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Negligence—Proximate Cause; Statutes—Amendments—Constitutional Requirement; Workmen's Compensation—Employees Within Act

Lawrence Howard

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The vacancy on the Law School faculty created by the death of Professor Luccock has been filled by the appointment of Harry M. Cross as Assistant Professor of Law. Professor Cross received the Bachelor of Arts degree from Washington State College in 1936 and the degree of Bachelor of Laws from the University of Washington in 1940. During 1940-41 he was a Sterling Fellow at Yale University, where he did graduate work in law. In 1941 he accepted a position in the Office of the General Counsel of the Treasury Department in Washington, D. C., and transferred the following year to the Legal Department of the Tennessee Valley Authority at Chattanooga, Tennessee, coming to the Law School in January of this year. Professor Cross is especially interested in the field of Property and will teach the Property courses. For several years he was engaged in abstracting and title work with the Adams County Abstract Company and the Washington Title Insurance Company.

RECENT CASES

NEGLIGENCE—PROXIMATE CAUSE. Defendant railway company allowed its train to stand partially across and to that extent block a city street for a period longer than permitted by ordinance and without using safety devices to stop vehicular traffic as required by ordinance. Plaintiff pedestrian, coming down the side of the street blocked by defendant's locomotive, was forced, in order to continue down the street, to leave the sidewalk and circle around the obstructing engine, at which point he was struck by an automobile coming around the engine from the opposite direction. The trial court sustained a demurrer to plaintiff's complaint in an action to recover from the railroad for personal injuries, and plaintiff appealed from the judgment of dismissal. *Held*: Judgment affirmed, defendant's negligence not being the proximate cause of plaintiff's injury. *LeRoy Smith v. Great Northern Railway Co.*, 114 Wash. Dec. 173, 127 P. (2d) 712 (1942).

The majority, while conceding, *arguendo*, that respondent's violation of ordinance constituted negligence *per se*, held that the train's partial occupancy of the city street merely supplied a condition by which the injury was made possible, the cause being the subsequent intervening act of the automobile operator. The case of *Webb v. Oregon-Washington R. & N. Co.*, 195 Wash. 155, 80 P. (2d) 409 (1938), where an automobile was driven into a train which had been standing on a crossing for a period prohibited by city ordinance, was cited, together with the decisions of several other jurisdictions, to sustain the principal holding.

The dissent opinion points out that while a person's negligence is not actionable if the new and independent negligence of another intervenes to produce the injury, this rule is subject to a recognized exception. The exception, as stated at 38 Am. Jur. 726, Sec. 70, is that "if an intervening cause was foreseen or might reasonably have been foreseen by the wrongdoer, his negligence may be considered the proximate cause of an injury, notwithstanding the intervening cause". The dissent distinguishes *Webb v. Oregon-Washington R. & N. Co.*, *supra*, on its facts.

The instant case suggests a fairly common fact situation, i.e. where an obstruction has been created on a public sidewalk forcing pedestrians to go into the street to pass around it. An injury to a pedestrian by vehicular traffic while thus forced into the street is generally held within the risk created by the one causing the obstruction, or held to be a reasonably foreseeable consequence thereof. Harper on Torts, Secs. 73, 119, 122, and cases there cited. Whether, in the instant case, respondent should, by the exercise of ordinary prudence, have foreseen the danger from passing automobiles to pedestrians forced into the street by the impeding locomotive, would seem to be a question of fact for the jury.

Respondent was apparently guilty of negligence *per se* in violating an ordinance—an ordinance one would think was intended to prevent the very type of harm which here resulted. Of course, negligence consisting of violation of an ordinance is not actionable, unless the proximate cause of the injury. *Berry v. Farmers' Exchange of Walla Walla*, 156 Wash. 65, 286 Pac. 46 (1930). But the negligent act of an intervening third party does not excuse the original wrongdoer if such intervening act could, or in the exercise of ordinary prudence, should have been foreseen. *Olson v. Gill Home Inv. Co.*, 58 Wash. 151, 108 Pac. 140, 27 L. R. A. (N. S.) 884 (1910).

The Restatement of Torts, Sec. 447, summarizes the situation in these words: "The fact that an intervening act of a third person is negligent does not make it a superceding cause of harm done to another which the actor's negligent conduct was a substantial factor in bringing about, if (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or (b) a reasonable man, knowing the situation when the act of the third person was done, would not regard it as highly extraordinary that the third person had so acted . . .".

The question of whether respondent should reasonably have foreseen the intervening act of the automobile operator and consequent injury to appellant was here precluded from consideration by the affirmance of the judgment of dismissal. It would better seem to have been left as a question of fact for the jury.

LAWRENCE HOWARD.

