Indiana Law Journal

Volume 5 | Issue 4 Article 6

1-1930

Contributory Negligence-Question of Fact for Jury-Basis for Conclusion of Jury

RECENT CASE NOTES

CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT FOR JURY—BASIS FOR CONCLUSION OF JURY—Appeal from verdict of jury and judgment for defendant below for damages for injury to wife of appellant, appellant, and car of appellant. Accident occurred on a paved street, widely used for travel, on a dark, misty night, at a time when street was slippery. Appellee's truck was parked near the curb, without lights. Appellant dimmed his lights for an approaching car and left them dimmed after he passed it, some fifty feet from appellee's truck. Appellant's car struck appellee's truck and was thrown eighty feet down the road on its side, and was practically demolished. *Held:* There was a basis for conclusion of jury of contributory negligence on part of appellant. *McKee v. Suez*, Appellate Court of Indiana, September 12, 1929, 167 N. E. 720.

The only question presented by assigned error of overruling of appellant's motion for new trial was whether there was a basis for conclusion of jury that appellant was guilty of contributory negligence.

Where contributory negligence is the proximate cause of the injury, plaintiff's remedy is barred. *Kingan & Co. v. Cleason*, 101 N. E. 1027; *Nave v. Flack*, 26 Ind. 443; *Hathaway v. Toledo, Wabash and Western Rd.*, 46 Ind. 25. The essential elements necessary to make available the defense of contributory negligence are: (1) want of ordinary care by plaintiff and (2) a causal relation between that want of care and the injury. *Salem-Bedford Stone Co. v. O'Brien*, 12 Ind. App. 217. What is or is not ordinary care depends on the circumstances. *Indianapolis St. Ry. v. Schmidt*, 71 N. E. 663. Ordinary care should be that degree of care and foresight which a reasonable and prudent man would or ought to use under the circumstances. (For an extreme case as respects contributory negligence, see *Pittsburgh, C. C. & St. L. Ry. v. Bennet*, 35 N. E. 1033, where a pedestrian undertaking to cross a track running on a city street, when he sees a train approaching at 930 feet, was held to be negligent.) The converse in facts of the principal case is presented in *Collins v. McMullins*, 225 Ill. 430, where plaintiff left car parked without lights and defendant drove into it at night. It was there held that plaintiff could not recover, due to his contributory negligence in leaving car parked without lights. The result in both cases is the same, that where both are negligent and negligence of both is proximate cause of the injury, neither can recover for his injuries.

In the principal case there was a basis for the jury's conclusion of contributory negligence on the part of appellant. Such force, as was necessary to throw appellant's car eighty feet and wreck it so completely, could result only from excessive speed. Under existing circumstances, high speed and running with lights dimmed when it was not necessary, does not show exercise of ordinary care, and has a causal relation to injuries complained of.

H. N. F.