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Negligence -- Contributory Negligence -- Outrunning Headlights as --

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in this state is a failure to state a cause of action.[48] The legislative handicap of having to give notice is enough to inflict upon a plaintiff, but to judicially handicap by placing the burden of pleading notice on him is to slap his cheek the second time. It would seem that the municipality which has been given such a fine legal weapon should be required to utilize it, pleading failure to give notice within the period specified as with other statutes of limitation. This would be in accord with modern pleading tendencies to remove pitfalls in the way of honest claimants.

If notice requirements are to be retained, there is need for a notice statute of general application, for all municipalities should be accorded the protection afforded by prior notice if it is a justified municipal safeguard. It would be to the interest of the bench, bar, and the public generally to be rid of the galaxy of varying requirements now found in our charters in favor of a requirement which would not make the charter of the particular city where the injury occurs such an important consideration. Such a step would remove much of the difficulty in construction and serve to inform the public generally of the uniform hurdle that all must face in suing a municipality in North Carolina. The following statute is proposed:

> **It shall be a good defense to an action brought against a city or town for injury to person or property sustained by reason of the negligence of the city or town, that a written statement of the time and place where the injury was received, the nature of the injury, and the amount of damages claimed was not filed with the city or town attorney or the mayor within 90 days after the injury occurred: Provided, where the person injured is an infant or non compos mentis such statement may be filed within 180 days: Provided, further, that where the action is for wrongful death the statement may be filed within 180 days of the date of death. All charter provisions for notice of injury or presentation of tort claims to the city or town applicable to tort injuries are hereby repealed.**

LEONARD STEWART POWERS.

Negligence—Contributory Negligence—Outrunning Headlights as—

The evidence of the plaintiff tended to show that he was driving 40 to 45 miles per hour along a highway on a clear night, and that he had just rounded a long curve and traveled over the crest of a small hill when his automobile collided with an unlighted truck which was

[48] MACINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §389 (1929).

parked on the other side of the hill. The plaintiff did not see the truck in time to stop or turn to the left before striking it. There was no traffic approaching from the opposite direction. *Held:* Nonsuit on the grounds of contributory negligence was proper since the plaintiff's evidence disclosed that he "outran his headlights" and that he was inattentive to the duty required of him for his own safety when he rounded the curve and topped the hill at a high rate of speed.[1]

The laws of the road have developed on the theory that every driver owes every other driver a duty to observe the statutes regulating travel on the highways. These statutes enter into and become a part of the measure of prudent conduct among drivers, and one who uses the highways is permitted by the law to put some reliance on the statutes being complied with by others. If the law were otherwise, one could not venture upon the highways without protecting himself from every conceivable danger and every driver would become an insurer of his own safety.[2]

The Supreme Court of North Carolina has had an opportunity to apply this theory many times in situations similar to that of the subject case. In fact, two other very recent decisions have involved rear-end collisions of this sort.[3]

When a car traveling upon the highway collides with an unlighted truck parked upon the hard surface, the negligence of the truck driver is usually easy of proof, especially in a state which requires by statute that flares or lights be set out a specified distance down the highway to warn approaching cars.[4] The question then becomes one of whether the driver of the moving car has exercised due care on his own part. In considering this question it is accepted that the car driver is permitted to rely to some extent upon a compliance by the truck driver with this requirement of giving warning, but on the other hand it has become a well established general rule of law in the courts of this country that it is negligence for one to drive a motor vehicle at such a rate of speed that it cannot be stopped in time to avoid an obstruction discernible within the range of his vision ahead.[5]

The application of this rule to situations similar to that of the subject case has developed along two general lines. In some states the rule has been made statutory, and applied strictly to bar a recovery by

[1] Tyson v. Ford, 228 N. C. 778, 47 S. E. 2d 251 (1948).
[2] Cummins v. Southern Fruit Co., 225 N. C. 625, 36 S. E. 2d 11 (1945).
[3] Riggs v. Gulf Oil Corp., 228 N. C. 774, 47 S. E. 2d 254 (1948); McKinnon v. Howard Motor Lines, 228 N. C. 132, 44 S. E. 2d 735. (1948).
[4] See N. C. GEN. STAT. §20-161 (1943).
[5] Fisher v. O'Brien, 99 Kan. 621, 162 Pac. 317 (1917); Spencer v. Taylor, 219 Mich. 110, 188 N. W. 461 (1922); Serfas v. Lehigh R. R., 270 Pa. 306, 113 Atl. 370 (1921); West Construction Co. v. White, 130 Tenn. 520, 172 S. W. 301 (1914); Nikoleropoulous v. Ramsey, 61 Utah 465, 214 Pac. 304 (1923); HUDDY, AUTOMOBILES §396 (8th ed. 1927).

