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Contributory Negligence - Affect of Plaintiff's Knowledge of Customary Speeding

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RECENT DECISION

Contributory Negligence—Effect of Plaintiff's Knowledge of Customary Speeding—Plaintiff was struck by defendant's car while she was attempting to cross a street near an intersection. A police officer testified that there were 25 mile-an-hour speed limit signs posted on both sides of the intersection, and on cross-examination was permitted to testify, over plaintiff's objections, that the average speed traveled by motorists at the time of the day at which the accident occurred was "about 30 miles an hour." Plaintiff had crossed the street at this point intermittently over a five year period. *Held:* That the testimony as to the average speed traveled by motorists was admissible as evidence of a custom bearing on the issue of contributory negligence. It was admissible for the purpose of acquainting the jury with all the facts and circumstances at the time of the accident necessary in the determination of this issue. *Cucinella et al. v. Weston Biscuit Co., Inc., 265 P.2d 513 (Cal. 1954).*

In the dissenting opinion Judge Carter disagreed with the majority view because such evidence was prejudicial to the plaintiff, for it could only be considered by the jury to excuse the negligence of the defendant.

> "The standard of care required of persons under given circumstances is not to be established by proof that others have been in the habit of acting in a certain manner," . . . "a mere custom or usage cannot make due care out of conduct that is, in fact, negligence under the circumstances disclosed by the evidence . . ." p. 521

It is settled law that the specific practice of others cannot be admitted in testimony as an excuse for the alleged negligent act of the defendant.[1] Therefore, evidence such as this should not be admitted.[2]

This viewpoint is supported by some courts,[3] but there are two errors apparent in the minority opinion. First, while the law cited is correct, the application to the facts is wrong. The cases referred to by the plaintiff involved attempts on the part of a defendant to show that he was not negligent, that he was following a custom, and therefore was in the exercise of due care.[4] They were not cases in which the defendant attempted to prove contributory negligence on the part of

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[1] Elswick v. Charleston Transit Co., 128 W. Va. 241, 36 S.E.2d 419 (1945).

[2] "Evidence of custom in conflict with statutory duty of defendant is not admissible." Frame v. Arrow Towing Service, 155 Or. 522, 64 P.2d 1312 (1937). "A statute cannot be nullified and made inapplicable in a case by proof of a custom which conflicts with it. A custom or usage repugnant to the express provisions of a statute is void." Allen v. Mack, 345 Pa. 467, 28 A.2d 783 (1942).

[3] Frame v. Arrow Towing Service, *supra,* note 2; People v. Crossan, 87 Cal.App. 5, 261 P. 531 (1927); 144 A.L.R. 827 (1943); 61 C.J.S. *Motor Vehicles* §516 (f).

[4] Allen v. Mack, *supra,* note 2; Huey & Philp Hardware Co. v. McNeil, 111 S.W.2d 1205 (Tex., 1937).

the plaintiff by showing that the plaintiff had knowledge of a custom which increased the danger to the plaintiff during the time he was doing a specific act. Second, the reasoning is confused. Does not all contributory negligence, in effect, excuse the negligence of the defendant? In those states still adhering to the common law rule that any contributory negligence is a complete bar to recovery on the part of the plaintiff it certainly has this effect. While it may not be a complete bar in states such as Wisconsin, it does excuse a part of the defendant's negligence by reducing his liability for the injuries he has caused to something less than 100 per cent.

The majority opinion of the court can be supported by legal reasoning. Contributory negligence is generally defined as some act or omission on the part of the injured person which caused or contributed to his injury, and which would not have been done or omitted by a person exercising ordinary prudence under the same circumstances.[5] While the standard of due care does not vary, the amount of caution necessary to constitute due care varies in direct proportion to the danger known to be involved in the undertaking.[6] A person walking across a seldom used street would not have to exercise the same amount of caution as a person crossing a heavily traveled street.

Ordinarily, a pedestrian has the right to rely on the exercise of due care by the driver of a car, and need not anticipate the negligence of a motorist.[7] If, however, the pedestrian has actual or constructive knowledge of such negligence, and of the danger created thereby, he must use the degree of care under the circumstances to avoid being injured that such knowledge requires a reasonable person to use.[8]

Hence, knowledge of a custom which increases the danger causes the amount of caution required to increase in proportion to the danger.[9] This results even though the custom is in itself negligent, such as the customary violation of a speed limit.[10]

Evidence of the average speed traveled at the particular place of the accident is admissible to show that the plaintiff failed to exercise the amount of caution required under the circumstances. If this evidence is not admitted it might be found that the plaintiff exercised due care

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[5] Walsh v. West Coast Coal Mines, 197 P.2d 233 (Wash., 1948); RESTATEMENT, TORTS §463.

