Hastings Law Journal

Volume 6 | Issue 3 Article 8

1-1955

Torts--Contributory Negligence as a Matter of Law

Walter Gordon Shore

On the basis of the above discussion, it would seem that the court was correct in concluding that the city of Fresno was in error when it deprived Wallace of his pension. As the scope of governmental pensions continues to expend there will be greater demand for judicial construction of pension statutes. The California courts should find *Wallace v. City of Fresno* helpful in reaching a reasonable solution to the question of modification of public pensions, one of the many complex problems in the pension field.

Robert L. Young

TORTS. CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW

In the recent case of *Hamilton v. Southern Nevada Power Co.*[1] the Supreme Court of Nevada held that a sixteen year old boy who, with his father, raised pipe out of a well and into contact with a high tension power line, the existence of which they well knew, was guilty of contributory negligence. This decision affirmed the trial court's action in granting defendant's motion for a nonsuit on the ground that plaintiff was contributorily negligent as a matter of law

The defendant in this case, a power company, maintained a power line in a twenty-foot "dedicated alleyway" which ran adjacent to the rear portion of the Hamilton property One of the lines, carrying 7,200 volts of electricity, encroached two feet upon the Hamilton property, thereby trespassing. It was required by statute[2] that power lines carrying over 600 volts be on cross-arms painted a bright yellow or that a warning sign of a certain size with the words "High Voltage" be placed thereon. The high voltage lines in this instance were uninsulated and carried on warning. At a lower level there were 110-220 volt lines which were insulated and with which the plaintiff's father was familiar, as he had made a connection to one in the past.

The plaintiff was a junior in high school and had done well in science courses but had had no training or experience in electricity He attended school some forty miles away where he lived during the week and on this occasion he came home over the weekend to help his father remove a corroded twenty-foot length of pipe from the well. The well and pump house were located at the rear of the property During the removal of the pipe, the plaintiff stood on the roof of the metal storage tank and guided the pipe as it was lifted through a hole in the roof of the pump house. Then the father climbed on top of the pumphouse; the plaintiff stood on top of the storage tank about thirteen feet below the wires which placed him at a higher level than his father. Then, in the words of the father, this is what happened: "We both pulled the pipe straight up until it was clear of the platform I started to move it over to the edge of the building and the electricity hit us "

This method of removing the pipe was the only one possible as it was too long to be passed through a door or window It was the same method used by others in the community The plaintiff and his father both knew that the wires were there but had paid little, if any, attention to them. The plaintiff's father testified that he did not give a thought to any wires, nor did he notice how close they were. He was a chemist and a university graduate and he had done the electrical wiring in the pump house connecting into the 110 volt line.

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[1] 273 P.2d 760 (1954).

[2] § 6150, NEVADA COMPILED LAWS (1929)

On the above facts upon a motion by the defendant, the trial court granted a judgment of nonsuit upon the specific ground that the infant plaintiff was contributorily negligent as a matter of law.[3] The trial court stated that the plaintiff's inattention to the wires overhead was a contributing cause of the accident, and that his negligence was so gross under the circumstances as to constitute negligence as a matter of law. The Supreme Court said, in affirming the trial court's decision:

> "Despite the fact that the evidence does not support the trial court's finding that plaintiff 'had control of the guiding of the pipe while it was in the air,' that is, after it was entirely out of the hole in the roof, it is nevertheless the fact that plaintiff, standing on the tank, with the wire in plain view six to eight feet over his head, helped pull the pipe through the roof into such proximity to the wire that the contact resulted."

The Supreme Court further said:

> *"The reasoning behind most of the cases that have affirmed a nonsuit, dismissal or similar action at the conclusion of the plaintiff's case is that a person who voluntarily approaches into close proximity with a wire he knows to be there, or with a knowledge of whose presence he is chargeable, does so at his own risk."* (Emphasis added.)

The trial court exceeded its discretionary authority when it ruled that such an open question of fact, as in this case, was gross negligence as a matter of law. The Supreme Court should have reversed the judgment of nonsuit. It is patently reversible error when one considers that for such a judgment the evidence must be viewed most favorably for the plaintiff,[3] contributory negligence must be the only reasonable conclusion to be drawn[4] and the negligence of the father, if any, is not to be imputed to the infant plaintiff.[5] The Supreme Court of Nevada apparently did not consider such matters, but decided the issue on a policy ground which gives the owner of power lines freedom from liability for negligence, hence resulting in summary dismissal of actions without injury into the reasonableness of the plaintiff's conduct. This policy of charging a person who voluntatrily comes into close proximity with a wire as doing so at his own risk is based on the fact that the danger of electricity is common knowledge and the assumption that no prudent person would come near an electric wire. Such a policy puts too great a burden on

[3] "The rule has been well established in this and other courts that in considering the granting or refusing of a motion for nonsuit, the court must take as proven every fact which the plaintiff's evidence tended to prove, and which was essential to his recovery and every inference of fact that can be legitimately drawn therefrom and give the plaintiff the benefit of all legal presumptions arising from the evidence, and interpret them most strongly against the defendant." Burch v. So. Pacific Co., 32 Nev. 75, 104 Pac. 225 (1909).

