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Contributory Negligence-Reliance on Due Care of the Defendant

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The question of the violation of privacy by photography appears to depend on whether the picture is offensive to the ordinary sensibilities, whether there is sufficient public interest in the photograph to justify its publication, and the context with which the picture is used. As to the first and second factors the balancing depends on the discretion of the particular court. In most instances the courts have favored a policy of allowing the press to "police" itself, stating that there would be no method of delineation between those photographs of great public interest and those so offensive to human sensibilities that publication would amount to a tort. This argument appears to be unsound, however, in this age of the progression of human dignities the courts could possibly establish a boundary beyond which the press could not transgress; a boundary established along the line of the mutilated body or the grief stricken parent, where photographs are clearly offensive and public interest slight. As to the context in which an inoffensive picture appears, it seems that if the photograph is used in its original context there has been no invasion of privacy, but if the photograph is lifted from its original circumstances and is used to portray or illustrate a different subject which is derogatory or offensive to the party involved there is a cause of action in the wronged party.

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CONTRIBUTORY NEGLIGENCE—RELIANCE ON DUE CARE OF THE DEFENDANT

The harshness of the rule that contributory negligence is a complete defense has long been recognized by the courts, since it places upon one party the entire burden of the loss for which two are responsible.[1] In automobile accident litigation there is an increasing dissatisfaction with this defense, and courts are becoming more reluctant to rule that the plaintiff's conduct was negligent as a matter of law.[2] This dissatisfaction has led to a number of methods of dealing with cases in which there is negligence on the part of both parties. One such method is the doctrine of "last clear chance" which has been adopted to some extent in nearly all jurisdictions. Although at common law the rule of comparative negligence has been almost entirely abandoned, it survives in a few states in the form of statutes. A recognized exception to the contributory negligence rule is the rule that a plaintiff at fault may nevertheless recover in cases in which the negligence of the defendant is characterized as willful or wanton. In recent years many courts have used language and reasoning which make it seem reasonable to assert another method for avoiding the harshness of the contributory negligence doctrine. That is, the situations in which

1. Prosser, Torts, 403 (1941).
2. Nixon, Changing Rules of Liability in Automobile Accident Litigation, 3 Law & Contemp. Probs. 476 (1936).

it is held that a plaintiff who has put himself in a position of peril was not negligent because he might reasonably rely on the defendant's using due care to avoid injury to the plaintiff. It might be asked why the courts will so hold and yet are unwilling to permit the defendant to justify his negligence on the basis of a reliance on the plaintiff's due care. This inconsistency would seem to be due to, and would emphasize, the fact that the courts are dissatisfied with the harsh contributory negligence rule. This article will be directed to an examination of situations arising in the field of automobile accident litigation in which courts allow a plaintiff at fault to recover on the basis of a reliance by the plaintiff on the defendant's due care.

In the railroad crossing cases, the courts often modify the "stop, look, and listen" rule[3] by permitting a reliance by the plaintiff on the due care of the railroad. There seems to be a growing tendency to permit the traveler to place more reliance upon warning devices at railroad crossings.[4] The decisions are not in accord as to the extent of reliance allowed the motorist when there are warning devices present, some courts holding that the traveler is still obliged to use reasonable care by listening and looking, and therefore finding contributory negligence as a matter of law if the plaintiff relies exclusively on the assurance or invitation implied from the fact that the signals are not on at the time.[5] Other courts hold that contributory negligence is in this situation a question for the jury.[6]

In some jurisdictions the courts relieve the plaintiff from the duty of looking and listening by placing a strict duty upon the defendant by statute. In a recent New Jersey case[7] the court held that the motorist is absolved from the duty of stopping, looking and listening if the signal bell at the grade crossing is not working. This holding was based on the New Jersey statute[8] which in substance provides that any person approaching a crossing is entitled to assume the signals installed by the railroad are in proper order unless a written notice to the contrary is prominently posted. A

3. Mr. Justice Holmes in Baltimore & Ohio Ry. v. Goodman, 275 U.S. 66, 48 S. Ct. 24, 7 L. Ed. 167, 56 A.L.R. 645 (1927), attempted to "lay down a standard once for all," which would require an automobile driver approaching a railroad crossing with an obstructed view to stop, look and listen, and if he cannot be sure otherwise that no train is approaching, to get out of the car. In a long series of cases since that time the courts have rejected the "get out of the car" requirement, and have said that the driver need not always stop. As to whether or not a driver must always look and listen, the courts are not in accord.

