attempt at an understanding of the standard required.

However, a brief look at some of the decided cases may shed further light upon the problem. The problem has arisen in regard to the blind,[7] the deaf,[8] the lame,[9] the intoxicated,[10] and others.[11]

[4] PROSSER, TORTS, § 31, p. 124 (1955). See also RESTATEMENT, TORTS, § 289 and comments (1934).
[5] 65 C. J. S. § 142, p. 782.
[6] 38 AM. JUR. § 210, p. 895.
[7] Balcom v. City of Independence, 178 Iowa 685, 160 N. W. 305 (1916); Hill v. City of Glenwood, 124 Iowa 479, 100 N. W. 522 (1904); Keith v. Worcester R. R., 196 Mass. 478, 82 N. E. 680 (1907); Weinstein v. Wheeler, 127 Ore. 406, 257 Pac. 20 (1928); Smith v. Sneller, 345 Pa. 68, 26 A. 2d 452 (1942); Flynn v. Pittsburgh R. R., 234 Pa. 335, 83 Atl. 207 (1912). See note: 141 A. L. R. 718.
[8] Smith's Administrator v. Railway Co., 146 Ky. 568, 142 S. W. 1047 (1912); Jadubiec v. Hasty, 337 Mich. 205, 59 N. W. 2d 385 (1953); Mitchell v. Seaboard

First of all, the fact that a person is blind, deaf, or otherwise disabled does not make it negligence for him to be upon the public streets. This seems to be the law generally[12] as well as in North Carolina.[13]

In many cases the standard of care applied by the courts has been the care of an ordinarily careful and prudent person having a like defect.[14] For example, in a Georgia case involving a deaf plaintiff who was struck by a streetcar, the court stated that the fact that the plaintiff was deaf "did not imply that he was required to exercise only that care which a prudent man who could hear would use, but which a prudent man in the same condition as to impairment of his hearing would exercise."[15] It may be pointed out that the above standard was that of the ordinary deaf person (or of the ordinary blind person, or of the ordinary lame person).

Ordinary care has been the standard applied by many courts, probably on the basis that they feel that the test should be the same for all sane adults. In *Toledo, P. & W. R. R. v. Hammett,* the trial court's instruction that the plaintiff was "bound to use that degree of care which an ordinarily prudent person whose hearing was so defective should have used under the circumstances . . ." was reversed by the appellate court.[16] The Illinois court said: "That degree or kind of care required to be used must be the same in the case of all adult persons in possession of their natural senses,—that is, that it should be reasonable and ordinary care. It cannot rest upon a sliding scale, depending upon the acuteness of or defects in the senses of sight, hearing, or feeling."[17]

However, many courts have held that a defect in one of the senses imposes the necessity of greater care upon the use of the remaining

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Airline R. R., 153 N. C. 116, 68 S. E. 1059 (1910); McCann v. Sadowski, 287 Pa. 294, 135 Atl. 207 (1927). See Note, 17 U. OF DETROIT L. J. 105 (1953).

[9] Denver v. Willson, 81 Colo. 134, 254 Pac. 153 (1927); Bianchetti v. Luce, 222 Mo. App. 282, 2 S. W. 2d 129 (1928); Payne v. West Chester, 273 Pa. 570, 117 Atl. 335 (1922).

[10] Straughn's Adm'r v. Fendly, 301 Ky. 209, 191 S. W. 2d 391 (1945); Epellett v. Sault Ste. Marie, 144 Mich. 392, 108 N. W. 360 (1906); McMichael v. Pennsylvania R. R., 331 Pa. 584, 1 A. 2d 242 (1938).

[11] Wray v. Fairfield Amusement Co., 126 Conn. 221, 10 A. 2d 600 (1940) (bone condition); Mahan v. State to Use of Carr, 172 Md. 373, 191 Atl. 575 (1937) (short stature); Edwards v. Three River, 102 Mich. 153; 60 N. W. 454 (1894) (deceased condition); Singletary v. A. C. L. R. R., 217 S. C. 212, 60 S. E. 2d 305 (1950) (dwarf); Eleason v. N. Y. Ry., 254 Wis. 134, 35 N. W. 2d 301 (1948) (epileptic fits).

