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Automobiles -- Guest's Duty -- Contributory Negligence as a Matter of Law

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This issue contains a note by KIRBY SULLIVAN, a former member of the LAW REVIEW staff—now a member of the North Carolina Bar, and J. C. JOHNSON, JR., a student at the University of North Carolina Law School.

NOTES AND COMMENTS

Automobiles—Guest's Duty—Contributory Negligence as a Matter of Law

The Virginia Supreme Court in *Butler v. Darden*[1] recently held that under certain circumstances as a matter of law the guest rider in a car has a duty to warn the driver of approaching dangers. The facts show that plaintiff guest was sitting in the front seat of defendant's car. The car was approaching a railroad crossing, with which the guest

[1] 189 Va. 459, 53 S. E. 2d 146 (1949).

was familiar, at ten miles per hour, and the guest did not, until within ten feet of the tracks, give any warning of the train which crashed into the automobile in which he was a passenger. The Court held that failure of plaintiff to give warning was contributory negligence as a matter of law and set aside a verdict for plaintiff. Mr. Justice Cardozo in criticizing a like result under similar circumstances pointed out that negligence of the guest is to be determined by the facts and circumstances of the particular case.[2] Consideration of whether the passenger believed the driver would take the necessary precautions, whether a warning was needless, or whether the warning of the guest might be dangerous were all possibilities to be weighed by triers of the facts. The North Carolina view is that it is the duty of the guest to keep a reasonable lookout for trains as the automobile approaches the tracks, and to warn the driver of any impending danger of a collision if it is apparent to the guest that the driver has not seen the engine, or having seen it, does not appreciate the danger of a collision.[3]

In the principal case the Court considers the position of the guest in the car, his familiarity with the road, and other factors as imposing on the guest a high degree of care for his own safety. Poor visibility has been considered by other courts as requiring from the guest a sharper lookout.[4] Certainly, if circumstances determine the degree of altertness required, poor visibility should demand that the guest keep a more alert watch for dangers.

Generally a distinction is made between the duty imposed on the guest rider approaching a busy street intersection as compared with his duty at a railroad crossing. The failure to give warning, if the guest had a chance to look, at a railroad intersection is contributory negligence as a matter of law, but at a highway crossing, contributory negligence of the guest is generally a jury question.[5] The basis for the distinction is premised on the inability of trains to stop as quickly as automobiles or to turn aside to avoid any obstacle upon the track.[6] Considering the

[2] Baker v. Lehigh Ry., 248 N. Y. 131, 161 N. E. 445 (1928).

[3] Johnson v. Atlantic Coast Line Ry., 205 N. C. 127, 170 S. E. 120 (1933); Smith v. Atlantic & Y. Ry., 200 N. C. 177, 156 S. E. 508 (1931); See Notes, 11 N. C. L. REV. 349 (1932), 9 N. C. L. REV. 98 (1930).

[4] Ames v. Terminal Ry. Ass'n., 332 Ill. App. 187, 75 N. E. 2d 42 (1947); Gilly v. Harris, 152 So. 378 (La. App. 1934); Peasley v. White, 129 Me. 450, 152 Atl. 530 (1930); Adams v. Hutchinson, 113 W. Va. 217, 167 S. E. 135 (1932); *But cf.* Uren v. Purity Dairy Co., 252 Wis. 446, 32 N. W. 2d 615 (1948).

[5] Hill v. Lopez, 228 N. C. 433, 45 S. E. 2d 296 (1947); Campion v. Eakle, 79 Colo. 320, 246 Pac. 280 (1926); Hunsavage v. Rocek, 74 Colo. 163, 219 Pac. 1080 (1923); Earhart v. Treatbar, 148 Kan. 42, 80 P. 2d 4 (1938); Moore v. Retz, 314 Mich. 52, 22 N. W. 2d 68 (1946); Landy v. Rosenstein, 325 Pa. 209, 188 Atl. 855 (1937); Hancock v. Norfolk & W. Ry., 149 Va. 829, 141 S. E. 849 (1928); Gilkerson v. Baltimore & O. Ry., 129 W. Va. 649, 41 S. E. 2d 188 (1946); Jones v. Virginia Ry., 115 W. Va. 665, 177 S. E. 621 (1934).

[6] Chicago & N. W. Ry. v. Golay, 155 F. 2d 842 (10th Cir. 1946); Leclair v. Boudreau, 101 Vt. 270, 143 Atl. 401 (1928).

higher speeds obtained by cars and the greater number of highway intersections, should a lesser duty be required at a highway intersection than at a railroad crossing? The more logical solution would be to let the jury determine that degree of care required in both situations.

Passengers of automobiles take note: the back seat is at a premium. The occupant of the back seat has less duty of lookout than if he were in the front seat.[7] Mr. Justice Cardozo criticized as contrary to the common standard of conduct the rule requiring the same duty of lookout by a guest, whether in the front or back seat, when approaching a railroad.[8] The basis, however, upon which the guest is barred from recovery is that he did not exercise a reasonable degree of care for his own safety.[9] Following this rule, the guest cannot rely blindly upon the alertness of the driver, but must, under the circumstances, exercise a reasonable degree of care for his own safety.

If the guest because of age, inability to operate an automobile, or for other reasons, is unfamiliar with dangers of automobile travel, he has no duty to give warning of dangers.[10] This type of guest would not recognize dangers apparent to others, and, under the circumstances, would be exercising the required degree of caution for his own safety.