"The court in determining whether plaintiff was negligent as a matter of law may consider only the uncontradicted facts and evidence; the evidence favorable to plaintiff must be accepted as true, and the whole evidence must be viewed most favorable to him." 65 C.J.S. 1148.

"Upon a motion as of nonsuit on the negligence of defendant upon the evidence, the evidence must be considered in the light most favorable to the plaintiff judgment of nonsuit reversed." McAllister v. Pryor, 187 N.C. 832, 123 S.E. 92 (1924).

[4] "Contributory negligence, like negligence, is ordinarily a question for the jury and becomes a question of law only when the court determines that but one inference can reasonably be drawn from the evidence." WITKIN, SUMMARY OF CALIFORNIA LAW, § 261(1).

"But where the facts are undisputed or conclusions therefrom irresistible to reasonable men, the question is for the court." 18 AM. JUR. 513.

"Plaintiff's contributory negligence is not established as a matter of law, unless the only reasonable hypothesis is that such negligence existed and reasonable or sensible men could have no other conclusion." Downing v. Silberstein, 89 C.A.2d 838, 202 P.2d 91 (1949).

[5] "Negligence of parent is not imputed to the child." Zargana v. Neve Drug Co., 180 Cal. 32, 179 Pac. 203 (1919).

the plaintiff by requiring him to guard against latent dangers to which he might expose himself, even through reasonable inadvertence, while at the same time allowing the owner of power lines immunity from liability even for its own misconduct or negligence. Further, such a policy as applied here does not allow inquiry into the standard of care applicable to the conduct of an infant.

The policy as enunciated by this court does not seem to be based upon valid reasoning and is clearly the minority rule. The better policy is to allow the jury to determine the reasonableness of the plaintiff's conduct under the circumstances as applied to the standard of care set by law unless the evidence is so conclusive that no reasonable men could differ. It has been the great effort of the law to achieve this policy of jury determination of such open questions of fact.

> The general rule,[6] properly applicable here, is: "Contributory negligence as a matter of law, as to coming in contact with an electric wire, must conclusively appear from plaintiff's evidence, and the mere fact that the person injured unnecessarily touched an electrical wire is not negligence per se."

Another statement of the rule[7] is:

> "When contributory negligence is urged as a ground for a nonsuit or a verdict for the defendant, it must appear that reasonable men, acting as triers of the fact, would find, without any reasonable probability of differing in their views, either that *the plaintiff knew and appreciated the danger,* or *that ordinarily prudent men, under the same circumstances, would readily acquire such knowledge and appreciation.* The fact of actual or constructive knowledge on the part of the plaintiff must appear either directly or by necessary inference from the evidence and the uniform experience of men, before the court can order a nonsuit or direct a verdict upon this ground. And this result must follow *after the evidence has received a construction most favorable to the plaintiff.*" (Emphasis added.)

In *Solen v. Virginia-Truckee R.R. Co.*,[8] quoting from *Railroad Co. v. Stout*,[9] a U.S. Supreme Court decision, the court states:

> "Certain facts we may suppose to be clearly established from which one sensible impartial man would infer that proper care had not been used, and that negligence existed, another man, equally sensible and equally impartial, would infer that proper care had been used and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of the jury Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists of only what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together,

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[6] 29 C.J.S. 647 See also: "Whenever the question of contributory negligence arises upon a state of facts in regard to which reasonable men might honestly differ, it ought to be submitted to the jury." Smith v. Odd Fellows Building Assoc., 46 Nev. 48, 205 Pac. 796 (1922).

"Except when plaintiff's own evidence shows him guilty of contributory negligence, the burden of proving it is upon the defendant and a presumption of due care weighs in his favor." City of Las Vegas v. Schultz, 59 Nev 1, 83 P.2d 1040 (1938).

"Courts should in an action involving contributory negligence define contributory negligence, and leave to the jury the application of the facts, as found by them, to the law given by the court." Musser v. Los Angeles & S.L.R. Co., 53 Nev. 304, 299 Pac. 1020 (1931).

"It is a general rule in civil actions applicable also to electrical cases, that it is the function of the jury to determine the facts and the function of the court to state the law. Where different conclusions may reasonably be drawn by different minds from the same evidence, the question is ordinarily for the jury." 18 AM. JUR. 513.

