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## Torts—Contributory Negligence As A Matter Of Law

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the lawyer in his role as predictor, *e.g.*, determining against whom to proceed. Also, the test forces prospective plaintiffs to establish adequacy or inadequacy of remedy prior to commencing suit, a burden of no little consequence. A further problem can be conceived where a plaintiff proceeds against the manufacturer-assembler alone, and it subsequently develops that the remedy is not adequate, *e.g.*, by reason of intervening bankruptcy of the manufacturer-assembler. How is this plaintiff to proceed against the component part manufacturer if the statute of limitations has run? Further will be the results of causing plaintiffs to possibly undergo the time and expense of several suits should inadequacy of remedy rear its head late in the proceeding against the manufacturer-assembler. A complete prediction of the adverse effects of the adequacy of remedy test would approach the impossible.

The test of adequacy of remedy detracts from the major holding of the case. It places burdens upon the action against a manufacturer for strict liability that will only impair the beneficial aspects of the remedy, in cases where component part manufacturers are involved. Judicial elaboration of the test could conceivably develop a monster of the law. The only solution is to abolish the test. Otherwise the evil of privity will have been replaced by an evil of undetermined nature and scope.

*Goldberg* represents a tremendously significant step in the development of New York tort law. The rule is clear: strict liability to all intended users despite privity of contract between such users and the manufacturer. But, the problems that will arise from the tenuous test of adequacy of remedy are many. The test serves no apparent purpose, and its main effects will be devastatingly detrimental to the rule of strict liability in products cases involving manufacturers of component parts. Unless the Court can come forward with both a convincing rationale for the failure to extend strict liability to a component part manufacturer where the remedy against the manufacturer-assembler is adequate, and define workable standards for the test of adequate remedy, this limitation should be overruled at the first opportunity.

*Thomas C. Mack*

#### CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW

Plaintiff, a construction inspector for the New York City Transit Authority, sued to recover for a personal injury allegedly resulting from the negligent maintenance of a trench dug by defendant. While inspecting a subway construction site, plaintiff suffered a broken leg when the side of an unsupported trench collapsed as he stepped across it. A contract between the defendant and the Authority provided that defendant shore up the sides of excavations, provide "necessary or convenient" facilities for personnel, and be responsible for work connected injuries. Judgment for plaintiff was reversed on the law and the facts, and the complaint dismissed by the Appellate Division, which found that there was no actionable negligence on defendant's part and addition-

ally that plaintiff assumed the risk and was contributorily negligent as a matter of law.<sup>1</sup> On appeal, *held*, judgment affirmed, one judge dissenting. Plaintiff had not made out a prima facie case of defendant's negligence and, even if defendant were negligent, the same evidence would establish plaintiff's negligence. *Nucci v. Warsaw Constr. Corp.*, 12 N.Y.2d 16, 186 N.E.2d 401, 234 N.Y.S.2d 196 (1962).

The cause of action was founded on negligence and therefore the requisites for establishing a case of actionable negligence are focal points of the analysis. The majority uses the common law standard of reasonable care, *i.e.*, "the risk reasonably to be perceived defines the duty to be obeyed."<sup>2</sup> A contractual duty that is not clearly specified with respect to the plaintiff, in the instrument itself, is a matter for interpretation by the court.<sup>3</sup> If a duty is found to exist and the facts indicate defendant's violation, the plaintiff must prove such violation is the proximate cause of his injury. An indispensable element of plaintiff's case in New York is proof that he has not been contributorily negligent.<sup>4</sup> The issue of contributory negligence is usually a fact question. Plaintiff's recovery may also be barred if the defense of assumption of risk can be successfully employed.<sup>5</sup> The distinction between assumption of risk and contributory negligence is that in the former, without negligence on the part of the defendant, the plaintiff voluntarily, knowingly and even reasonably embarks upon a risk with foresight of the consequences;<sup>6</sup> in the latter, the plaintiff, in a condition created by defendant's negligence, acts carelessly, inadvertently or unreasonably, and such act severs the causal link between the defendant's negligence and the plaintiff's injury.<sup>7</sup>

Contributory negligence has been found as a matter of law where a plaintiff could perceive the danger and unreasonably elected to encounter the risk although an alternative course was available;<sup>8</sup> where a plaintiff actively con-

1. *Nucci v. Warsaw Constr. Corp.*, 13 A.D.2d 699, 214 N.Y.S.2d 91 (2d Dep't 1961) (memorandum decision).

2. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928); *accord*, *Carte v. Saks Fifth Ave.*, 277 App. Div. 606, 609-10, 101 N.Y.S.2d 761, 764-65 (1st Dep't 1951), *aff'd*, 303 N.Y. 832, 104 N.E.2d 375 (1952); James, *Scope of Duty in Negligence Cases*, 47 Northwestern U.L. Rev. 778 (1953); 2 Harper & James, *Law of Torts*, 928-36 (1956).

3. See *Rosenbaum v. Branster Realty Corp.*, 276 App. Div. 167, 93 N.Y.S.2d 209 (1st Dep't 1949); *Bethlehem Steel Co. v. Turner Constr. Co.* 2 N.Y.2d 456, 141 N.E.2d 590, 161 N.Y.S.2d 90 (1957).

4. *Burdick v. Worrall*, 4 Barb. 596 (N.Y. Sup. Ct. 1848); *Spencer v. Utica & Schenectady R.R.*, 5 Barb. 337 (N.Y. Sup. Ct. 1849); *Lee v. Troy Citizens' Gas-Light Co.*, 98 N.Y. 115 (1885).

5. Restatement, *Torts* § 893 (1939).

6. *McEvoy v. City of New York*, 266 App. Div. 445, 42 N.Y.S.2d 746 (2d Dep't 1943); *McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 160 N.E. 391 (1928) (dictum) (Cardozo, C.J.).

7. James, *Contributory Negligence*, 62 Yale L.J. 691 (1953); Malone, *The Formative Era of Contributory Negligence*, 41 Ill. L. Rev. 151 (1946).

8. *Shields v. Van Kelton Amusement Corp.*, 228 N.Y. 396, 127 N.E. 261 (1920); *Monacelli v. State of New York*, 295 N.Y. 332, 67 N.E.2d, 569 (1946).

tributed to the creation of the dangerous condition<sup>9</sup> and where a plaintiff failed to observe standard precautions in working with a potentially dangerous object.<sup>10</sup> However, the negligence of a plaintiff has been held to be an issue properlymissible to a jury where a plaintiff realized the passageway supplied by defendant in a construction area was defective, yet chose to utilize it rather than abandon his work<sup>11</sup> and where a plaintiff's choice of conduct was clearly unreasonable only from the vantage point of hindsight.<sup>12</sup>

In arriving at its decision to dismiss the complaint, the Court found that the defendant owed the plaintiff no contractual duty and that any common law duty with which it could be charged was not violated.<sup>13</sup> Furthermore, if duty and violation could have been found from the facts, the plaintiff's negligence deprived his complaint of merit.<sup>14</sup> The opinion of the Court of Appeals is in terms of the plaintiff's negligence as a bar, whereas the Appellate Division also cites assumption of risk.<sup>15</sup> The holding of contributory negligence as a matter of law may have been predicated on a finding of that slight degree of negligence which bars a plaintiff in New York, or on an evaluation of the inspector's behavior as unreasonable. Notwithstanding the facts considered in the light most favorable to the plaintiff, that the trench was three to four feet in width and depth, as opposed to the defendant's testimony of dimensions of two to three feet, the majority rejected plaintiff's contention that he was not negligent. The plaintiff had argued that (a) having crossed the ditch safely before, he was reasonable in expecting to cross without accident on this occasion and (b) he had no reasonable, alternative route. The reasonableness of the plaintiff's behavior and the defendant's possible violations of contractual or common law duties were, in the dissent's view, issues for the jury.<sup>16</sup>

Analysis of the majority and dissenting opinions of the Court seems to indicate that the theory of contributory negligence does not adequately support the holding. If there were no actionable negligence on the defendant's part, then the plaintiff should not have failed on the ground of contributory negligence, for he would not have been under a special duty of care to undertake extraordinary precautions for his own safety.<sup>17</sup> But assumption of risk, although apparently not pleaded by the defendant, would have been a possible basis for the holding if defendant had no duty to this plaintiff and if the

9. *Townes v. Park Motor Sales*, 7 A.D.2d 109, 180 N.Y.S.2d 553 (1st Dep't 1958); *aff'd*, 7 N.Y.2d 767, 163 N.E.2d 142, 194 N.Y.S.2d 37 (1959) (memorandum decision).

10. *Utica Mut. Ins. Co. v. Amsterdam Color Works Inc.*, 284 App. Div. 376, 131 N.Y.S.2d 782 (1st Dep't 1954), *aff'd*, 308 N.Y. 816, 125 N.E.2d 871 (1955).

