Insurance-Weight of Evidence-Construction of Policy-Proximate Cause

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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. 1038, 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.

INSURANCE—WEIGHT OF EVIDENCE—CONSTRUCTION OF POLICY—PROXIMATE CAUSE—Plaintiff sued on a policy of accident insurance for the death of her husband. The policy covered death resulting "directly and inde-
RECENT CASE NOTES

pendently of all other causes, from bodily injuries sustained through external, violent, and accidental means.” Plaintiff recovered below and defendant now claims the verdict is not sustained by sufficient evidence, in that it was not shown that death was effected directly and independently of all other causes. Decedent left his work, feeling ill, and started home in his car. A witness testified that he heard a crash and found decedent in his car, bent over the steering wheel, the car having run into a tree with great force. The coroner said that death was due directly to shock, with certain diseases as contributing factors, but that death would probably have occurred by the shock alone. The jury found that the accident was the only efficient and active cause of death. HELD: judgment affirmed. The jury was given proper instructions and there was evidence to support the verdict. Kokomo Life and Accident Insurance Co. v. Wolford, Appellate Court of Indiana, July 6, 1929; 167 N. E. 156.

There was evidence to support the verdict, and although there was evidence to the contrary, in such case an appellate court can look only to the evidence to sustain the verdict; and if, on all the evidence, reasonable men might draw different inferences therefrom, one supporting the verdict and the other impeaching it, the court must make the inference supporting the verdict. Board of Commissioners of Parke County v. Sappenfield, 10 Ind. App. 609; Bischof v. Mickels, 147 Ind. 115.

The causes of death referred to in the insurance policy were proximate and direct causes and not remote causes. Continental Insurance Co. v. Lloyd, 73 N. E. 824; Aetna Life Insurance Co. v. Fitzgerald, 75 N. E. 262; Robinson v. National Life and Accident Insurance Co., 76 Ind. App. 161.

The instruction asked for by defendant that “if insured suffered from diseases and his death resulted from shock caused by external, violent and accidental means jointly and in connection with such diseases, and if insured’s bodily infirmities were aggravated by the accident and his infirmities contributed to his death, there could be no recovery,” was properly denied. Continental Insurance Co. v. Lloyd, supra; Central Life Insurance Co. v. Fitzgerald, supra; Robinson v. National Life and Accident Insurance Co., supra.

If the accident set in motion a force that progressed upon existing conditions, in natural and usual sequence, to effect the fatal result, the accident can be found to be the proximate cause of death. Continental Insurance Co. v. Lloyd, supra.

In direct accord with this case, it has been held that where the policy provided the same as in this case, and insured fell and broke his leg and seven weeks later contracted pneumonia and died, that the disease was the natural sequence of insured’s weakened condition resulting from the fall, and that the fall was therefore the proximate cause of death. Robinson v. National Life & Accident Insurance Co., supra.

The case is undoubtedly sound. R. C. H.

MUNICIPAL CORPORATIONS—EVIDENCE—CONSTITUTIONAL LAW—DELEGATION OF POWERS—Under the city manager law, Acts 1921, p. 594, c. 218, No. 3, the city clerk was required to determine within five days after its filing whether a petition, asking that the question of adoption of city manager government be submitted to the electorate of a city, was signed by at