St. John's Law Review

Volume 19, November 1944, Number 1 Article 12

Negligence--Last Clear Chance--Assumption of Duty of Due Care (Elliot v. The New York Rapid Transit Corporation, 293 N.Y. 145 (1944))

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NEGLIGENCE—LAST CLEAR CHANCE—ASSUMPTION OF DUTY OF DUE CARE.—Deceased was killed by a fall from an elevated train when the train pulled out of a station while he was hanging by his hands from stanchions on the outside of the train platform. In view of the helpless drunken condition of the deceased, the respondent was under a duty to see to the welfare of the man. A *prima facie* case was made out by the appellant when he showed respondent's failure to exercise due care in letting a helplessly intoxicated fare on the train. The judgment of the Trial Term, affirmed by the Appellate Division, dismissed the complaint, denying the appellant's right to the doctrine of last clear chance since the conductor's uncontradicted testimony brought forth the facts that the train was moving and that he had immediately employed every means to stop its motion. *Held*, judgment reversed. Whether or not the respondent could have done something more to avert this tragedy and whether failure to act in time was the proximate cause of death were jury questions, hence it was error to dismiss the complaint. *Elliot v. The New York Rapid Transit Corporation*, 293 N. Y. 145, 56 N. E. (2d) 86 (1944).

When the deceased entered the train from which he fell to his death, the respondent assumed a duty of more than ordinary care since the deceased was helplessly drunk (a condition which was apparent to the conductor). Therefore the respondent was under a duty to make an explanation of the appellant's death to the court. In cases [1] where there is no special duty resting upon the defendant to protect the plaintiff from the results of his own intoxication, the fact that the plaintiff was intoxicated, if it is a contributing cause of the injury, is a bar to the action. But this rule is modified in cases [2] where a defendant, like a common carrier, owes to a passenger plaintiff a special duty to protect him because of the fact that he is intoxicated. The care which a common carrier is bound to exercise to safeguard the drunken man would be dictated by his known condition and the situation as a whole. The fact that the condition is self-imposed does not mitigate the duty. A common carrier also assumes a duty of due care in the case of a sick or disabled passenger for hire. There are many decisions [3] in which the duty toward a sick or dis-

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one, plaintiff could recover if his negligence was slight and that of the defendant was gross in comparison. Under the other the negligence of both plaintiff and defendant were to be compared, not for the purpose of relieving one of liability or denying the other a right to recover but for the purpose of reducing the amount of plaintiff's damages according to the extent which his own negligence contributed to the injury. *See* LIABILITY OF CARRIERS (2d ed. 1929) § 852. The United States Supreme Court has adopted the second theory in all actions under the federal statute.

[1] Fardette v. N. Y. & Stamford R. R. Co., 190 App. Div. 543, 180 N. Y. Supp. 179 (1920).

[2] Fagan v. Atlantic Coast Line R. R. Co., 220 N. Y. 301, 115 N. E. 704 (1917).

[3] O'Hanlon v. Murray, 285 N. Y. 321, 34 N. E. (2d) 339 (1941); Buckley v. Hudson Valley Ry. Co., 212 N. Y. 440, 106 N. E. 121 (1914).

abled person is the same as the duty to an intoxicated person.

The appellant also made out a case grounded on the doctrine of last clear chance. The learned judge in the Trial Term should have charged as Chief Justice Pound suggested in the case of *Storr v. N. Y. Central R. R. Co.*,[4] that the doctrine is never wakened into action unless and until there is brought home to the defendant to be charged with liability, knowledge that another or his property is in a state of present peril, in which event there must be a reasonable effort to counteract the peril and avert its consequences.[5] If one by a negligent act places himself or his property in a position of danger, his negligence does not contribute to defeat his recovery if the situation was known to the defendant in time to avert the consequence of the plaintiff's own negligence. In such a case the defendant's negligence is the sole cause of the injury. It must not run on "inert and callous" and cause an accident which proper care might have avoided. Knowledge may be established by circumstantial evidence, in the face even of professions of ignorance,[6] but knowledge there must be, or negligence so reckless as to betoken indifference to knowledge. This doctrine of last clear chance, as set forth in many states, really means that even though a person's own acts may have placed him in a position of peril, yet if another acts or omits to act with knowledge of the peril and an injury results, the injured person is entitled to recover.[7]

M. A. H.

NEGLIGENCE—MANUFACTURER'S LIABILITY FOR INJURY FROM INHERENTLY DANGEROUS ARTICLE.—While wearing an evening gown with a glazed double-netted skirt manufactured by the defendant, the plaintiff was seriously injured when the netting of her dress ignited, instantly enveloping her in flames. The plaintiff's proof tended to show that the netting was treated with an explosive substance (nitrocellulose sizing) that rendered it inherently dangerous for the purpose for which it was intended. From a judgment of the trial court granting the defendant's motion to set aside a plaintiff's verdict and for a directed verdict on the ground that there was a deficiency in the proof that the dress as manufactured and delivered was inherently dangerous, the plaintiff appeals. *Held,* judgment reversed. The defendant manufacturer did not adduce any evidence to show the nature of the sizing used in the dress. The jury could properly take most

[4] 261 N. Y. 348, 185 N. E. 407 (1933).

[5] Panarese v. Union Ry. Co., 261 N. Y. 233, 185 N. E. 84 (1933); Woloszynowski v. N. Y. Central R. R. Co., 254 N. Y. 206, 172 N. E. 471 (1930).

[6] Bragg v. Central New England Ry. Co., 228 N. Y. 54, 126 N. E. 253 (1920).

[7] Chunn v. Washington City & Suburban Ry., 207 U. S. 302, 28 Sup. Ct. 63 (1907); Green v. Los Angeles Terminal R. R. Co., 143 Cal. 31, 76 Pac. 719 (1903).