11. *Kaplan v. 48th Ave. Corp.*, 267 App. Div. 272, 45 N.Y.S.2d 510 (2d Dep't 1943); accord: *Grant v. United States*, 271 F.2d 651 (2d Cir. 1959).

12. *Cf. Zurich Gen'l Acc. & Liab. Ins. Co. v. Childs Co.*, 253 N.Y. 324, 171 N.E. 391 (1930) (Cardozo, C.J.).

13. Instant case at 18-19, 186 N.E.2d at 402-03, 234 N.Y.S.2d at 198-99.

14. *Ibid.*

15. *Nucci v. Warsaw Constr. Corp.*, 13 A.D.2d 699, 214 N.Y.S.2d 91 (2d Dep't 1961).

16. Instant case at 23-24, 186 N.E.2d at 405-06, 234 N.Y.S.2d at 202-03.

17. *McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 160 N.E. 391 (1928) (dictum); see *Restatement, Torts*, § 893, comment *d* (1939).

plaintiff accepted a risk whose consequences a reasonable man would have perceived.<sup>18</sup> Some of the facts, however, cast doubt on the inspector's foresight of the danger in crossing the trench; he had uneventfully crossed it before, and his companion had immediately and safely preceded him over the same trench. Finally, if one concedes, as the majority additionally stated, that there may have been duty and violation on the defendant's part, should their legal effect have been eliminated by the conduct of the plaintiff in this case? Was the "carelessness" of the inspector of the degree found in other cases of contributory negligence as a matter of law,<sup>19</sup> or was it more analogous to the conduct in worker accident cases left to determination of a jury?<sup>20</sup> The decision may suggest a policy determination that the Court will henceforth hold a specific class of plaintiffs who function daily in an area of many potential dangers, such as a construction site, to a higher order of watchfulness for their own safety than would be demanded of ordinary laymen.

(Mrs.) Josephine Y. King

LIABILITY FOR DISABILITY FROM OCCUPATIONAL DISEASE COMMENCES WITH MEDICAL TREATMENT EVEN WHEN THERE IS NO LOSS OF EARNINGS

In January the claimant, a lathe operator whose work included the machining of both plastic and steel components, noticed a sore developing under his right arm. About a week later a rash erupted on the top of both hands, which subsequently spread to his face, neck and legs. On February 23, he received his first medical treatment therefor, but continued working until October. Medical testimony established that the rash was due to contact with plastic resin at his work. The Workman's Compensation Board, confirming its referee, fixed the date of disablement as February 23, with the result that claimant would receive payment for his medical expenses from that date. The Appellate Division reversed the Compensation Board so far as it had required payment to claimant of medical expenses incurred prior to the time of any wage loss.<sup>1</sup> On appeal, *held*, award reinstated. The board may fix as the date of "disablement" in an occupational disease case the time of physical impairment or need of medical care prior to any loss of wages. *Ryciak v. Eastern Precision Resistor*, 12 N.Y.2d 29, 186 N.E.2d 408, 234 N.Y.S.2d 207 (1962).

Forty-seven states now include "occupational diseases" within their workmen's compensation statutes.<sup>2</sup> Some states have included a definition of the

18. *Zurich Gen'l Acc. & Liab. Ins. Co. v. Childs Co.*, 253 N.Y. 324, 171 N.E. 391 (1930).

19. *Townes v. Park Motor Sales*, 7 A.D.2d 109, 180 N.Y.S.2d 553 (1st Dep't 1958), *aff'd*, 7 N.Y.2d 767, 163 N.E.2d 142, 194 N.Y.S.2d 37 (1959) (memorandum decision); *Utica Mut. Ins. Co. v. Amsterdam Color Works Inc.*, 284 App. Div. 376, 131 N.Y.S.2d 782 (1st Dep't 1954), *aff'd*, 308 N.Y. 816, 125 N.E.2d 871 (1955).

20. *Kaplan v. 48th Av. Corp.*, 267 App. Div. 272, 45 N.Y.S.2d 510 (2d Dep't 1943) (cited as authority in *Grant v. United States* 271 F.2d 651, 655 (2d Cir. 1959)).

1. 15 A.D. 2d 609, 222 N.Y.S.2d 376 (3d Dep't 1961).

2. Alabama, Mississippi and Wyoming do not.