[12] Neff v. Wellesley, 148 Mass. 487, 20 N. E. 111 (1889); Weinstein v. Wheeler, 127 Ore. 406, 257 Pac. 20 (1928).

[13] Cook v. Winston-Salem, 241 N. C. 422, 85 S. E. 2d 696 (1954); Foy v. Winston, 126 N. C. 381, 35 S. E. 609 (1900).

[14] Jones v. Bayley, 49 Cal. App. 2d 567, 122 P. 2d 293 (1942); Kerr v. Connecticut Co., 107 Conn. 304, 104 Atl. 751 (1928); Trumbley v. Moore, 151 Neb. 780, 39 N. W. 2d 613 (1949).

[15] Atlanta Consol. Street Ry. v. Bates, 103 Ga. 333, 350, 30 S. E. 41, 49 (1897).

[16] 220 Ill. 9, 13, 77 N. E. 72, 74 (1906).

[17] *Id.* at 13, 77 N. E. at 74.

senses.[18] In an early Massachusetts decision, the court said that "if the plaintiff was a person of poor sight, common prudence required of her greater care in walking upon the streets, and avoiding obstructions, than is required of persons of good sight."[19]

The North Carolina court in the principal case, following *Foy v. Winston*,[20] seemed to agree with this theory. It is clear that the word "care" as used by the Massachusetts and North Carolina courts refers to the particular plaintiff's effort or diligence or care and not to the standard of care. In the *Cook* case the court avoids any possible confusion by using the word "effort" as follows: "Plaintiff's evidence compels the conclusion that he, a blind man, failed to put forth a greater degree of effort than one not acting under any disabilities to attain due care for his own safety: that standard of care which the law has established for everybody. . . . Such a failure to use due care for his own safety was a proximate contributing cause of his injuries."[21]

It is submitted that this statement of the North Carolina Supreme Court leads to a clearer understanding of the standard of care required of persons under physical disability and, if followed generally, would remove much of the existing confusion.

DONALD LEON MOORE

Torts—Negligence—Injuries to Elevator Passengers

In a recent case the Supreme Court of North Carolina upheld a nonsuit on the ground that the plaintiff, an elevator passenger, was guilty of contributory negligence.[1] In this case the court, by implication, followed the rulings of previous North Carolina decisions that the owner of an elevator owes a passenger riding thereon that degree of care exercised by the ordinary prudent man under the circumstances.[2] Various jurisdictions have used different approaches in determining the protection to be afforded passengers on elevators in terms of the duties owed by manufacturers and those under contracts to maintain, as well as owners.

[18] Hill v. City of Glenwood, 14 Iowa 479, 100 N. W. 522 (1904); Winn v. Lowell, 1 Allen 177 (Mass., 1861); Fann v. North Carolina R. R., 155 N. C. 136, 71 S. E. 81 (1911).
[19] Winn v. Lowell, 1 Allen 177, 180 (Mass., 1861).
[20] 126 N. C. 381, 35 S. E. 609 (1900).
[21] Cook v. Winston-Salem, 241 N. C. 422, 431, 85 S. E. 2d 696, 702 (1954).

[1] Waldrup v. Garver, 240 N. C. 649, 83 S. E. 2d 663 (1954). The North Carolina court held that where the plaintiff's evidence showed that the tenant of a building failed to use lighting facilities provided by the owner of the building, opened an elevator, and stepped into an open shaft, a nonsuit was proper as contributory negligence was shown in the plaintiff's evidence. The court implied, however, that the defendant building owner owed his tenant the ordinary degree of care.
[2] Ramsey v. Nash Furniture Co., 209 N. C. 165, 183 S. E. 536 (1936); Hood v. Mitchell, 206 N. C. 156, 173 S. E. 61 (1934); Scott v. Western Union Telegraph Co., 198 N. C. 795, 153 S. E. 413 (1930).