Does the paying passenger have the same degree of duty as the gratuitous guest?[11] A bus passenger[12] and taxi occupant[13] have been held to have no duty to keep a lookout. The "share-the-ride" passenger, paying for his transportation, can rely more on the driver than the gratuitous guest.[14] It would seem that in consideration of the fare, the passenger is relieved from maintaining a lookout. The guest's own negligence may, however, preclude a recovery although he has paid for the ride.[15]

The guest statutes are not phrased to cover the duty of the guest to the host or himself, but only the duty of the driver to his gratuitous guest.[16] The guest's duty is in need of clarification. One of the dangers recognized by the courts is that by requiring too active a part from the guest in the operation of the automobile, back-seat driving will be

[7] Davis v. Joseph, 164 So. 467 (La. App. 1935); Banks v. Adams, 135 Me. 270, 195 Atl. 206 (1937); Fabiano v. Carey, 279 Mich. 269, 271 N. W. 754 (1937).

[8] Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 121 (1921).

[9] Smith v. Atlantic & Y. Ry., 200 N. C. 177, 156 S. E. 508 (1931).

[10] Kelly v. Hanwick, 288 Ala. 336, 153 So. 269 (1934); Banks v. Adams, 135 Me. 270, 195 Atl. 206 (1937); Noakes v. New York C. & H. Ry., 121 App. Div. 716, 106 N. Y. Supp. 322 (1907), *aff'd*, 195 N. Y. 543, 88 N. E. 1126 (1909).

[11] Silver v. Silver, 280 U. S. 117 (1929).

[12] Miller v. Blue Ridge Transp. Co., 123 W. Va. 428, 15 S. E. 2d 400 (1941).

[13] Yellow Cab Co. v. Eden, 178 Va. 325, 16 S. E. 2d 625 (1941); Scales v. Boynton Cab Co., 198 Wis. 293, 223 N. W. 836 (1929).

[14] Dennis v. Wood, 357 Mo. 886, 211 S. W. 2d 470 (1948).

[15] HUDDY, THE LAW OF AUTOMOBILES 196 (1927); 1 LAW OF AUTOMOBILES IN NORTH CAROLINA §55 (3rd Michie ed. 1947).

[16] MALCOLM, AUTOMOBILE GUEST LAW 1 (1937). North Carolina does not have guest statute. See Note 9 N. C. L. REV. 47 (1930) (proposed guest statute).

encouraged.[17] It is negligence to interfere with the driver in some situations, but in others, non-interference will bar the guest from recovery. Any rigid rule to apply to all situations is undesirable. The probable North Carolina rule is that when danger arising out of the operation of a vehicle by another is manifest to a passenger or guest who has adequate opportunity to control the situation by warning the driver, and he sits without protest and permits himself to be driven to his injury, his negligence will bar a recovery—such negligence is not the negligence of the driver imputed to him as a passenger, but his own negligence in joining with the driver and facing manifest danger.[18] The courts should, however, consider each situation upon its facts, and apply the usual negligence rule of the conduct of the reasonable man under the circumstances. The adoption of a statute to cover this situation in inadvisable because a statute cannot be phrased to cover all the variations that are sure to arise. The rule that a guest must exercise reasonable care under the circumstances should be applied in all cases, regardless of the guest's position in the automobile or his familiarity with automobile travel. Further, unless negligence or the lack of it is clear, the issue of negligence should be submitted to the jury. Constant application of this rule might lead to clarification of an automobile guest's duty to keep a lookout.

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Chattel Mortgages—Recordation—Persons Protected

At common law a chattel mortgage was valid as between the parties thereto without change of possession;[1] but, in order to be upheld against the attack of interested third persons, a transfer of possession to the mortgagee was essential.[2] The early registration acts,[3] designed pri-

[17] Hedges v. Mitchell, 69 Colo. 285, 194 Pac. 620 (1920); Bradley v. Interurban Ry., 191 Iowa 1351, 183 N. W. 493 (1921); Chambers v. Hawkins, 223 Ky. 211, 25 S. W. 2d 363 (1930); Young v. White Sulphur Ry., 96 W. Va. 534, 123 S. E. 433 (1924).

[18] 1 LAW OF AUTOMOBILES IN NORTH CAROLINA §35 (3rd Michie ed. 1947).

[1] Williams v. Jones, 95 N. C. 504 (1886); McCoy v. Lassiter, 95 N. C. 88 (1886); Leggett v. Bullock, 44 N. C. 283 (1853); Pike v. Armstead, 16 N. C. 110 (1827).

[2] McCoy v. Lassiter, 95 N. C. 88 (1886); *see* Cowan v. Dale, 189 N. C. 684, 128 S. E. 155 (1925); 1 JONES, CHATTEL MORTAGES AND CONDITIONAL SALES §176 (Rev. ed. 1933); cases cited 10 AM. JUR., CHATTEL MORTGAGES, §157.

[3] N. C. Act of 1715, c. 38 §11: ". . . , That every mortgage of . . . goods or chattels, which shall be first registered in the register's office . . . where the mortgager (sic) liveth, shall be taken, deemed, judged, allowed of and held to be the first mortgage, and be good, firm, substantial and lawful; in all courts of Justice within this government; any former or other mortgage of the same . . . , goods or chattels, not before registered, notwithstanding; unless such prior mortgage be registered within fifty days after the date." N. C. Act of 1820, c. 3 §1: "That no mortgage, nor deed or conveyance in trust for any estate, whether real or personal . . . , shall be good and available in law against creditors or purchasers for a valuable consideration, unless the same shall have been proven and