William and Mary Review of Virginia Law

Volume 2 | Issue 3 Article 10

Torts, Section II (Survey of Virginia Case Law - 1955)

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Repository Citation

John E. Messick, *Torts, Section II (Survey of Virginia Case Law - 1955)*, 2 Wm. & Mary Rev. Va. L. 275 (1956), http://scholarship.law.wm.edu/wmrval/vol2/iss3/10

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SECTION II—Husband's Tort Rights Against Wife, Contributory Negligence, Burden of Proof.

Husband's Tort Rights Against His Wife. Presented with an original proposition in *Vigilant Insurance Company* v. *Bennett*,[1] the Supreme Court of Appeals enlarged married women's rights in respect to property. Under this interpretation, the wife may bring an action against the husband for any tort committed against her property during coverture.

Interpreting married women's rights under Sections 55-35 and 55-36 Va. Code (1950) which were part of the original Married Women's Act,[2] the Court states the purpose of the act was to enlarge the personal rights of married women and to secure to them separate estates over which they were to have greater control. The provisions in this section, however, expressly omitted allowing a married woman from maintaining an action against the husband for a purely personal tort such as malicious prosecution, defamation, etc.

In arriving at its decision in this case, the Court distinguishes *Keister's Adm'r.* v. *Keister's Ex'or.*[3] which was an action for a personal tort and held that the legislative intent had not been to bestow on a married woman the substantive civil rights which would allow her to maintain such an action against her husband. Since the legislature had failed to state that an action could be maintained, and the section was in derogation of the common law which forbade a married woman from maintaining any action against her husband, the Court construed it strictly and denied recovery. In this instance, Section 55-35 allows a married woman to acquire and dispose of property as if she were unmarried. It changes her status in regard to property in such a manner that she now has full control over her separate estate. The legislature in passing this statute, said the court, fully intended to sever all unity of estate existing between husband and wife under the common law and to remove all disabilities and impediments preventing one spouse from maintaining an action

[1] 197 Va. 216, 89 S.E.2d 69 (1955).
[2] Acts 1876-77, ch. 329, p. 333 as amended by Acts 1877, ch. 265, p. 247.
[3] 123 Va. 157, 96 S.E. 315, 1 A.L.R. 439 (1918).

against the other for wrongs committed against his respective properties. Since both are now on an equal status in relation to property rights, and the wife may maintain an action against the husband as if he were a stranger, the husband is able to maintain an action against the wife for wrongs committed against his property during coverture. In this action, the plaintiff was subrogated to the rights of the husband and was allowed to maintain the action. This decision by the highest court provides a needed clarification of the rights of married women.

Contributory Negligence. In the field of contributory negligence, the Court, in four instances, clarifies the rule of contributory negligence as a matter of law and also deals with Sections 56-414 and 56-416 on comparative negligence. The first of these cases was *Chesapeake and Ohio Railway Company* v. *Hanes Adm'r*[4] in which a driver of an automobile drove upon a railroad track with which she was thoroughly familiar, having used it twice a day for six months, and was hit by a train. There was conflicting evidence as to the giving of the statutory signals, and the failure to instruct the jury as to the negligence of the Railway Company in not giving the statutory signals and the causal relationship of such failure to the acident was held to be reversible error. If it could be proven that the Railway had not given the statutory signals, it would only affect the amount of recovery but would not completely deny it under the rule stated in *Virginia Railroad Company* v. *Haley*[5] where it was held negligence per se to fail to signal in conformance with the statute.

A clearer case of contributory negligence may be shown by *Norfolk and Portsmouth Belt Line Railroad Company* v. *Mueller*[6] where an employee, Forbes, was held contributorily negligent as matter of law, and it was imputed to his employer, Mueller, when he drove onto a blind crossing without taking proper precautions. Forbes' negative testimony that he heard no warning from the train was outweighed by the unequivocal testimony of the train crew that the bell was ringing, and by the fact that there was no testimony that the driver was listening for a signal. The court does not state in positive terms what would constitute

[4] 196 Va. 806, 86 S.E.2d 122 (1955).
[5] 156 Va. 350, 157 S.E. 776 (1931).
[6] 197 Va. 533, 90 S.E.2d 135 (1955).

proper precaution. If the driver, Forbes, had dismounted from the cab, and had walked onto the tracks to a point where he could see around the obstruction and had seen nothing, returned to his truck, driven onto the track and was hit by the train, would he have been contributorily negligent? He was proceeding at the statutory speed of 5 mph and had his truck under control. He testified that the sight of the train, and the impact was instantaneous.