4. Note, Warning Devices at Crossings, 2 Wyo. L. J. 138 (1947).

5. Muggenburg v. Leighton, 63 N.W.2d 533 (Minn. 1954). Cf. Summerlin v. Atlantic Coast Line R., 238 N. C. 438, 78 S.E.2d 162 (1953), in which it was held that plaintiff was contributorily negligent as a matter of law in a case in which the plaintiff contended she had a right to rely on a timely warning of the approach of a locomotive, either from a bell or from a headlight. Apparently this was due to the rule that a higher degree of care is required at unguarded crossings, as stated in supra note 4.

6. Gillan v. Chicago, N.S. & M. Ry., 1 Ill. App.2d 466, 117 N.E.2d 833 (1954); Gillies v. N. Y. Central R., 116 N.E.2d 555 (Ind App. 1954) (citing 75 C.J.S. 61).

7. Gibson et al. v. Pennsylvania R., 14 N. J. Super. 425, 82 A.2d 635 (1951).

8. N.J. Rev. Stat. § 48:12-84 (1937).

Georgia statute likewise seems to give the motorist a complete reliance.[9] That statute provides that the crew of a train "shall keep and maintain a constant and vigilant lookout" in corporate limits "to signal the approach by constantly tolling the bell" of the locomotive.

Most courts are unwilling to apply the reliance "doctrine" to the extent of declaring the plaintiff not guilty of contributory negligence as a matter of law. The policy behind this rule in the railroad cases seems to be that the courts are not willing to make the railroad the "insurer" of the motorist. At least, that is the argument the railroads advance against strict enforcement of statutes such as those in New Jersey and Georgia.[10]

Another rule which has proved to be much too stringent in certain circumstances is the so-called "range of vision" rule. The general statement of that rule is that it is the duty of a driver to correlate his speed to his range of vision. The trend of the cases seems to be to allow the plaintiff to rely in many instances on the highway being unobstructed, thereby modifying the strict range of vision rule.[11] Most courts permit reliance by the plaintiff to the extent that the question of contributory negligence is for the jury, but they refuse to go further and declare that reliance in these situations precludes a finding of contributory negligence as a matter of law. In a Kansas case,[12] decided in 1952, the defendant's truck was pulling a house mounted on dollies on a through highway at night, with no lights on the house. Since there was evidence that the plaintiff was traveling at a high rate of speed prior to the rear-end collision which occurred, the defense was violation of the range of vision rule. In holding that the question of contributory negligence was properly submitted to the jury, the court held that although it is true as a general rule that it is the duty of a driver to correlate his speed to his range of vision, it is also the rule that the operator of a vehicle may assume that others using the highway will observe the law, and therefore a driver acting upon such assumption is not guilty of negligence as a matter of law. In a Georgia case,[13] decided in 1949, the evidence showed a high rate of speed on the part of the plaintiff prior to a rear-end collision. The court held that a driver on the highway has the right to assume that others driving cars will observe the rules of law respecting lights upon the rear of their vehicle.[14]

9. Ga. Code, secs. 94-506 and 94-507 (1933), as interpreted in Southern Ry. v. Florence, 81 Ga. App. 445, 57 S.E.2d 856 (1950).

10. But see, supra note 4, argument that in a case in which the plaintiff stopped when wigwag signal was in operation, and then proceeded across the tracks after the wigwag stopped oscillating, the courts should rule that plaintiff is not guilty of contributory negligence as a matter of law.

11. Grunsfeld v. Yenter, 100 Colo. 570, 69 P.2d 309 (1937); Alt v. Kerbs, 161 Ore. 256, 88 P.2d 804 (1939); Davis v. Browne, 20 Wash.2d 219, 147 P.2d 263 (1944); Northwestern Transit, Inc. v. Wagner, 223 Ind. 447, 61 N.E.2d 591 (1945).