anyone driving a motor vehicle after dark who collides with an unlighted vehicle ahead.[6] Other courts, in states where there is no such statute, have felt that the rule should not be applied as an arbitrary measure of the driver's fault, and have allowed a much greater scope of inquiry. These jurisdictions feel that the court should not set up a rule that the question of negligence on a given state of facts is almost entirely one of law.[7] The rule is therefore given to the jury, to be applied by them in the light of conditions surrounding the accident. Speed, visibility, topography of the road, color of the truck, and other factors may then be considered, and the standard of the reasonable and prudent man retains its fluidity. This seems to be the preferable application, since the issue of contributory negligence is ordinarily for the jury,[8] and the court should not take the case away from the jury where there is any evidence opposing contributory negligence in the plaintiff's proof.[9] At least one jurisdiction has taken a different approach to the same situation and has found the truck driver to be guilty of a gross disregard of the rights of others when he leaves his truck stopped and unlighted on the highway, thus depriving him of his right to rely upon the contributory negligence of the plaintiff to defeat recovery.[10]

The North Carolina Supreme Court first adopted the rule that it was negligence to outrun one's headlights in 1927 in *Weston v. Southern Ry.*,[11] which involved a collision between an automobile moving along the highway and an unlighted freight train standing upon a grade crossing. The plaintiff driver of the car was held to be contributorily negligent as a matter of law. Two years later the court was called upon to decide whether it could be said as a matter of law that the plaintiff was contributorily negligent when the evidence showed that he had run into the back of an unlighted truck parked on the concrete portion of the highway.[12] The court noted its decision in the *Weston* case, but instead of applying the rule against "outrunning the headlights" fell back upon the general standard of the reasonable and prudent man, and finding that there were "opposing inferences permissible from the plaintiff's proof," held that the issue of contributory negligence was properly

[6] See *e.g.*, Lindquist v. Thierman, 216 Iowa 170, 248 N. W. 504 (1933); Curtis v. Hubbel, 42 Ohio App. 520, 182 N. E. 589 (1932).

[7] Rozycki v. Yantic Grain and Products Co., 99 Conn. 711, 122 Atl. 717 (1923); Hanno v. Motor Freight Lines, 17 La. App. 62, 134 So. 317 (1931); Chaffee v. Duclos, 105 Vt. 384, 166 Atl. 2 (1933).

[8] Lincoln v. Atlantic C. L. Ry., 207 N. C. 787, 178 S. E. 189 (1935).

[9] Battle v. Cleve, 179 N. C. 112, 101 S. E. 555 (1919).

[10] Inter-City Trucking Co. v. Daniels, 181 Tenn. 126, 178 S. W. 2d 756 (1944).

[11] 194 N. C. 210, 139 S. E. 237 (1927).

[12] Williams v. Frederickson Motor Express Lines, 198 N. C. 193, 151 S. E. 197 (1929) (plaintiff's evidence was that he did not see the unlighted truck until he was within five or ten feet because his lights were adjusted down).

submitted to the jury. For some years thereafter the court used the same approach in similar rear-end collision cases.[13]

In 1940 the court indicated a change of attitude. In *Clarke v. Martin*[14] the usual result of the previous cases was followed in sustaining the denial of the motion for nonsuit of the plaintiff's case. But the court found error in the failure of the trial judge to direct the jury to find the plaintiff guilty of contributory negligence if they found from the evidence that the plaintiff was traveling at such speed that he could not stop within a "much greater" distance than he could see. The *Weston* case was quoted at length and the principle enunciated there was held to be applicable to the case at bar. That same year in *Beck v. Hooks*[15] a denial of a motion for non suit in the trial court was reversed on the authority of the *Weston* case. The court split four to three on the decision, and Justice Clarkson, writing the dissent, vigorously protested against what he interpreted to be a departure from "the rule of reasonable prudence" and a substitution for it of a "mathematical form." In his opinion, the rule required an "instant recognition of danger when, through the highest degree of diligence and altertness, it [the truck] might have been seen."[16]

