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Trial - Instructions to Jury - Duty of Court to Instruct on Its Own Motion

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injunctive relief as being an unfair trade practice.²³ This approach would give relief in a situation where equity demands justice, and would not result in uncertain law, as a reliance on the doctrine of equitable servitudes as applied to chattels has caused in the past.

WESLEY N. HARRY.

TRIAL — INSTRUCTIONS TO JURY — DUTY OF COURT TO INSTRUCT ON ITS OWN MOTION. — Plaintiff, a track laborer, brought an action to recover damages for personal injuries sustained in a collision between the hand car on which he was riding, and a pick-up truck driven by the defendant. The latter's defense consisted of a general denial followed by a plea of contributory negligence. There were no instructions given nor requested concerning the issue of contributory negligence. The jury returned a verdict for the plaintiff. The Supreme Court of Oklahoma *held*, two justices dissenting, that while the instructions standing alone could be subject to criticism, when considered together they fairly submitted the issues to the jury and no reversible error existed. *Moddy v. Childers*, 344 P.2d 262 (Okl. 1959). The dissent stated that contributory negligence is a fundamental issue of law, and as such it was the court's duty, on its own motion, to instruct correctly on it.

The Oklahoma Supreme Court has repeatedly maintained, in negligence actions, that it is the duty of the court, on its own motion, to give instructions which fairly state the law applicable to the fact situation, and that failure to do so is reversible error.¹

Contributory negligence should be considered a fundamental issue in all cases in which it is involved.² In the instant case the defendant failed to request instructions on contributory negligence. The majority holding makes no mention of such an instruction, but from the facts given it could well have been a determinative factor. Giving proper instructions on the issue in a case, according to one legal writer, is a judicial duty as the judge is charged with knowledge of the law, and the parties have an absolute right to an instruction on the applicable rules of law.³

It has been held, that a failure of the court to give a certain instruction cannot be raised on appeal if no request was made for it at the trial.⁴ In at least one jurisdiction the rule seems to be that the court has no right to instruct on its own initiative, nor are the parties required to ask for instruc-

23. West's Ann. Bus. & Prof. Code, § 17000 (1959) (Unfair Trade Practices); West's Ann. Bus. & Prof. Code, § 16900 (1959) (Fair Trade Contracts). See also, 24 Ops. Atty. Gen 278 (Cal. 1959).

1. *Oklahoma Transportation Company v. Green*, 344 P.2d 660 (Okl. 1959). (This case was decided seven days after a rehearing was denied the instant case. It was held, that negligence on the part of either driver was a fundamental issue in the case, and since it was specifically pleaded, and evidence introduced in support of that defense, the defendant was entitled to have the jury properly instructed thereon, even without such a request.); *Garner v. Myers*, 318 P.2d 410 (Okl. 1957) (Ct. cites Tit. 12 O.S. 1951 § 577 subd. 3); *Roadway Express, Inc. v. Baty*, 189 Okl. 180, 114 P.2d 935 (1941) (Ct. cites 12 Okl. Stat. Ann. § 577 subd. 5); *Beams v. Young*, 92 Okl. 294 222 Pac. 952 (1923); *First National Bank of Mounds v. Cox*, 83 Okl. 1, 200 Pac. 238 (1921).

2. *Roadway Express, Inc. v. Baty*, *supra*, note 1.

3. 1 REID, *BRANSON INSTRUCTIONS TO JURIES* § 5 (3rd ed. 1960).

4. *Wallace v. Riales*, 218 Ark. 70, 234 S.W.2d 199 (1950); *Cobb v. Marshall Field & Co.*, 22 Ill. App.2d 143, 159 N.E.2d 520 (1959) (Statutory requirement).

tions.⁵ The better view would seem to be that error in the court's instructions which is fundamental, or goes to the foundation of the case, is reversible on appeal, whether or not a request for such an instruction was made at the trial stage.⁶

The North Dakota Rules of Civil Procedure provide that, the court shall instruct the jury as to the law of the case.⁷ In a recent North Dakota decision it was held that, the trial court, has the duty to fully and fairly instruct on the law governing the issues in the case.⁸ It is impossible to tell what the holding would be if this point was brought before the courts in North Dakota.

JACK CHRISTENSEN.

5. *J. C. Penney Co. v. Evans*, 172 Miss. 900, 160 So. 779 (1935) (Pursuant to statute, the court has held that, "the trial judge is without the right to instruct the jury on his own initiative, but is restricted to the granting or refusing of instructions requested by the parties litigant, who are not required to request such."); *National Surety Corporation v. Vandevender*, 108 So.2d 860 (Miss. 1959).

6. *Gross v. Boston, W. & N.Y. St. Ry. Co.* 117 Conn. 589, 169 Atl. 613 (1933); *Keller v. Gartin*, 220 Iowa 78, 261 N.W. 776 (1935); *Brown v. Nichols*, 337 Mich. 684, 60 N.W.2d 907 (1935); *McNeill v. McDougald*, 242 N.C. 255, 87 S.E.2d 502 (1955).

7. N.D. Rules of Civil Procedure 51(a) (1957).

8. *Stokes v. Dailey*, 97 N.W.2d 676 (N.D. 1959).