1963

Contributory Negligence of Automobile Passengers

Martin C. Spector

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WHAT IS THE DUTY of a passenger when the auto in which he is riding is approaching a railroad crossing, or an intersection, or when the auto is going at an excessive rate of speed, or if the driver is intoxicated? When does the passenger have a duty to remonstrate with the driver and when may he rely on the skill and care of the driver? May the contributory negligence of the driver be imputed to the passenger? Note that this article deals with contributory negligence as such, and does not attempt to distinguish between results in guest statute or non-guest-statute situations.

> An invited guest is not to be supine and inert as mere freight. Accepting the hospitality of his friend does not excuse him from the duty of acting for his own safety as a reasonably prudent person would under like circumstances.[1]

Railroad Crossing

When a train is approaching, the traveler must look attentively and effectively up and down the track before attempting to cross. The traveler is chargeable with what he could have seen had he so looked and with hearing what he would have heard had he so listened. In other words, where he looks and listens but does not see or hear the approaching train which is in full view, it will be presumed that he did not look or listen at all or, if he did, that he did not heed what he saw or heard. Such a rule is predicated upon the assumption that by the exercise of ordinary care, the effective use of his senses, he could have seen the approaching train which was in full view or plainly visible.[2]

The rule which charges the traveler with seeing what he could have seen if he had looked and with hearing what he could have heard if he had listened is without application where it cannot be said as a matter of law that the traveler is presumed to have seen the locomotive. The question of contributory negli-

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[1] Koster v. Matson, 139 Kan. 124, 30 P. 2d 107, 111 (1934).

[2] Stowers v. Union Pac. R. Co., 72 Idaho 87, 237 P. 2d 1041 (1951).

gence cannot be withdrawn from the jury where vision is impaired by darkness.[3]

When the passenger testified that he was watching for the train and that the truck in which he was riding was traveling at a low rate of speed and could have stopped at any time during its immediate approach to the crossing, the passenger was bound to see the plainly visible train.[4] When the passenger is charged with knowledge of an approaching train, it is his duty to warn the driver or to take other appropriate action to avoid injury. The passenger's failure to act constitutes contributory negligence.[5]

In the absence of evidence to the contrary, an occupant of an automobile will be presumed to have exercised ordinary care for his own safety. When undisputed evidence indicates that the occupant could have seen or heard the approaching train if he had looked or listened, the presumption is rebutted and the occupant will be held contributorily negligent as a matter of law.[6]

In the recent California case of *Pober v. Western Pacific Railroad Company*[7] the driver of an automobile approaching a railroad crossing ignored a reflectorized railroad warning sign, two white *RxR's* painted on the street about 200 feet in advance of the crossing, and double white lines parallel to and in advance of the tracks; and in complete disregard of two crossing signs, the highly visible nature of the silver and orange colored engine of the defendant, the large headlight of the engine, and two blasts of the whistle, so operated the automobile that it crashed into the train. The driver made no attempt to stop, swerve, or otherwise avoid the accident. There was evidence that the driver was intoxicated at the time of the accident.

The court held that the passenger is bound to exercise ordinary care for his own safety. In approaching a place of danger, the passenger may not shut his eyes to an obvious danger and rely blindly on the driver. The extent of his duty depends on the particular circumstances and ordinarily is a question of fact

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[3] Hendrickson v. Great Northern Ry. Co., 170 Minn. 394, 212 N. W. 600 (1927); Miller v. Manistique and L. S. Ry. Co., 234 Mich. 184, 207 N. W. 809 (1926).

[4] Yearout v. Chicago, Milwaukee, St. Paul and Pacific R. Co., 82 Idaho 466, 354 P. 2d 759 (1960); Stowers v. Union Pac. R. Co., *supra* n. 2.

[5] Yearout v. Chicago, Milwaukee, St. Paul and Pacific R. Co., *supra* n. 4.

[6] Gilkersen v. Baltimore and Ohio R. Co., 129 W. Va. 649, 41 S. E. 2d 188 (1946).