STATUTES—AMENDMENTS—CONSTITUTIONAL REQUIREMENT. Plaintiff taxpayers sought to enjoin defendant school district and King County superintendent of schools from approving a contract of employment with defendant Beardsley as superintendent of Bothell schools, on the ground that the school board had unlawfully terminated the contract of the former superintendent, one Thomas, because the board had failed to state reasons for such termination, as required by Chapter 42, Laws of 1941. Defendants claim that Chapter 42 was repealed or rendered ineffective by the later passage at the same session of the 1941 legislature of Chapter 179. Both Chapter 42 and Chapter 179, Laws of 1941, purported to amend Section 1, Chapter 131, Laws of 1939, but neither act in any way referred to the other. Sec. 1, Chapter 131, as amended by Chapter 42, provided for notice to teachers of a termination of their contracts, the reasons therefor, etc.; Sec. 1, Chapter 131, as amended by Chapter 179, omitted entirely any reference to the above amendatory provision contained in Chapter 42 and merely reiterated the *original* provisions of Chapter 131 with the addition of a subdivision providing for the joint purchasing of supplies, equipment and services by school districts. Both

bills were referred to the committee on education on the same day and reported back on the same day with the recommendation that they do pass. *Held*: The demurrer was properly sustained and the action properly dismissed because Mr. Thomas' contract was not unlawfully terminated, since Chapter 179, being enacted after Chapter 42, and having an emergency clause, became the law, and Chapter 42 never became effective. *State ex rel. Gebhardt v. Superior Court for King County*, 115 W. D. 569, 131 P. (2d) 943 (1942).

Two lines of authority are recognized by the majority opinion in the instant case. One line of authority is supported by *Lewis v. Town of Brandenburg*, 105 Ky. 14, 20 KY. LAW REP. 1011, 47 S. W. 862 (1898), in which the court in a factual situation almost identical with that which confronted the Washington Court in the *Gebhardt* case, held that where a section of a statute was amended by adding thereto certain words, and subsequently, at the same session of the general assembly, was again amended by adding thereto certain words, the former amendment was not repealed, although the words added thereby were omitted from the latter act in quoting the statute as amended after the words "so as to read as follows"; the two amendments not being inconsistent. The majority in the instant case stated that they were not in accord with the result reached in the *Lewis* case and followed what appears to be the better view, as enunciated in the case of *State ex rel. Brady v. Lightner*, 77 Ore. 587, 152 Pac. 232 (1915). In the *Lightner* case, two amendments of the same prior act, neither amendment referring to the other, were passed at the same session of the Oregon Legislature and were filed in the office of the secretary of state only one hour and twenty-five minutes apart. In holding that the later act superseded the earlier one, the court based its decision upon the constitutional provision requiring the section amended to be set forth at length in the amendatory act. The last amendatory act must be the whole act, when it is set out "so as to read as follows." The court further stated that if the amended act could be made larger by a provision which the court selects for itself out of a previous amendment on the same subject, it is not set forth at length, and the constitutional provision would be violated. Consequently, the Washington Court in the *Gebhardt* case properly concluded there can be but one Section 1, Chapter 131, Laws of 1939, as amended, and that was expressed in the last amendatory act. The section will stand as last amended. *Detroit United R. v. Barnes Paper Co.*, 172 Mich. 586, 138 N. W. 211 (1912).

The dissenting opinion and the brief of *amici curiae* relied strongly on the legislative history of the two amendments and the intention of the legislature. It seems quite clear that even the majority would recognize that the legislature intended both amendments to stand as the law, the amendments not being inconsistent, but a legislative intent cannot override a mandatory constitutional requirement, Wash. Const., Art. 2, Sec. 37. The first essential for an amending act is that it shall measure up to the constitutional standards. Jones, *Statute Law Making in the United States* (1912) p. 172. A constitutional provision of the character of Article 2, Section 37 (Wash. Const.) is generally regarded as mandatory; and it is said that the intention of the legislature in reference to an amendment of a statute is unimportant, unless manifested in the manner directed by the constitution. *Dodd v. State*, 18 Ind. 56 (1862); Black, *Construction and Interpretation of the Laws* (2d ed. 1911) sec. 169. The intent to be ascertained and enforced is the intent expressed in the words of the statute,

read in the light of the constitution and the fundamental maxims of common law. 2 Lewis' *Sutherland Statutory Construction* (2d ed. 1904) sec. 388, p. 745, 747.

Even in the absence of such a constitutional provision, a similar result to that of the *Gebhardt* case was reached in *Columbia Wire Co. v. Boyce*, 104 Fed. 172 (C. A. A. 7th) (1900); *Heinze v. Butte and B. Consol. Min. Co.*, 107 Fed. 165 (C. A. A. 9th) (1901); and *Com. v. Kenneson*, 143 Mass. 418, 9 N. E. 761 (1887).

