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seem to be the evident intention. The Court neither cited nor discussed these constitutional and statutory provisions.

Bernard Thomas

PROPRIETY OF INSTRUCTION ON COMPARATIVE NEGLIGENCE

The decision in *McCulloch v. Horton*¹ has given rise to the question whether the doctrine of comparative negligence now prevails in Montana. The Court approved denial of a requested instruction on contributory negligence to the effect that plaintiff could not recover if he were guilty of "any negligence, however slight, that proximately contributed" to his injury.²

In 114 A. L. R. 823, where the case is reprinted and annotated, the author of the comment states at page 832 that the requested instruction correctly expounds the law of contributory negligence as limited by the doctrine of proximate cause, inasmuch as the expression "however slight" is qualified by the phrase "that proximately contributed," but that the Court, in rejecting that instruction, necessarily took the position that slight negligence on the part of plaintiff, even though actually contributing to his injury, would not bar recovery. This latter position, said the writer, represents the doctrine of comparative negligence, viz., the doctrine that plaintiff may recover if his negligence is slight as compared with defendant's negligence.³

It is true that this instruction has been approved in a number of cases on the ground that a contrary ruling would amount to adoption of the comparative negligence principle.⁴ Thus, in

¹105 Mont. 531, 74 P. (2d) 1, 114 A. L. R. 823 (1937).

²The offered instruction read in full as follows: "Should you believe from the evidence that the plaintiff was negligent, and that the defendant was also negligent, you must not compare their negligence and thereby make up your verdict against the party that may appear to you from the evidence to have been the more negligent and in favor of the party that may appear to have been guilty of the lesser degree of negligence, because under the law of this State if a plaintiff was guilty of any negligence, however slight, that proximately contributed to the injuries he receives, he cannot recover by this action."

³"The two doctrines may be defined as follows: (1) Doctrine of comparative negligence.—Even though the plaintiff was negligent, and even though his negligence concurrently with the defendant's negligence proximately caused his injury, he may recover, if the degree of his negligence was slight as compared with that of the defendant. (2) Doctrine of contributory negligence as limited by or in its relation to the doctrine of proximate cause.—While the contributory negligence of the plaintiff, however slight, will defeat his right to recover, if it was the proximate or the concurrent cause of his injury, it will not defeat that recovery if it merely remotely caused or contributed to the injury." 114 A. L. R. at 831.

⁴*Birmingham Ry. Light & P. Co. v. Bynum*, 139 Ala. 389, 36 So. 736 (1903); *Botti v. Savill*, 97 Cal. App. 524, 275 Pac. 1029 (1929); *Cream-*

California, where the latter principle has been repudiated,³ instructions almost identical with the one rejected by the Montana Court have been approved.⁴ It is said that negligence amounts to failure to exercise due care; that any failure to exercise due care bars recovery if such failure proximately contributes to the injury; hence that "any negligence, however slight," means any failure to use due care or ordinary care.

Nevertheless, it seems unlikely that the Montana Court intended to adopt the doctrine of comparative negligence. It is a doctrine which prevails in exceedingly few States.⁵ It was expressly repudiated in an earlier Montana case, *Hughey v. Fergus County*.⁶ Chief reliance was placed in the principal case upon THOMPSON'S COMMENTARIES ON THE LAW OF NEGLIGENCE wherein it is said that "it is not the law that negligence of the plaintiff contributing in any degree, however slight, will defeat recovery."⁷ A similar statement appears in BEACH ON CONTRIBUTORY NEGLIGENCE.⁸ But the context makes it clear that these writers did not intend to do more than adopt the familiar principle that plaintiff may recover if his negligence is the remote, whereas defendant's negligence is the near or proximate, cause of the injury.⁹ Even in the principal case the Court noted that the words of the offered instruction were "that proximately contributed to" rather than "that proximately caused." Possibly the supposed difference is trivial or non-existent but the effort to distinguish indicates absence of intention to adopt the rule of comparative negligence.

er v. Cerrato, 1 Cal. App. (2d) 441, 36 P. (2d) 1094 (1934); Gherke v. Cochran, 198 Wis. 34, 222 N. W. 304 (1928); Premier Service Co. v. Sefton, 31 Ohio App. 154, 166 N. E. 140 (1929); Rogers v. Ziegler, 21 Ohio App. 186, 152 N. E. 781 (1925).

