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## Torts - Contributory Negligence of Incompetents - Problem Area of Mental Deficiency Less Than Total - *Wright v. Tate*, 208 Va. 291 (1967)

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**Torts—CONTRIBUTORY NEGLIGENCE OF INCOMPETENTS—PROBLEM AREA OF MENTAL DEFICIENCY LESS THAN TOTAL.** In *Wright v. Tate*,<sup>1</sup> decedent, a 22 year-old guest passenger of low intelligence, was killed in an accident while riding with defendant-operator whose driving ability had been seriously impaired by overindulgence in alcoholic beverages. A wrongful death action was brought in which the decedent was held as a matter of law<sup>2</sup> to have been contributorily negligent and thereby assumed the risk of injury, inasmuch as he continued to ride knowing well of defendant's conspicuous intoxicated condition.

Facing for the first time the question of whether or not a person with a mental deficiency less than total, *i.e.*, of low mentality but not insane, is to be charged with the same degree of care for his own safety as a reasonable man of ordinary prudence, the Virginia Supreme Court of Appeals affirmed, holding that, "[i]f the rule were otherwise, there would be a different standard for each level of intelligence resulting in confusion and uncertainty in the law."<sup>3</sup>

It has been generally recognized that, ". . . a subjective standard will be applied in determining the contributory negligence of insane plaintiffs."<sup>4</sup> While there exists a scarcity of cases directly in point, the accepted rule in the United States today is that an individual *completely* lacking in the ability to apprehend and avoid danger because

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resort to a § 9(c) election, the machinery for the resolution of representation questions.

1. 208 Va. 291, 156 S.E.2d 562 (1967).

2. Whether a guest knew or should have known that the intoxicated condition of the driver impaired his ability to drive is ordinarily a question for the jury. *Meade, Adm'r v. Meade, Adm'r*, 206 Va. 823, 827, 147 S.E. 2d 171, 174 (1966). But here there was no conflict in the evidence that the ability of the driver was so impaired.

3. 208 Va. 291, 156 S.E.2d 562 (1967) at 565. Prosser on *primary* negligence states: "As to all lack of intelligence short of actual insanity no allowance is made; the standard of reasonable conduct is applied . . ." PROSSER, TORTS 156 (1964). ". . . [C]ontributory negligence is, in general, determined by much the same tests and rules as the negligence of the defendant." *Id.* at 429; but Prosser points up a split of authority among the few cases litigated. *Id.* at 156 n. 37.

4. 2 HARPER & JAMES, TORTS § 16.8 (1956). An objective test was followed in *Criez v. Sunset Motor Co.*, 123 Wash. 604, 213 P. 7 (1923), which involved a mentally-ill auto driver. Pursuant to the strict mandate of a motor vehicle law, the Washington court held that *all* drivers must exercise reasonable care in the operation of vehicles for the safety of all highway users, but carefully limited its holding relevant to this specific statute, as could well be the case where any such legislation has been made so applicable. *See also Deisenreifer v. Kraus-Merkel Malting Co.*, 97 Wis. 279, 72 N.W. 735 (1897).

of his mental condition cannot be guilty of contributory negligence.<sup>5</sup> On the other hand a diversity of opinion is found with respect to mental deficiency less than total and therein lies the core of the problem that has arisen in the litigation of such cases.

Here again, there are few pertinent cases of consequence. The initial decision in the area was *Worthington v. Mencer*,<sup>6</sup> which held that, "[o]ne whose mind is *merely dull* . . . is [to be] chargeable with the same degree of care for his personal safety as are others of brighter intellect. . . ." (emphasis added).<sup>7</sup> The court's proposition was predicated on the theory that, ". . . any attempt to frame and adapt varying degrees of intelligence would necessarily involve confusion and uncertainty in the law,"<sup>8</sup> a contention which is reiterated in *Wright*. Amplification of this view, which has the purported merits of simplicity and expediency in application, has also been substantially ascribed to in Louisiana.<sup>9</sup>

Weaned from the narrowness of this stand by the continued emergence of scientific advances, the majority of courts, however, now adhere to the view that variances of mental condition should be taken into consideration in passing upon an individual's capacity for contributory negligence.<sup>10</sup> Despite being clouded by the fact that the plaintiff was but an "infant" (twelve), the decision in *Baltimore & Potomac R.R. v. Cumberland*<sup>11</sup> postulated the initial break with the earlier restrictive "Worthington rule." The court in this case decided that a plaintiff was not to be held for faults which arose from inherent mental (or physical) defects, but must be held to the exercise of such facilities and capacities as he was endowed with by nature for avoidance of danger.<sup>12</sup>

It was not, however, until *Seattle Electric Co. v. Hovden*<sup>13</sup> that the same standard was applied to adults. Rather than subscribe to such an

5. The earliest formulation of the rule came out of *Boland & Wife v. Missouri R.R. Co.*, 36 Mo. 301 (1865) (infants); cf. *Lawrence v. Bumberger R.R. Co.*, 3 Utah 2d 247, 282 P.2d 335 (1955) (insane persons).