In the *Campbell*[7] case, the Court held that reasonable precautions consisted of driving slowly, looking and listening for trains, proceeding in a cautious manner over the tracks. There the Court did not hold that the driver was guilty of contributory negligence as a matter of law but left it for the jury to decide. It appears that there is an inconsistency in these two decisions. Although the facts are slightly different in the *Campbell* case, it appears that the standard of care due of the driver in each case was a proper matter for jury determination.

Where the city ordinances involved are merely permissive in nature as in *Southern Railway Company* v. *Wilson*,[8] the Court held that the comparative negligence rule does not apply, and contributory negligence as a matter of law barred a recovery under the rule of *Wray* v. *Norfolk Electric Company*[9] which held that when a traveler who approaches a grade crossing and stops his vehicle in a place of safety, apparently for the purpose of looking and listening for trains, continues when there is a train in full view, he is guilty of a reckless disregard for his own safety. A person is under a duty to maintain a proper lookout and to abide by what he sees, and if he fails to do so, he is guilty of contributory negligence as a matter of law. The Court applied this principle in *Von Roy* v. *Whitescarver*[10] where the plaintiff undertook to make a left turn when there was an obvious flow of traffic from the other direction. The Court held that since looking discloses traffic, the right to proceed is governed by the test of whether a person of ordinary prudence would attempt it. The fact that a proper signal was given was only one element of the proper manner in executing a turn and failure to look

[7] Southern Railway Co. v. Campbell, 172 Va. 311, 322, 1 S.E.2d 255 (1939).
[8] 196 Va. 883, 86 S.E.2d 53 (1955).
[9] 191 Va. 212, 215, 61 S.E.2d 65, 67 (1950).
[10] 197 Va. 384, 89 S.E.2d 346 (1955).

ahead after signalling constitutes contributory negligence as a matter of law.

The question of res judicata brought forth an interesting opinion in *Byrum* v. *Ames and Webb, Inc.*[11] The Court applied the doctrine of *Ferebee* v. *Hungar*[12] which stated the essentials of res judicata. Stated simply they are (1) identity of persons and parties to the issue; (2) identity of issue; (3) mutual estoppel. In the *Ames* case the fact that there had been a previous suit in which both parties had been defendants was held not to be res judicata, as the parties in the present suit had not been adverse parties thereto; therefore, element one was missing. Element three was also missing, for if Ames and Webb, Inc. had brought an action for damages to their barricade, they could not prove the negligence of Byrum by the judgment in the previous case against both parties which dismissed the suit as to Ames and Webb, Inc., but held Byrum negligent. Under these rules, the Court held that a suit in which there were no cross-claims was not conclusive as to the defendant company's negligence.

During the past year, two significant cases arose under the Guest Statute.[13] The Court held in *Dickinson* v. *Miller*[14] that mere monetary compensation is not the only consideration that will change the occupant of an automobile from a guest to a paying passenger. Services rendered or to be rendered are sufficient.[15] A bargain for service in return for the offered transportation is sufficient to make a person a paying passenger. In the other case,[16] the question was not whether the occupant was a passenger, but whether the guest was guilty of contributory negligence and whether the driver was grossly negligent towards his passenger. The passenger, plaintiff, was held not contributorily negligent as a matter of law for there was nothing to indicate that the trust of the passenger in the driver's competence was misplaced. This rule is derived from a series of cases of which the first was *Norfolk and Western Railway Company* v. *Wellons Ad'mr.*[17]

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[11] 196 Va. 597, 85 S.E.2d 364 (1955).
[12] 192 Va. 32, 63 S.E.2d 761 (1951).
[13] Va. Code §8-646.1 (1950).
[14] 196 Va. 659, 85 S.E.2d 275 (1955).
[15] White v. Gregory, 161 Va. 414, 170 S.E. 739 (1933).
[16] Newell v. Riggin, 197 Va. 496, 90 S.E.2d 150 (1955).
[17] 155 Va. 218, 154 S.E. 575 (1930).