Whether Justice Clarkson's fears are to be realized remains to be seen. In some of the rear-end collision cases decided since the *Beck* case, the court still speaks in terms of each case being decided on its own facts.[17] That would allow the court to consider conditions surrounding the accident in determining whether the driver has exercised prudent care, rather than nonsuiting the plaintiff as a matter of course because he had hit an unlighted truck from the rear. At least one case

[13] Lambert v. Caronna, 206 N. C. 616, 175 S. E 303 (1934) (plaintiff traveling at 30 to 35 mph tipped his lights down just before he hit rear of car parked on highway); Cole v. Koonce, 214 N. C. 188, 198 S. E. 637 (1938) (plaintiff traveling 25 miles per hour on foggy night with visibility of 30 yards); Clarke v. Martin, 215 N. C. 405, 2 S. E. 2d 10 (1939) (motion for non-suit properly denied though plaintiff's evidence showed he was traveling at a speed of about 25 mph and visibility was restricted by fog and ice to 10 or 15 feet); Page v. McLamb, 215 N. C. 789, 3 S. E. 2d 275 (1939) ("There was allegation and evidence tending to prove that the defendant's truck was parked at least partially on the hard surface of the road in the nighttime without lights either in front or rear, and that the driver of the plaintiff's tractor did not observe the truck in time to avoid colliding with it. This was sufficient to deny the defendant's motion for nonsuit").

[14] 217 N. C. 440, 8 S. E. 2d 230 (1940).

[15] 218 N. C. 105, 10 S. E. 2d 608 (1940) (plaintiff traveling 40 mph on straight road, was blinded by passing car, took foot off accelerator and was traveling 15 or 20 mph when he hit the truck).

[16] *Id.* at 115.

[17] Tyson v. Ford, 228 N. C. 778, 47 S. E. 2d 251 (1948) ("No factual formula can be laid down which will determine in every instance the person legally responsible for a rear end collision on a highway at night between a standing vehicle and one that is moving"); Cummins v. Southern Fruit Co., 225 N. C. 625, 36 S. E. 2d 11 (1945) ("A much broader view of the occurrence and its component and related factors is necessary to determine whether the plaintiff failed to exercise ordinary prudence under the circumstances and conditions which prevailed at the time of the collision.").

indicates that the standard of the reasonable and prudent man definitely has not been abandoned for a "mathematical form."[18] Still it must be noted that most of the rear-end collision cases decided since the *Beck* case have ended in nonsuit on the grounds of contributory negligence, and each time the court has grounded its decision in whole or in part upon the fact that the plaintiff had been outrunning his headlights.[19] The same result might have been reached in these latter cases if the standard of prudent care alone had been applied. Be that as it may, the fact remains that so long as decisions are made in terms of a standard that may be arbitrarily applied, there is danger that the standard itself will in time become a mechanical rule and embodied in our law as such to the exclusion of a rule of reason under pressure of these decisions.

Recent cases give some indication of the weight to be given conditions existing at the time of the collision as affecting the plaintiff's chances of getting to the jury. It would seem that a driver is not required to slow or attempt to stop when he is momentarily blinded by a passing car, especially when the blinding occurs just before the accident takes place.[20] On the other hand, to travel for as much as two or three seconds, or for as far as 100 feet while blinded is contributory negligence as a matter of law.[21] The color of the truck is a factor and if it is greyish, or mud-splattered, or film-covered so as to blend into the background, it is a point in the plaintiff's favor, for he is less likely to be put on notice of its presence.[22] Sometimes the height of the truck body above the ground has been considered, where the car's lights were tipped downward and did not readily disclose the body of the truck. But this favors the plaintiff only if he was forced to slant his lights because he passed a car just before the accident. To drive with the lights tipped downward when there is no passing traffic is negligence.[23] The presence of smoke or fog on the highway seems to be treated as putting the driver on notice of danger.[24]

The subject case points up the effect which the court will give to the presence of curves and hills in the road just before the place of the accident. The plaintiff's evidence showed that he was traveling under otherwise perfect conditions when he went around a curve and over a

[18] Cummins v. Southern Fruit Co., *supra* note 17.