6. 96 Ala. 310, 11 So. 72 (1892). The court here equated the ability to recount facts and give credible testimony as a witness with the capacity of an individual to possess the requisite mental stability to be contributorily negligent.

7. *Id.* at 315, 11 So. at 73-4.

8. *Id.*

9. *Johnson v. Texas & Pacific Ry. Co.*, 16 La. App. 464, 135 So. 114 (1931).

10. Note, *Contributory Negligence of Incompetents*, 3 WASHBURN L.J. 215, 219 (1964).

11. 176 U.S. 232 (1899).

12. *Id.* at 238.

13. 190 F. 7 (9th Cir. 1911). The court cited *Baltimore & Potomac R. R. v. Cumberland*, *supra* note 11, as authority for its decision. *But see* Spragens, *The Effect Of*

*absolute* criterion between total and less-than-total insanity, *Seattle Electric Co.* directly adopted the solution of the slowly growing majority which succinctly answers the dilemma by the *relative* test of relinquishing to the jury the determination of what degree of insanity is required to absolve an individual from contributory negligence in a particular fact situation. This approach was the one pursued by the lower court in the instant case.

Enhancing the stature of this view are successive cases, all of recent vintage, in Kansas,<sup>14</sup> California,<sup>15</sup> and Ohio,<sup>16</sup> which have acquiesced to such mode of determination. There also exists strong dictum to this effect in an Indiana decision,<sup>17</sup> and Georgia lately has expounded a concomitant opinion on the degree of "ordinary care" required in such situations<sup>18</sup> which was untenable with its view earlier in the century.<sup>19</sup>

*Wright v. Tate*<sup>20</sup> was no doubt correctly decided in any event, since there was ample evidence shown that decedent did in fact recognize the danger involved. However, despite the fact that it conforms to the position taken by the Restatement,<sup>21</sup> the rationale behind the court's holding seems dubious at best, and places Virginia in the decreasing minority of jurisdictions that continue to adhere to the older "absolutist" approach. It is hoped that as more courts adopt the more liberal view with regard to less than total insanity, the Virginia Supreme Court of Appeals will reassess its position.

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*Mental Defects, Less Than Insanity, On The Standard Of Care Required Of Defendants In Civil Negligence Cases*, 31 Ky. L.J. 80 (1942), maintaining that the federal court made a misapplication of the rule pronounced in *Baltimore & Potomac R.R.* which the author contends dealt strictly with the standard of care required of infants.

14. *Noel v. McCaig*, 174 Kan. 677, 258 P.2d 234 (1953).

15. *DeMartini v. Alexander Sanatorium, Inc.*, 192 Cal. App.2d 442, 13 Cal. Rptr. 564 (1961).

16. *Feldman v. Howard*, 5 Ohio App.2d 65, 214 N.E.2d 235 (1966), *rev'd on other grounds*, 10 Ohio St.2d 189, 226 N.E.2d 564 (1967).

17. *Riesback Drug Co. v. Wray*, 111 Ind. App. 467, 39 N.E.2d 776 (1942).

18. Plaintiff should be held only to that exercise of ordinary care which "... every person in his mental and physical condition would have exercised under the same or similar circumstances." *Emory U. v. Lee*, 97 Ga. App. 680, 701, 104 S.E.2d 234, 249 (1958).

19. "By 'ordinary care' is meant that degree of care which might reasonably be expected of an ordinarily prudent person under like circumstances." *Georgia Cotton-Oil Co. v. Jackson*, 112 Ga. 620, 621, 37 S.E. 873, 874 (1901).

20. 208 Va. 291, 156 S.E.2d 562 (1967).

21. "Unless the actor is a child or an insane person, the standard of conduct for his own protection is that of a reasonable man under like circumstances." RESTATEMENT (SECOND) OF TORTS § 464 (1965). "Mental deficiency which falls short of insanity, however, does not excuse conduct which is otherwise contributory negligence." *Id.* at Comment g.