[6] ". . . and the care required is proportionate to the danger involved, under all the circumstances of the particular case." 61 C.J.S., *supra*, note 3, §457; Adair v. Valley Flying Service, 196 Or. 479, 250 P.2d 104 (1952).

[7] Jacoby v. Johnson, 190 P.2d 243 (Cal. 1948), 144 A.L.R., *supra*, note 3.

[8] 61 C.J.S., *supra*, note 3, §468 (b) and cases there collected.

[9] *Supra*, note 6.

[10] "The amount of care necessary in crossing a street or highway depends on the attendant circumstances and the danger involved, and the pedestrian must use that degree and amount of care which the usual and actual traffic conditions of the thoroughfare require." 61 C.J.S., *supra*, note 3, §527 (i) (3) and cases there collected.

in crossing, when, in fact, because of his knowledge of the custom, he did not exercise the necessary amount of care.

Legal authority also supports the view of the majority.[11]

". . . the custom here cannot be invoked to supersede or nullify the . . . statute. But it does not follow that such custom cannot be considered in determining whether plaintiff was free from contributory negligence."[12]

"If defendant violated the statute, . . . plaintiff was not thereby excused from exercising ordinary care on his part."[13]

Wisconsin has held that the violation of a statute fixing a speed limit for automobiles on a highway does not in itself deprive the defendant of the defense of contributory negligence.[14]

"Such regulations are not intended to abrogate the duties of travelers recognized by the common law for their mutual safety, and leaves them subject to its accepted rules of ordinary care and the duties that spring from their relations as travelers on a public highway." p. 444.

"From this it results that in all cases where it is shown that a person operating a motor vehicle in excess of the speed fixed by law, causes another traveler personal injuries, the question presented is whether, under all the facts and circumstances shown, his conduct amounts to gross negligence, and thus precludes him from asserting the defense of contributory negligence; and if such operator is found guilty of only a want of ordinary care, which proximately caused the collision and consequent injuries, then he is entitled to assert the defense of contributory negligence." p. 445.

This case has been approved on a number of occasions.[15] The language of the court in this and other cases[16] is broad enough to justify the conclusion that in Wisconsin evidence of customary violation would be admissible on the issue of contributory negligence.

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[11] Ritter v. Hicks, 102 W. Va. 541, 135 S.E. 601 (1926); Altsman v. Kelly, 336 Pa. 481, 9 A.2d 423 (1939); Desjarlais v. Kelley, 299 Mass. 182, 12 N.E.2d 190 (1938); Mann v. Standard Oil Co., 129 Neb. 226, 261 N.W. 168 (1935); Hansen v. Connecticut Co., 98 Conn. 71, 118 A. 464 (1922); 172 A.L.R. 1141 and cases there collected, "According to the weight of authority, evidence of a custom which is contrary to a statute or ordinance is not admissible, but it has been held admissible on the question of contributory negligence." 61 C.J.S., *supra,* note 3, 61 C.J.S., *supra,* note 4.

[12] Langner v. Caviness, 238 Iowa 774, 28 N.W.2d 421 (1947).

[13] Saddler v. Parham, 249 S.W.2d 945 (Ky. 1952).

[14] Ludke v. Burck, 160 Wis. 440 (1915). The statute involved in this case was WIS. STATS. (1915) §1636-49, which was repealed in 1929, but which, in substance, is WIS. STATS. (1953) §85.40.

[15] Zimmermann v. Mednikoff, 165 Wis. 333 (1917); Foster v. Bauer, 173 Wis. 231 (1921); Hopkins v. Droppers, 184 Wis. 400 (1924); Bentson v. Brown, 186 Wis. 629 (1925); Hillside Garage & Transit Co. v. Pflittner, 206 Wis. 26 (1929); Umlauft v. Chicago, M., St. P., & P. R. Co., 233 Wis. 391 (1940); Roswell v. Chicago, M., St. P., & P. R. Co., 240 Wis. 507 (1942).

[16] Grohusky v. Ferry, 251 Wis. 569, 30 N.W.2d 205 (1947) where the court said, "It is true that on a country highway a motorist traveling at the higher rate of speed is entitled to entertain a reasonable expectation that pedestrians will take account of the country speeds in yielding the right of way."

It appears that the defendant should be entitled to show the amount of caution required by the plaintiff as a matter bearing on the issue of contributory negligence; and in order to show the amount of caution required, it is necessary to show the danger involved in the undertaking. Therefore, any custom which tends to increase the danger is a material fact, and testimony as to the custom should be admissible in evidence.[17]

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[17] *Supra,* notes 6, 10, and 11.