The fact that the plaintiff was asleep bore no causal connection to the accident.

The fact that the driver fell asleep made out a *prima facie* case of want of due care, but the passenger could recover only if the injuries sustained were caused by the gross negligence of the driver.[18] Gross negligence as defined by the Court in *Thornhill* v. *Thornhill*,[19] and applied here is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence. It was held to be a question of degree and not of kind. The question of whether there was gross negligence or not is one of fact and is to be left to the discretion of the jury unless it is so clear that reasonable people could not differ and then it becomes one of law.

Burden of Proof. Failure to carry the burden of proof denied recovery to several plaintiffs. A case of this type was *Olds* v. *Wood*[20] where the plaintiff was injured by a flash fire while her hair was being shampooed. Plaintiff alleged that the manufacturer of the preparation had failed to use due and proper care in manufacture and to give due and proper instructions as to its use. The defendant's evidence showed that when used according to the directions a flash fire was not possible. The Court ruled that the plaintiff failed in her burden of proof. There being no affirmative proof of negligence, there could be no recovery. In *Lane* v. *Hampton*,[21] the plaintiff in an action for wrongful death, failed to show by a preponderance of the evidence that the injuries from which the decedent died were caused by the negligence of the defendant. In the absence of any notice, the driver of an automobile using a highway has the right to assume that it is clear.[22]

In *Fletcher* v. *Horn*,[23] where the defendant made out a *prima facie* case against himself by admitting that he crossed into the wrong lane in violation of Section 46-220, the burden of proof is upon him to offer a reasonable explanation. The explanation must be such that it outweighs the positive evidence of the plain-

[18] Boggs v. Plybon, 157 Va. 30, 160 S.E. 77 (1931).
[19] 172 Va. 553, 2 S.E.2d 318 (1939).
[20] 196 Va. 960, 86 S.E.2d 32 (1955).
[21] 197 Va. 46, 87 S.E.2d 803 (1955).
[22] *Id.* at 49, 87 S.E.2d at 805.
[23] 197 Va. 317, 89 S.E.2d 89 (1955).

tiff. Here, the explanation that he had crossed into the wrong lane to avoid hitting the plaintiff's on-coming car, which was in the wrong lane, was held by the Court to be sufficiently satisfactory, in the absence of contradictory evidence that reasonable people might not differ as to its effect. The plaintiff's failure to offer contradictory evidence constituted a failure to carry his burden of proof.

Banks v. *Liverman*[24] concerned the liability of a state employee for acts done in the course of his employment. The action was brought in the Federal Court under admiralty jurisdiction, and the State was not sued because of its immunity. This was an action for injuries received while working on a State-operated ferry. The case was governed by *Sayers* v. *Bullar*[25] in that the evidence of the plaintiff failed to show any affirmative acts of negligence on the part of the defendant. Without this, the doctrine of *Wynn* v. *Gaudy*,[26] holding that State employees are liable for injuries which are the result of their individual negligence in the performance of their duties within the scope of their employment did not apply.

In two cases, *Barb* v. *Lowe*[27] and *Short* v. *Long*,[28] it was held to be a jury question as to whether or not the plaintiff had carried his burden of proof. In the former case where the validity of lay estimates of distance was questioned, the Court, in reinstating a verdict for the defendant, held that estimates of distances by lay witnesses are at best approximations and whether they are inherently incredible are questions for the jury. In the latter case, where the evidence of neither party proved conclusively who was at fault, the Court held that since either version could be supported, the jury's verdict settled the question of negligence.

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[24] 129 F. Supp. 743 (1955).
[25] 180 Va. 222, 22 S.E.2d 9 (1942).
[26] 170 Va. 590, 197 S.E. 527 (1938).
[27] 196 Va. 1014, 86 S.E.2d 854 (1955).
[28] 197 Va. 104, 87 S.E.2d 776 (1955).