³Dresser v. Southern Calif. Edison Co., Ltd., 28 Cal. App. (2d) 510, 82 P. (2d) 965 (1938).

⁴See California cases cited in note 4, *supra*.

⁵The doctrine was once followed but is now repudiated in Illinois, Kansas and Tennessee. It has been adopted by statute in several States, including Florida, Georgia, Mississippi and Wisconsin. In other States it applies to certain types of cases only such as employers' liability and workmen's compensation cases. It "probably does not now obtain in any common law jurisdiction" except by statute. THROCKMORTON'S COOLEY ON TORTS (Rev. Student's Ed.), Sec. 323. Twenty-nine States which have expressly repudiated the doctrine are listed in 114 A. L. R. at 836-837.

⁶98 Mont. 98, 37 P. (2d) 1035 (1934).

⁷Sec. 170. See also Secs. 171 and 172.

⁸Sec. 20.

⁹Thus, Thompson, in a passage relied upon in the principal case, states that slight negligence will not bar recovery, "because, as we shall see, if the negligence of the person killed or injured was the remote or far-off cause of the catastrophe, and that of the defendant was the proximate or near cause of it, the law permits the plaintiff to recover damages; and yet in such a case it cannot be said that the negligence of the person killed or injured did not, in some degree, contribute to produce the death or injury."

Rejection of the instruction is not surprising in a State, such as Montana, where different degrees of negligence are recognized. Various statutes describe "slight care and diligence," "ordinary negligence," "great care and diligence," and "gross negligence."¹² The provision of Sec. 7579, on contributory negligence, is only that a plaintiff is barred if he has, "wilfully or by want of ordinary care," brought the injury upon himself. It can hardly be said, in this State, that the term "negligence" in the instruction necessarily imports want of ordinary care. There is, on the contrary, much reason for the view that the instruction might have meant or have been understood as meaning that plaintiff would be barred by failure to exercise extraordinary care, i. e., by slight negligence."

It thus seems evident that the writer in *A. L. R.* used the term "negligence" in a sense different from that of the Montana Supreme Court. His concept apparently denies existence of different degrees of negligence." Probably that is the better concept, but, in view of the Montana statutes and also of the misleading character of the terminology, it is believed preferable to refrain from using "slight" as an adjective modifying "negligence," in instructions on contributory negligence. The word, if used at all, ought to be employed only to qualify "want of ordinary care."¹³ But the rule of contributory negligence, in its common law form, is so harsh that use of the term at all should be discouraged.

Ira F. Beeler.

PRIVILEGED COMMUNICATIONS TO INDUSTRIAL ACCIDENT BOARD

In *Magelo v. Roundup Coal Mining Co.*,¹ decided a few months ago by the Montana Supreme Court, it was held, on demurrer, that a letter, written by an employer to the Industrial Accident Board with reference to an employee's claim then pending, lost its privileged character because its statements of circumstances surrounding the filing of previous claims by the same employee, suggestive of fraud and malinger-

¹²See Secs. 1748.1, 7658, 7704, 7733, 7768, 7810, 7821, 7853, 7869, R. C. M., 1935.

¹³See, to this effect, *Cremer v. Portland*, 36 Wis. 92 (1874), quoted in *BEACH ON CONTRIBUTORY NEGLIGENCE*, Sec. 20.

¹⁴The two concepts are discussed in 20 R. C. L. 21, Sec. 16.

¹⁵"To instruct a jury that a plaintiff in a personal injury case cannot recover if she was guilty of negligence in the slightest degree directly contributing to her injury would, we think, tend to mislead most any jury when such charge is not given in connection with a statement that her only duty is to exercise ordinary care." *Rogers v. Ziegler*, 21 Ohio App. 186, 152 N. E. 781 (1925) at p. 783.

¹⁶6 P. (2d) 932 (Mont., 1939).