

805.69 CITY OR COUNTY NEGLIGENCE - DEFENSE OF CONTRIBUTORY
NEGLIGENCE - HANDICAPPED PLAINTIFF.

This issue reads:

"Did the plaintiff by *his* own negligence, contribute to *his* [injury] [damage]?"

You will answer this issue, only if you have answered the issue as to the defendant's negligence "yes" in favor of the plaintiff.

On this issue the burden of proof is on the defendant. This means that the defendant must prove, by the greater weight of the evidence, that the plaintiff was negligent and that such negligence was a proximate cause of the plaintiff's own [injury] [damage].

A person traveling on a [street] [sidewalk] [alley] [bridge] [public way] has a duty to use ordinary care to protect *himself* from [injury] [damage].¹ *He* must use *his* senses to discover and to avoid such dangerous conditions as would be discovered and avoided by a reasonable person exercising ordinary care for *his* own safety under the same or similar circumstances. If one or more of a person's senses is impaired because of blindness, deafness, or some other handicap, the law requires *him* to take more care and use more vigilant caution for *his* own safety on public ways in order to compensate for *his* handicap.²

Thus, in order to exercise ordinary care for *his* own safety, a person who is [blind] [deaf] [(*name other handicap*)] must exercise that degree of care which a reasonable person with the same or similar handicap would exercise under the same or similar circumstances.³ The failure to exercise such ordinary care would be negligence.⁴ When the plaintiff's negligence concurs with the negligence of the defendant in proximately causing the plaintiff's [injury] [damage], it is called contributory

negligence, and the plaintiff cannot recover.

In this case the defendant contends, and the plaintiff denies, that the plaintiff was negligent in one or more of the following ways:

(Read all contentions of contributory negligence supported by the evidence).

The defendant further contends, and the plaintiff denies, that plaintiff's negligence was a proximate cause of and contributed to the plaintiff's [injury] [damage].

I instruct you that contributory negligence is not to be presumed from the mere fact of [injury] [damage].

Finally, as to this issue on which the defendant has the burden of proof, if you find, by the greater weight of the evidence, that the plaintiff was negligent and that such negligence was a proximate cause of plaintiff's [injury] [damage], then it would be your duty to answer this issue "Yes" in favor of the defendant.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the plaintiff.

1. *Wallsee v. Water Co.*, 265 N.C. 291, 296 (1965); *Welling v. Charlotte*, 241 N.C. 312, 320 (1955); *Walker v. Wilson*, 222 N.C. 66, 68 (1942); *Watkins v. Raleigh*, 214 N.C. 644, 647 (1939).

2. "[I]n the exercise of common prudence, one of defective eyesight must usually, as a matter of general knowledge, take more care and employ keener watchfulness in walking upon the streets and avoiding obstructions than the same person with good eyesight, in order to reach the standard of excellence established by the law for all persons alike, whether they be weak or strong, sound or deficient." *Cook v. Winston-Salem*, 241 N.C. 422, 429 (1955) (quoting a Massachusetts case). Whether this rule will undergo modification in light of recent legislation on the rights of the handicapped is unclear to the

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3. The standard of care required of a handicapped person is not higher than that required of a non-handicapped person. The fact that he is "bound to a higher degree of caution than a normal person does not mean that there is imposed on him a higher standard of duty, but rather that in order to measure up to the ordinary standard he must more vigilantly exercise caution through other senses and other means, in order to compensate for the loss or impairment of those senses in which he is defective." *Id.* at 429-30 (quoting a Pennsylvania case).

4. *Id.* at 431.