12. Fowler v. Mohl, 172 Kan. 423, 241 P.2d 517 (1952).

13. McDowall Transport, Inc. v. Gault, 80 Ga. App. 445, 56 S.E.2d 161 (1949).

14. Ibid. "It is not necessarily such a lack of ordinary care on the plaintiff's part as will defeat a recovery for the operator of a properly equipped automobile to drive it in the night at such a rate of speed that he cannot stop it within the limit of his

Another rule which has been modified in some situations by permitting reliance by the plaintiff is that based on statutes or ordinances dealing with right of way at intersections. Courts hold rather uniformly that because the plaintiff had the right of way does not excuse him from the exercise of reasonable diligence as he approaches an intersection to avert an accident made possible by the negligence of one approaching from a side street.[15] Yet some courts hold that a motorist on the right is not negligent in crossing an intersection in front of an automobile seen approaching from the left at an excessive speed, where that automobile has ample opportunity to slow down in time to avoid a collision, since the motorist on the right is justified in assuming that the driver on the left will slow down when nearing the intersection.[16] Conversely, if the plaintiff did not have the right of way at the time of the accident, the courts will sometimes disregard the right of way rule so as to allow the plaintiff to recover on the theory that he could rely on other drivers using due care.[17]

Another type of situation in which this problem of reliance may arise is when one of parties fails to observe the "rule of the road" requiring vehicles to keep to the right. In a recent Michigan case,[18] the plaintiff was driving on a straight, level U.S. highway on a clear day. He observed the defendant's car approaching from the opposite direction, on the plaintiff's side of the highway, for a distance of one-half mile, without any apparent reason or excuse. The plaintiff failed to slacken his speed, sound his horn, or turn further toward his side of the highway, or do anything to avert the collision until the two cars were 60 to 80 feet from each other. He then turned to the left, the defendant's car moved in the same direction, so the plaintiff turned back to the right, and the collision occurred well on the defendant's half of the highway. The trial court ruled that the plaintiff was guilty of contributory negligence, and granted the defendant's motion for judgment notwithstanding the verdict. The appellate court reversed, and held that the question of the existence of an emergency was for the

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vision ahead. . . . To hold otherwise would force the traveler to assume that the highway was liable to be obstructed and, in view of this, so to travel that he would not collide with any obstruction in the highway, however negligently they might have been created or maintained." The court also spoke in terms of the comparative negligence doctrine, but in view of the above-quoted language it would appear that the case was decided not on the basis of comparative negligence, but rather on the refusal of the court to apply strictly the range of vision rule, as opposed to the plaintiff's reliance on the highway being unobstructed.

15. E.g., Garner v. Brown, 31 Wyo. 77,. 223 Pac. 217 (1924).
16. Roddy v. Herren, 125 S.W.2d 1057 (Tex. Civ. App. 1939).
17. Ries v. Cheyenne Cab & Transfer Co., 53 Wyo. 104, 79 P.2d 468, 4 N.C.C.A. (N.S.) 342 (1938); Lewis v. Fireman's Ins. Co., 73 So.2d 669 (La. App. 1954). The Louisiana court stated that the case fell within the rule "so aptly stated" in Blashfield, Cyclopedia of Automobile Law and Practice, perm. ed., Vol. 2, par. 1029: "An automobilist, against whom the traffic regulations with respect to intersectional rights of way operate . . . is nevertheless not required to anticipate that a driver having the right of way will violate traffic regulations or will cross an intersection without slowing down as required by law. On the contrary, although not having the right of way, he is nevertheless entitled to assume that the approaching vehicles or drivers so favored are not approaching at a negligent rate of speed, or in violation of law, and may assume, until the contrary appears, that such a motorist will operate his car with the care ordinarily displayed. . . ."
18. Triestran v. Way, 286 Mich. 13, 281 N.W. 420 (1939).

jury, and that the plaintiff, after observing the defendant's car, had the right to assume that the driver thereof would also be looking and would guide the vehicle to the proper side of the road.

This rule would apparently be followed by the Wyoming courts, as adopted in the leading case of *O'Malley v. Eagan*.[19] In that case the defendant was held not liable because the plaintiff's driver was on the wrong side of the road. The evidence showed that when the defendant first saw the other car there was ample opportunity for the driver to get to his own side of the road. The court held that the defendant was not negligent in assuming that the other driver would turn to the proper side of the road in time to avoid the collision. This result was also reached in the recent case of *Dallason v. Buckmeier*,[20] an action arising out of a collision between the plaintiff's tank truck, which was in the wrong lane on a curve, and defendant's approaching automobile which struck the truck as the truck was returning to its own lane. In view of these cases it would seem reasonable to assume that a Wyoming court would allow a similar reliance on the part of the plaintiff in a situation in which the defendant was on the wrong side of the road.