[7] Stevens v. United Gas & Electric Co., 73 N.H. 159 (1905)

[8] 13 Nev. 129 (1878).

[9] 17 Wall. 663 (1873).

> consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given, it is the great effort of the law to obtain."

That the question of standard of care for persons sui juris is generally one for the jury is well established.[10] The reasons for submitting the case to the jury are even more compelling in cases of this nature involving infants.

> "Usually the question of contributory negligence in actions for injuries to infants by coming in contact with wires charged with electricity has been held to be for the jury The reasons for the rule that contributory negligence of infants is generally for the jury would apply with special force in this class of cases, where the danger is not generally obvious, and its probable extent, even if it is in some measure apparent, is not likely to be appreciated by the inexperienced. In many of the cases in which the question of contributory negligence was held to be for the jury, the contact with the electrical wire was accidental, or its nature mistaken and no shock anticipated, or the circumstances would lead the child to believe that no serious harm would result."[11]

In a case where a boy intentionally touched a dead wire that came into contact with a live one (the age was not shown); it was said:

> " but that he appeared to have been of that indiscreet age which is between irresponsibility and the full responsibility of manhood, and at an age when it might fairly be left to the jury to say how far he should be held responsible."[12]

Thus, even though there was an intentional touching of the wire, it was deemed proper to have the jury determine the standard of care for which the plaintiff was to be held responsible.

In the case of *Rice v. Wheeling Electrical Co.*,[13] on the question of contributory negligence of a sixteen year old boy helping to remove a wire of excessive voltage, the instruction was that the jury should consider, among other things, the boy's age, his knowledge of electricity, *knowledge of the particular wire,* and the general circumstances at the time of the accident.

In the principal case the court has inserted the word "well" in front of the word "knew" as it apparently concluded that the plaintiff "well knew" of the wire, notwithstanding the evidence of the plaintiff, if viewed favorably to him, was to the contrary. Even if the conclusion that the infant plaintiff "well knew" that the wires were there were well founded, still the evidence must show that the boy had knowledge of this particular wire and of its danger for the court to hold him contributorily negligent as a matter of law.[14] Further, the plaintiff is not required to assume that the defendant is negligent and guard against latent dangers, but he is entitled to assume that the defendant is careful and has complied with the law,[15] and that the defendant will warn against latent dangers known to the defendant.[16] But even if it were established that the plaintiff had knowledge of the wire and appreciated the danger, the standard of care should not be so rigid as to require him to be alert to the danger every second. Contact with a wire through inadvertence or momentary forgetting has been held to not breach the standard of ordi-

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[10] See note 6 *supra.*

[11] L.R.A. (1917F) p.101.

[12] Texarkana Gas & E. L. Co. v. Orr, 59 Ark. 215, 27 S.W 66 (1894).

[13] 62 W.Va. 685, 59 S.E. 626 (1907).

[14] Rice v. Wheeling Electrical Co., 62 W.Va. 685, 59 S.E. 626 (1907).

[15] Gornstein v. Priver, 64 Cal.App. 249, 221 Pac. 396 (1923).

[16] Sanchez v. East Contra Costa Irrigation Co., 205 Cal. 515, 271 Pac. 1060 (1928).

nary care.[17] Therefore it is submitted that the court exceeded its discretion on this matter and that the conclusion of the court that the plaintiff "well knew" of the wire was not a sound basis for taking the matter from the jury

Also involved here is the question of violation of a statute as negligence per se. Contributory negligence of one of the class protected is not a defense in such a case. And also a liberal court might view the defendant's maintenance of the wire over the Hamilton property as a nuisance to which contributory negligence is not a defense. The Nevada Supreme Court, however, did not discuss these issues in its opinion.