[7] 55 Cal. 2d 314, 11 Cal. Rptr. 106, 359 P. 2d 474 (1961).

for the jury; but the passenger is normally bound to protest against actual negligence or recklessness of the driver.[8]

When the passenger is aware that the driver is violating the law, not looking for trains, or is driving in a negligent manner, or that an engine or train is approaching on the tracks and is so close as to constitute an immediate threat to those in the vehicle, the passenger has the duty of doing whatever an ordinary prudent person would do under the same circumstances to warn or inform the driver in an effort to prevent a collision.[9]

The only time when there is not at least a question of fact as to the passenger's contributory negligence is when he is unaware that the driver is carelessly rushing into danger.[10] Failure of the passenger to observe the condition of the traffic on the highway without any fact brought to his attention which would cause a person of ordinary prudence to act will not support a finding of contributory negligence.[11]

The mere fact that an automobile is approaching a railroad track does not place a burden on a guest to ascertain whether or not a train is approaching,[12] but an approach to a railroad crossing is in itself a warning of danger of which the traveler is bound to take notice.[13]

Thus, if a car approaches a railroad crossing and the driver slows down as he nears the tracks and appears to fully perceive the conditions along the railroad track, and there is nothing to cause the passenger to remonstrate with the driver, then the guest has no burden to ascertain if a train is approaching: The approach to a railroad crossing is a warning of danger which means that the passenger should at least observe that the driver is taking the necessary precautions for their safety.

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[8] Parker v. Southern Pacific Co., 204 Cal. 609, 269 P. 622 (1928); Miller v. Atchison T. and S. F. Ry. Co., 166 Cal. App. 2d 160, 332 P. 2d 746 (1958); Miller v. Western Pacific Railroad Company, 24 Cal. Rptr. 785 (Cal. App. 1962).

[9] Pobor v. Western Pacific Railroad Company, *supra* n. 7; Miller v. Western Pacific Railroad Company, *supra* n. 8; Cate v. Fresno Traction Co., 213 Cal. 190, 2 P. 2d 364 (1931).

[10] Pobor v. Western Pacific Railroad Company, *supra* n. 7; Miller v. Western Pacific Railroad Company, *supra* n. 8; Thompson v. Los Angeles, etc. Ry. Co., 165 Cal. 748, 134 P. 709 (1913); Gadbury v. Ray, 171 Cal. App. 2d 150, 340 P. 2d 66 (1959).

[11] Robinson v. Cable, 55 Cal. 2d 425, 11 Cal. Rptr. 377, 359 P. 2d 929 (1961).

[12] Klein v. Southern Pacific Company, 21 Cal. Rptr. 233 (Cal. App. 1962).

[13] Parker v. Southern Pacific Company, *supra* n. 8; Miller v. Western Pacific Railroad Company, *supra* n. 8; Pobor v. Western Pacific Railroad Company, *supra* n. 7.

Intoxication

When a guest passenger voluntarily rides with a driver who is intoxicated to a point which seriously affects his ability to drive safely, and the driver's condition is known or should have been known to the guest passenger, this constitutes independent contributory negligence of the passenger which is sufficient to bar his recovery for injuries sustained in any case where the driver's negligence is the proximate cause of an accident.[14]

Taylor v. Birks[15] was an action for personal injuries sustained by a sleeping, intoxicated guest when the car in which he was riding hit a telephone pole while the automobile was traveling at a high and reckless speed. The driver of the automobile was sober and had insisted on taking the guest home because of the guest's intoxicated condition.

The court held that the guest was not guilty of contributory negligence as a matter of law. Since the plaintiff became intoxicated before he became a guest, he had no way of anticipating that he would become a passenger in the defendant's automobile. The defendant was not allowed to rely on a defense which he had created by insisting that the guest go home with him.

Speed

The duty of the guest is to remonstrate with the driver if a reasonably prudent person would have done so under like circumstances; but the guest will not be held guilty of contributory negligence as a matter of law for failing to warn the driver that the car is being driven above the speed limit.[16]

In *Bell v. Maxwell*[17] the passenger got out of the car after the driver had been going at excessive speeds, and then got back into the automobile when the driver told the guest he would drive at a normal rate of speed. It was held to be a question for the jury as to whether the passenger was contributorily negligent.