Another type of case in which reliance by the plaintiff may present a problem is the situation in which a pedestrian is injured while crossing a street or highway at a place other than an authorized crosswalk. In a Vermont case,[21] the plaintiff was a woman sixty-five years old, and because of past illness had walked slowly for some time, and was somewhat bothered by street-lights at night. At the time of the accident it was dark and the street-lights were on, so the plaintiff attempted to cross the street a short distance away from the regular crosswalk. Just before she reached the middle of the street, she was hit by the defendant motorist, who according to plaintiff's testimony was going about thirty miles an hour. The court, in holding that the question of contributory negligence was for the jury, said that a pedestrian crossing a busy city street at night, though at a point some distance from a crosswalk, was not obliged to exercise constant vigilance, and that the plaintiff was entitled to assume that an approaching motorist would exercise the care required of him by law.

However, in a similar case in Connecticut,[22] the court held that the test is whether the pedestrian, if not on the crosswalk, is so near to it that the motorist should anticipate the likelihood of his presence. If the test is followed, the pedestrian could rely on due care of the motorist in situations of this sort only if he is reasonably close to a crosswalk or regular place of crossing. In other words, some courts would severely limit this "doctrine"

19. 43 Wyo. 233, 2 P.2d 1063, 77 A.L.R. 582, rehearing denied, 43 Wyo. 350, 5 P.2d 276, 77 A.L.R. 582 (1931); cf. McKicker v. Kuronen, 71 Wyo. 222, 256 P.2d 111 (1953).

20. 284 P.2d 386 (Wyo. 1955).

21. Hill v. Stringer, 116 Vt. 296, 75 A.2d 657 (1950); cf. Martin v. Statler, 370 Pa. 293, 88 A.2d 46 (1952).

22. Degnan v. Olson, 136 Conn. 171, 69 A.2d 642 (1949).

of reliance in these cases. It would seem to be the growing trend, however, to allow the plaintiff in these cases to rely on the defendant's due care to the extent that the question of contributory negligence is for the jury, without regard to the "proximity" test.[23]

In conclusion, no general prediction can be made as to when a court will choose to allow reliance by the plaintiff to overcome a defense of contributory negligence in any particular type of case. Nor can it be said how a Wyoming court would regard this theory in any of the situations discussed, with the possible exception of a case like *O'Malley v. Eagan*. However, at least it can be said that this theory of reliance is another tool for use by the plaintiff's counsel in dealing with the problem of contributory negligence. In line with the increasing reluctance on the part of the courts to apply strict fault concepts in automobile accident litigation, it should prove a most useful tool.

JERALD E. DUKES

WHAT EVIDENCE SHOULD BE SUBMITTED TO THE JURY WHEN THE DEFENDANT PLEADS GUILTY TO MURDER IN THE FIRST DEGREE?

Prior to 1915 the statute[1] in Wyoming on first degree murder provided only for the punishment of death, i.e., anyone found guilty of murder in the first degree to suffer death. In that year the State Legislature appended the words "but the jury may qualify their verdict by adding thereto 'without capital punishment' and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment, at hard labor for life."[2]

One of the first cases to apply this revised statute was *State v. Best*.[3] In that case the defendant changed his plea of not guilty to guilty. The Judge questioned the defendant as to his realization of the import of his plea, and then announced that evidence would be taken for the purpose of enabling the jury to fix the punishment. The evidence was heard and the jury returned an unqualified verdict of murder in the first degree. The defendant appealed from this verdict, contending that his plea of guilty

23. Orth v. Gregg, 217 Iowa 561, 250 N.W. 113 (1933); Mazzaferro v. Dupius, 321 Mass. 718, 75 N.E.2d 503 (1947); cf. Byrne v. Dunn, 296 Mass. 184, 5 N.E.2d 10 (1936) in which the plaintiff was walking in the street on the right side because of ice on the sidewalks. See also, Clouatre v. Lees, 321 Mass. 679, 75 N.E.2d 242 (1947) in which plaintiff, a boy of 16, rode a bicycle out into a street from a driveway between a store and a filling station. The court held that since there was a school in the vicinity, the plaintiff "was entitled to take into account the probability that motorists would regard the presence of the school and the liklihood that school children would be encountered."

1. Wyo. Comp. Stat. sec. 5789 (1910).
2. Wyo. Laws 1915, c. 87 sec. 1. This statute has been carried forward, unchanged, to the present time. See Wyo. Rev. Stat. sec. 31-201 (1931), Wyo. Comp. Stat. sec. 9-201 (1945).
3. State v. Best, 44 Wyo. 383, 12 P.2d 1110 (1932).