In California one can expect to get to the jury on such evidence as was present in the *Hamilton* case. An analysis of the California cases which have granted a nonsuit because of contributory negligence shows that it is essential to defendant's motion that the evidence show that the plaintiff knew of the danger or had been warned of the danger, so that there was a voluntary or unnecessary exposure. Examples of contributory negligence as applied by California courts are: "Voluntarily grasping a live power wire *after being warned no to touch it.*",[18] "One employed to do plumbing at an electrical plant, *who had been warned* to avoid wires in close proximity to his work and is injured by coming in contact with the wires because of momentary forgetfulness of the danger is guilty of contributory negligence if there is no emergency or unexpected event at the time of the accident which tends to confuse him or distract his attention from the wires."[19] Where a boy of twelve climbed thirty-three feet up a metal tower and into contact with power lines, the court would not reverse a trial court decision of nonsuit based on contributory negligence as a matter of law, as it was not an abuse of discretion. but conceded that: "The question is one for the jury depending generally upon what the evidence discloses as to the degree of intelligence of the minor and as to his opportunity for knowing or being aware of the danger which attends his coming or bringing himself in contact with such dangerous instrumentalities as are high power electric wires."[20] Here, even for deliberate contact, knowledge of the danger was essential to support the holding of the trial court that plaintiff was contributorily negligent as a matter of law In another California case of a twenty-seven year old farm worker who contacted 11,000 volts with a raised rod, the court said: "Where it appeared that the contact with defendant's high voltage wire occurred when plaintiff raised a limber iron rod which was twenty-two feet long out of a well, that plaintiff admitted there were some wires overhead almost in the path of the rod he was lifting, that he could have determined whether the wires were insulated or not by simply looking at them, and that he also knew that if such a rod supported by a man on the ground comes into contact with a naked high voltage wire serious injury to the man holding it was inevitable, a finding that plaintiff was guilty of contributory negligence as a matter of law was justified."[21] These facts appear somewhat similar to the principal case with the exceptions that here it was a person sui juris, and the rod was a limber one which increased the chances

[17] "To forget about a known danger is not negligence, unless it shows the want of ordinary care which is for the jury" Anderson v Southern Calif. Edison Co., 77 Cal.App. 328, 246 Pac. 559 (1926).

[18] Bartulucı v San Joaquin L. & P Corp., 21 Cal.App.2d 376, 69 P.2d 440 (1937).

[19] Ergo v Merced Falls G. & E. Co., 16 Cal. 334, 119 Pac. 101 (1911) Andrews v. Valley Ice Co., 167 Cal. 11, 138 Pac. 699 (1914).

[20] Wallace v. Gt. Western Power Co. of Calif., 204 Cal. 15, 266 Pac. 281 (1928).

[21] Dresser v So. Calif. Edison Co., 28 Cal.App.2d 510, 82 Pac. 965 (1938)

of contact. Most important, however, is that here the defendant proved that there were two posters on the pump house wall near the switch which *warned* of high voltage wires and the dangers from them. This warning clearly distinguishes it from the Nevada case.

The question was held to be for the jury in *Anderson v. Southern Calif. Edison Co.*[22] where it was said: "In an action against an electric power company for injuries sustained by plaintiff through coming in contact with high voltgage wires maintained by the power company over the roof of the building on which plaintiff was working as a painter's apprentice, the question of the company's negligence in maintaining the wires in dangerous proximity to the roof of the building and of plaintiff's contributory negligence in *forgetting* about the wires after having seen them are for the jury to determine from all the facts and circumstances of the case." More recent California decisions on contributory negligence in automobile accident cases support the view that the issue is one for the jury except in rare instances of a clearly negligent plaintiff. In *Malinson v. Black*,[23] the court said: "Only in rare instances does the question of contributory negligence become a question of law. Every mistake of judgment is not negligence, for mistakes are made even in the exercise of ordinary care." And in *Downing v. Silberstein*,[24] the court said:

> "In a personal injury suit, the burden of proving plaintiff's contributory negligence is on the defendant Plaintiff's contributory negligence is not established as a matter of law, unless the only reasonable hypothesis is that such negligence exists and reasonable or sensible men could have drawn no other conclusion. where there are different inferences that may be drawn, one for and one against, the one against will be followed, and that before it can be held as a matter of law that contributory negligence exists, *the evidence must point unerringly to that conclusion.*" (Emphasis added.)

It is submitted that the decision in the *Hamilton* case is not well founded and is contra to the better rule which exists in California. On a similar set of facts in California, without evidence pointing to knowledge or to a warning of the danger and in absence of a deliberate or wanton contact with the danger, one can expect to have the question of contributory negligence determined by a jury Further, in the absence of evidence controverting plaintiff's contention of ordinary care, he would be aided by the presumption of law that "A person takes ordinary care of his own concerns."[25] This is established in *Lim Ben v. Pacific Gas & Elec. Co.*[26] where the court said:

> "Dictates of common prudence might point to any one of several reasonable conclusions Coupled with the presumption of law that 'A person takes ordinary care of his own concerns.', it would seem that the conduct of decedent was the result of some sudden happening and was neither negligent or deliberate. In any event we feel the case comes squarely within the rule that if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury."

Walter Gordon Shore

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[22] 77 Cal.App. 328, 246 Pac. 559 (1926).
[23] 83 Cal.App.2d 375, 188 P.2d 788 (1948).
[24] 89 Cal.App.2d 838, 202 P.2d 91 (1949).
[25] CALIF. CODE CIV. PROC. § 1963, sub. 4.
[26] 101 Cal.App. 174, 281 Pac. 634 (1929).