The guest who feels himself in danger of great bodily harm due to the excessive speed of the vehicle in which he is riding

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[14] Otis v. New Orleans Public Service, 127 So. 2d 197 (La. App. 1961); Cowan v. Bunce, 27 Cal. Rptr. 758 (Cal. App. 1963).

[15] 325 P. 2d 737 (Okla. 1958).

[16] Mills v. Southwest Builders, Inc., 70 N. M. 407, 374 P. 2d 289 (1962); Bradbeer v. Scott, 193 Cal. App. 2d 754, 14 Cal. Rptr. 458 (1961).

[17] 246 N. C. 257, 98 S. E. 2d 33 (1957).

is not ordinarily expected to leap from the vehicle while it is still in rapid motion. The guest may have a duty to leave the car if there is a reasonable opportunity to do so, if a person in the exercise of ordinary care would have done so under the same or similar circumstances.[18]

A passenger in an automobile was barred from recovering damages for personal injuries as a matter of law in *Bogen v. Bogen.*[19] In this case the defendant husband did not tell the plaintiff wife to get back in the car, or that his reckless driving and excessive speeding was over.

When the driver is recklessly rushing on at a dangerous rate of speed, and the guest, knowing the danger, sits silent and fails to protest or remonstrate, he assumes the risk of injury. A person is precluded from recovery for an injury when he is aware of the danger and understands the risk, and voluntarily exposes himself to the possibility of bodily harm.[20] The occupant may not abandon the exercise of his own faculties and absolutely entrust his safety to the driver in the face of imminent danger or where there is manifestly lack of ordinary care on the part of the driver.[21]

A passenger is not bound to anticipate the resumption of reckless driving and does not assume the risk involved when, after the passenger's protest of the driver's excessive speed under dangerous conditions, he commences to drive more carefully.[22]

Intersections

A guest may ordinarily rely upon a driver who has exclusive control of the automobile except in the case of visible lack of caution or known imminence of danger, when it becomes the duty of the guest to take such action as an ordinary prudent and careful person would take under similar circumstances.[23]

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[18] Bell v. Maxwell, *supra* n. 17.

[19] 220 N. C. 648, 18 S. E. 2d 162 (1942).

[20] Koster v. Matson, *supra* n. 1.

[21] Lorrance v. Smith, 173 La. 883, 138 So. 871 (1931).

[22] Farm Bureau Mutual Insurance Co. of Indiana v. Seal, 179 N. E. 2d 760 (Ind. App. 1962).

[23] Lamfers v. Licklider, 332 S. W. 2d 882 (Mo. 1960); Brooks v. Mock, 330 S. W. 2d 759 (Mo. 1959); Robinson v. Cable, *supra* n. 11; Van Pelt v. Carte, 26 Cal. Rptr. 182 (Cal. App. 1962); Dashnow v. Myers, 121 Vt. 273, 155 A. 2d 859 (1959).

> The driver of an automobile synchronizes his speed to the time, place, and duration of his own observation and not to that of his passenger. The passenger not being forewarned as to how the driver of an automobile expects to operate it in a particular situation is at a disadvantage and makes his observation under difficulties. It is confusing and disturbing to a driver of an automobile to have a passenger suggesting how he shall drive. Unless the passenger sees an obvious danger which the driver might not see, there would be no duty on the passenger to warn the driver.[24]

In Mouser v. Talley[25] the plaintiff was a guest in an automobile which stopped at an intersection to make a left hand turn. After stopping, the driver made his turn and was struck by another car. During the short period of time between the starting of the automobile and the collision, one of the passengers protested.

The court, in discussing plaintiff's duty to remonstrate with the driver where one of the other passengers in the car protested, stated that "where one of two or more passengers riding in an automobile gives timely warning to the driver in an audible voice of approaching danger, fellow passengers are relieved from any duty to protest." The court held that there was no contributory negligence in this case because of the short period of time between the starting of the automobile and the collision with the oncoming vehicle.

The host's negligence must persist for a long enough period of time to give the guest an opportunity to protest, or the guest will be exonerated from contributory negligence in not warning the driver.[26]

In *Bernard v. Bohanan*[27] there was conflicting evidence as to whether the driver of the automobile stopped at the stop sign before entering the intersection where there was a collision and the passenger was injured. The court held that where there was lack of evidence showing that the motorist was not cautious up to the moment she entered the intersection, the passenger was not contributorily negligent as a matter of law although she did not warn the motorist of the stop sign.

