

10-1-1958

Torts—Contributory Negligence of Decedent in Wrongful Death Action

Buffalo Law Review

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Recommended Citation

Buffalo Law Review, *Torts—Contributory Negligence of Decedent in Wrongful Death Action*, 8 Buff. L. Rev. 187 (1958).

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plausible— that under the circumstance, the advice she received *could* cause such a reaction.

Thus the majority rejected one of the contentions against allowing recovery for neurotic mental suffering—the fear of false and inflated claims. It did not, however, consider the more theoretical objection, the notion that the plaintiff should be held to the same standard as that applied to the defendant. Plaintiff's reaction, assuming that it flowed partially from a sub-standard state of mind, might not be considered to be contributory negligence because her injury was not caused by any volitional act of her own. Her cancerphobia did not result from any substandard conduct on her part, but was inseparable from her sub-normal state of mind. The distinction thus drawn between a case of substandard *action* and one of substandard *reaction*, might be justified on the ground that although the law may attempt to influence volitional physical activity, it cannot presume to operate in the area of purely emotional responses.

Contributory Negligence of Decedent in Wrongful Death Action

In an action for the negligent shooting of plaintiff's husband by a New York City policeman, verdict was for the defendants. Plaintiff appealed alleging errors in the instructions to the jury. The automobile of the decedent had collided with another automobile and the decedent was attempting to flee the scene of the accident. The defendant patrolman, while not a witness to the accident, was in the vicinity, and upon hearing cries of "hit and run" from several spectators, gave chase. His patrol car collided with the car of decedent after the latter's car had blown a tire. The decedent had jumped from his car and was attempting to flee on foot when defendant patrolman, after calling the decedent to stop, fired a shot which ricocheted off decedent's car, struck and killed him.

Appellant's contention was that the trial court erroneously charged the jury on the question of decedent's contributory negligence. The effect of this charge was to allow the jury to find that if the deceased was negligent in the initial accident, from which he was fleeing, he could be contributorily negligent as to the shooting by defendant patrolman. The Court in *Fields v. City of New York*³⁹ held this to be prejudicial error and ground for a new trial stating that even conceding decedent's negligence in the prior collision, this incident was wholly separate and unrelated to the shooting, especially in view of the fact that the officer had not even witnessed the accident.

The appellant also alleged error in the instruction to the jury on the question of justifiable homicide. The charge was correct in stating that leaving the scene

39. 4 N.Y.2d 334, 175 N.Y.S.2d 32 (1958).

of the accident is only a misdemeanor.⁴⁰ However, the trial court allowed the jury to decide, on the evidence, whether a felony had been committed and whether the homicide was justifiable under section 1055 of the Penal Law. The Court indicate^d that since the decedent had not committed a felony the question of justifiable homicide should not have been submitted to the jury. Such instruction was clear error. However, it was unavailable to appellant since no exception had been taken to this portion of the charge.

The degree of force which may be employed by a police officer in the apprehension of a fleeing misdemeanant has been closely restricted. To justify the taking of a human life it must be shown that a felony has actually been committed.⁴¹ In cases of suspected felonies the officer acts at his peril.

Negligence — City Not Liable for Death of Pedestrian Forced into the Street by Sidewalk Obstruction

In *Morello v. Brookfield Construction Co.*,⁴² Philip Morello was hit by an automobile while crossing beneath a newly constructed overpass, and died of the sustained injuries. The administratrix and wife of the deceased brought an action based on negligence and nuisance against the automobile driver, construction company, electrical contractor, and city—the theory being that insufficient lighting affected the driver's visibility and that debris on the north sidewalk had forced the deceased pedestrian into the road.

The trial jury absolved all defendants except the automobile driver, having determined that the insufficient lighting was not in any way, causally or proximately, related to the accident, but that the sole cause of the accident was the driver's negligence. The trial judge had previously dismissed the plaintiff's cause of action sounding in nuisance as "merged" with the negligence count, and eliminated the plaintiff's "debris theory" as not supported by sufficient evidence. Whether these acts of the trial judge, as affirmed by the Appellate Division,⁴³ were warranted and proper was the question presented to the Court of Appeals.

The majority of the Court decided that the trial court acted properly in dismissing the nuisance count. Where a nuisance arises solely from negligence, the nuisance and negligence elements may be so intertwined as to be practically in-

40. N. Y. VEHICLE AND TRAFFIC LAW §70(5) (a).

41. *Conraddy v. People*, 5 Parker Cr. Rep. 234 (1862); *Magar v. Hammond*, 183 N.Y. 387, 76 N.E. 474 (1906).

42. 4 N.Y.2d 83, 172 N.Y.S.2d 577 (1958).

43. *Morello v. Brookfield Construction Co.*, 2 A.D.2d 849, 156 N.Y.S.2d 163 (1st Dep't 1956).