The dissent appears to have the view that it is repugnant to sound legislative practice to include both amendments in one bill or to have the second amendatory act set forth the first at full length and to then add the desired amendment. However, it would seem that such practice is what is required by the constitutional provision. Of course, if the last statute is complete and independent in itself and does not purport to be an amendment, the constitutional provision does not apply. *Haynes v. Seattle*, 83 Wash. 51, 145 Pac. 73 (1914). The constitutional requirement was intended to remedy the evils of confusion and uncertainty by requiring the legislature changing the law to state it entire in its amended form—the whole act, when revived or revised, or a whole section amended. *Warren v. Crosby*, 24 Ore. 558, 34 Pac. 661 (1893); *Fletcher v. Prather*, 102 Cal. 413, 36 Pac. 658 (1894); Black, *CONSTRUCTION AND INTERPRETATION OF THE LAWS* (2d ed. 1911) p. 431, 583. It is intended that the law in force after the amendment shall be formulated and stated as it reads entire, and not in shreds. *City of Portland v. Stock*, 2 Ore. 69, (1863); *Blakemore v. Dolan*, 50 Ind. 194 (1875).

The *Gebhardt* decision will serve as a valuable warning to the legislature, and especially to the committees, that in drafting amendatory acts the complete amended act as desired should be set forth in the last expression of the legislature.

J. G.

WORKMEN'S COMPENSATION—EMPLOYEES WITHIN ACT. Clausen received a permit from Spokane County to cut timber from certain land. The permit was conditioned in only two respects: First, that the timber was not to be resold; and second, that the permit holder would clear and pile the brush. Clausen was killed while clearing timber. His wife's claim against the Department of Labor and Industries for a pension was denied. Appeal from a judgment of the superior court reversing the department's order. Held: Claim rejected. Clausen was not a "workman" under the Act. *Clausen v. Dept. of Labor and Industries*, 115 Wash. Dec. 54, 129 P. (2d) 777 (1942).

According to the Act (REM. REV. STAT. (Sup.) § 7674-1) "the term workman means every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his personal labor for any employer coming under this act whether by way of manual labor or otherwise in the course of his employment." Prior to this amendment, it was firmly established that an independent contractor was not entitled to benefits of the Workmen's Compensation Act. *Machenheimer v. Department of Labor and Industries*, 124 Wash. 259, 214 Pac. 17 (1923); *Burchett v. Dept. of Labor and Industries*, 146 Wash. 85, 261 Pac. 802 (1927). The amendment, however, has not settled the status of the independent contractor. In *Lindbloom v. Dept. of Labor and Industries*, 199 Wash. 487, 91 P. (2d) 1001 (1939), the court,

without mentioning the amended section of the statute, held the claimant an independent contractor and therefore not entitled to recover. In *Hubbard v. Dept. of Labor and Industries*, 198 Wash. 354, 88 P. (2d) 423 (1939), the court also held the claimant, who had been hurt while sawing wood for the Pacific Coast Coal Company, an independent contractor and not within the Act. The court again failed to mention § 7674-1 and instead cited § 7675 of the Act which defines a workman as "every person in this state, who is engaged in the employment of any employer coming under this act . . ." This latter definition does not mention the independent contractor.

The court has given its interpretation to § 7674-1 in *Norman v. Dept. of Labor and Industries*, 172 Wash. 51, 19 P. (2d) 132, (1933); and *Haller v. Dept. of Labor and Industries*, 113 Wash. (2d) 164, 124 P. (2d) 559 (1942). The court in the *Norman* case held the claimant, who was hired by Spokane County to eradicate weeds, to be a workman within the meaning of this section. The claimant in the *Haller* case was hired to clean a well. He had another man assist him, and while the two were working, he was injured. The court said Haller, though an independent contractor, was not "working under an independent contract, the essence of which is his personal labor," since his helper was as necessary to the job as he.

In the instant case, the court held Clausen was neither an employee nor an independent contractor, but a mere licensee. Since neither Spokane County nor Clausen was obligated to act, no contract of employment existed at all. In reaching this conclusion the court laid down two tests: (1) In determining whether the relationship is that of employer-employee, the main factor is the right to control the means and manner of the performance of the work to be done. (2) In determining if the claimant is an independent contractor the main factor is his right to proceed, free from control, until a definite result has been obtained.

Thus, the first job of one claiming to be a "workman" under the act is to show the existence of a contract of employment. A mere casual and indefinite agreement as to the amount of labor and compensation is insufficient. *Kirk v. Dept. of Labor and Industries*, 192 Wash. 671, 74 P. (2d) 227 (1937). Then, if he be adjudged an independent contractor and not an employee, he must show that the job contracted for would be performed completely or substantially by himself.

H. K.