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[24] McCormack v. Haan, 30 Ill. App. 2d 311, 174 N. E. 2d 206, 208 (1961).

[25] 375 P. 2d 968 (Okla. 1962).

[26] Koepke v. Miller et al., 241 Wis. 501, 6 N. W. 2d 670 (1942); Diggs v. Lail, 201 Va. 871, 114 S. E. 2d 743 (1960).

[27] 203 Va. 372, 124 S. E. 2d 191 (1962).

Ordinarily, the passenger has no duty to direct and control the driver unless it is obvious that the driver is taking no precautions for their safety.[28]

Vigilance of Passenger

A passenger without some reason to suspect a particular defect in an automobile has no duty to inspect the automobile before accepting an invitation to ride in it.[29] Where the passenger did not know that the rear tires of the automobile were slick and worn, and where there was no evidence of careless and reckless driving of the automobile and no evidence to show that the passenger in the exercise of due care had reasonable ground to believe that the rear tires were slick and worn, then there was no sufficient evidence of contributory negligence for the case to be submitted to the jury.[30]

When a passenger becomes aware of a danger, or when he should be aware of it, he has a duty to exercise ordinary care for his own safety and to protect himself by giving warning to the driver. A passenger has no duty to be a lookout for the driver.[31] The front seat passenger and the rear seat passenger ordinarily are burdened with the same duty of personal vigilance.[32]

Where the driver was proceeding along the highway at a reasonable speed and the guest had observed nothing to cause her to complain about the way he was driving, the fact that the guest was sitting with her knees on the seat talking to the driver and paying no attention to the road ahead or to the driver's operation of the vehicle does not constitute sufficient evidence for the submission to the jury of the question of contributory negligence.[33]

Imputing Driver's Contributory Negligence

The contributory negligence of one in charge of or in control of a train, car, or other vehicle cannot be visited upon a person who is a passenger therein unless the person so riding has charge or control of the vehicle or over the person who is driving the

[28] See also Mize v. Gardner Motor Co., 166 Va. 415, 186 S. E. 108 (1936).

[29] Mann v. Bowman Transportation, Inc., 300 F. 2d 505 (4th Cir. 1962).

[30] Johnson v. Lewis, 251 N. C. 797, 112 S. E. 2d 512 (1960).

[31] Rahja v. Current, 119 N. W. 2d 699 (Minn. 1963).

[32] Yarabek v. Brown, 357 Mich. 120, 97 N. W. 2d 797 (1959).

[33] Watters v. Parrish, 252 N. C. 787, 115 S. E. 2d 1 (1960).

same.[34] The passenger may be burdened with his own negligence when he joins the driver in "testing manifest danger," [35] but ordinarily the negligence of the driver is not imputed to the passenger.[36]

Conclusion

In order for a passenger to recover for injuries sustained through the negligence of a third party, the passenger must be free of contributory negligence.

He may be required to take action for his own safety if he observes that the driver is unfit to operate the vehicle, or if he observes a danger of which a reasonably prudent person would warn the driver. A passenger is under no duty to supervise the driving of the vehicle, nor is he under a duty to maintain an independent lookout.

The guest will be deemed contributorily negligent where he has an adequate and proper opportunity to protect his own safety and when the danger is reasonably manifest to the guest and he fails to remonstrate with the driver, thus allowing the injury to occur.

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[34] Elyton Land Co. v. Mingea, 89 Ala. 521, 7 So. 666 (1890); Central of Georgia Ry. Co., 195 Ala. 378, 70 So. 729 (1916).

[35] Hardie v. Barrett, 257 Pa. 42, 101 A. 75 (1917).

[36] Fisher v. Suko, 111 N. W. 2d 360 (N. D. 1961); Bartek v. Glasers Provision Co., 160 Neb. 794, 71 N. W. 2d 466 (1955); Campbell v. Marquis, 112 Ohio App. 50, 175 N. E. 2d 106 (1960).