[19] Sibbitt v. R. & W. Transit Co., 220 N. C. 702, 18 S. E. 2d 703 (1941); Pike v. Seymour, 222 N. C. 42, 21 S. E. 2d 884 (1942); Caulder v. Gresham, 224 N. C. 402, 30 S. E. 2d 312 (1944); McKinnon v. Howard Motor Lines, 228 N. C. 132, 44 S. E. 2d 735 (1948) (by implication); Riggs v. Gulf Oil Co., 228 N. C. 774, 47 S. E. 2d 254 (1948); Tyson v. Ford, 228 N. C. 778, 47 S. E. 2d 251 (1948).

[20] Cummins v. Southern Fruit Co., 225 N. C. 625, 36 S. E. 2d 11 (1945).

[21] McKinnon v. Howard Motor Lines, 228 N. C. 132, 44 S. E. 2d 735 (1948).

[22] Cummins v. Southern Fruit Co., 225 N. C. 625, 36 S. E. 2d 11 (1945).

[23] Pike v. Seymour, 222 N. C. 42, 21 S. E. 2d 884 (1942).

[24] Riggs v. Gulf Oil Co., 225 N. C. 625, 36 S. E. 2d 11 (1945); Sibbitt v. R. & W. Transit Co., 220 N. C. 702, 18 S. E. 2d 703 (1941).

small hill, and collided with an unlighted truck just below the crest of the hill. In its decision, the court pointed out that, by statute, curves and hills are conditions a motorist is required to consider in regulating his speed "as may be necessary to avoid colliding with any person, vehicle, or other conveyance."[25] That requirement, considered in conjunction with the rule of the *Weston* case was held to be one of the two circumstances which prevented the plaintiff from getting to the jury. The other was evidence of the inattentiveness of the driver. The court did not indicate whether the first circumstance alone would have been sufficient to support its decision. If so, and if the case is later interpreted to mean that it is negligence as a matter of law to drive around a curve and over the crest of a hill on a clear night at a speed of 40 to 45 miles per hour, then it would seem that the court has taken a step toward the adoption of a mathematical formula for the solving of these rear-end collision cases.

LEMUEL H. GIBBONS.

Trusts—Duration—Rule against Perpetuities

A died in 1923 leaving property by will in trust for his son *B*, with a power of appointment in *B* by will, the property to go to *B's* children if he died intestate. *B*, a widower, died, in 1945, leaving one-half the property to his two infant children upon their reaching age 25 and the other half in trust for them for life with power to appoint by will to a class or a charity. Upon the trustee's request for instructions, *held*, the children take the property free of the trust and the power; the equitable life estates would probably last longer than 21 years after the death of *B* and thus violate the Rule against Perpetuities.[1]

There is a difference of opinion as to the point in time when the period of the rule against remoteness of vesting begins to run, where there is a general power of testamentary disposition. Some authorities maintain that the period starts when the power is exercised, because the donee could appoint to his estate, which is practically like appointing to himself.[2] Others claim that it is just like any other special power because of the inability to appoint to oneself and that it should start when the power was created, either by deed or will.[3] The weight of

[25] Tyson v. Ford, 228 N. C. 778, 781, 47 S. E. 2d 251, 252 (1948).

[1] American Trust Co. v. Williamson, 228 N. C. 458, 46 S. E. 2d 104 (1948).

[2] Miller v. Douglass, 192 Wis. 486, 213 N. W. 320 (1927); Rous v. Jackson, 29 Ch. D. 521 (1885); KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS §695 (2d ed. 1920).

[3] De Charette v. De Charette, 264 Ky. 525, 94 S. W. 2d 1018 (1936); Hawkins v. Ghent, 154 Md. 261, 140 Atl. 212 (1928); Minot v. Paine, 230 Mass. 514, 120 N. E. 167 (1918); *In re* Lewis' Estate, 349 Pa. 571, 37 A. 2d 482 (1944); *In re* Warren's Estate, 320 Pa. 112, 182 Atl. 396 (1936); *In re* Powell's Trusts, 39 L. J. Ch. 188 (1869); GRAY, THE RULE AGAINST PERPETUITIES §526 (4th ed. 1942); ROOD, A TREATISE ON THE LAW OF WILLS 779 (2d ed. 1926); 2 SIMES,