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Torts -- Contributory Negligence as a Matter of Law -- A Threat to Stare Decisis

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department is busily putting limited access signs on many of our newer highways.³⁴ Either the highway department is proceeding under a conviction that power to designate limited access highways is implied in the general grant of powers to that department, a conviction which hardly seems tenable, when we consider our court's traditional solicitude for individual rights,³⁵ or the North Carolina highway department is making an attempt to bluff abutters into a belief that they have lost rights which have, in fact, always been theirs. Let us hope that if these acts are tested in the courts, as they should be, the commission will be able to offer convincing evidence of its authority to designate Limited Access Highways in North Carolina.

HAMILTON C. HORTON, JR.

Torts—Contributory Negligence as a Matter of Law—A Threat to Stare Decisis

In broad daylight the plaintiff-pedestrian, who had looked both ways and had seen no vehicle approaching, started across the open highway and was struck by defendant-motorist eighteen inches from the other side; the motorist was traveling only twenty to twenty-five miles per hour and the plaintiff had clear visibility for 700 feet. The Supreme Court reversed the judgment for the plaintiff on the ground that he was contributorily negligent as a matter of law.¹ Judge Bobbitt, dissenting,² thought that there was more reason for submitting this case to the jury than there was in the similar case of *Williams v. Henderson*,³ because more evidence of due care was shown here. The principal case attempted to distinguish the *Williams* case,⁴ but did not seem to

Chapel Hill.) an inquiry as to the authority under which the Commission was constructing Limited Access Highways.

³⁴ Typical are those erected on the Durham-Chapel Hill highway: "Limited Access Highway. Entrance by permit only. S. H. & P. W. C."

³⁵ The Minnesota Court, in *Petition of Burnquist*, 220 Minn. 48, 19 N. W. 2d 394 (1945), reviews the question of whether statutory authority is necessary and tabulates those states which are with and those without statutes. That court found a statute unnecessary, construing the general grant of power to determine what "land" to acquire, to include all interests growing out of land, including easements of access. The great majority of states, however, obviously felt a specific statute necessary: *e.g.*, ILLINOIS ANNO. STAT. c. 121 § 334 *et seq.* (Supp. 1954); ANNO. LAWS OF MASS. c. 81 § 7c (1953); N. Y. CODE ANNO. c. 248 § 30.4 (1937); OHIO GEN. CODE § 1178-21 (Page 1946); ORE. LAWS c. 226 § 14 (1947).

¹ *Garmon v. Thomas*, 241 N. C. 412, 85 S. E. 2d 589 (1954).

² *Id.* at 418, 85 S. E. 2d at 593.

³ 230 N. C. 707, 55 S. E. 2d 462 (1949). Plaintiff's intestate crossed the open highway to go to her mail box. As she was standing at the box with her back to the road two trucks were approaching, the second following the first at a short distance. The first truck passed and she turned suddenly and walked in front of the second truck. The court held that intestate was not contributorily negligent as a matter of law.

⁴ *Garmon v. Thomas*, 241 N. C. 412, 416, 85 S. E. 2d 589, 592: "Here the

succeed. In effect, it seems that the *Williams* case was overruled, or at least restricted to its own peculiar facts.

In looking at other cases in this area disharmony is also found.⁵ It seems that the phrase "contributory negligence as a matter of law" is readily applied to justify opposite results in cases with similar facts. According to a recent writer, the phrase "explains nothing and succeeds only in creating an aura of mystery about the entire decision."⁶

defendant was operating his heavily loaded truck at 45 to 50 miles per hour within 150 feet of the vehicle just ahead. As the road was straight he saw or should have seen the deceased on the shoulder of the highway, standing at the mail box before the first truck passed her. She had her back to him and was apparently oblivious to his approach. Yet he did not slacken his speed or apply his brakes or sound his horn. These circumstances present a case for the jury.⁷ One would think that being "oblivious" while crossing a highway would be contributory negligence as a matter of law; here deceased's oblivion was the very thing that got plaintiff's case to the jury. It seems, therefore, that the only way to reconcile the *Garmon* and *Williams* cases is to think in terms of last clear chance for the *Williams* case.

⁵ The following cases held that plaintiff was contributorily negligent as a matter of law: *Garmon v. Thomas*, 241 N. C. 412, 85 S. E. 2d 589 (1954). *Badders v. Lassiter*, 240 N. C. 413, 82 S. E. 2d 357 (1954). Wife of plaintiff stopped at the intersection as she was coming out of a servient road and after seeing defendant-motorist approaching from her right about a block away she changed to low gear and went across the intersection at a speed of five miles per hour and did not again look to her right or hear anything until the impact. *Singletary v. Nixon*, 239 N. C. 634, 80 S. E. 2d 676 (1954). Plaintiff's lights and brakes were adequate when he ran into the defendant truck-trailer as it was backing off the road into a terminus. *Johnson v. Heath*, 240 N. C. 255, 81 S. E. 2d 657 (1954). Plaintiff who had allegedly never seen the mule drove his automobile into same on a bright moonlight night without slackening his pace or turning to the left when there was nothing in the left lane to prevent such. *Sheldon v. Childers*, 240 N. C. 449, 82 S. E. 2d 396 (1954). Plaintiff's evidence tended to show that he was driving his automobile about 50 miles per hour, following defendant's tractor-trailer, and when he was about 400 feet to the rear of defendant's vehicle, with a clear view ahead, he blew his horn and turned into the left lane to pass, and when he was about 200 feet behind the tractor-trailer, it pulled into the left lane to enter a dirt road on its left and stopped, blocking all but about two and one-half feet of hard surface on plaintiff's left and about five feet of hard surface and six feet of shoulder level with the pavement on plaintiff's right over which he could have passed. Plaintiff applied his brakes, and there were skid marks for 157 feet before his automobile hit the trailer and stopped.

The following cases held that plaintiff was not contributorily negligent as a matter of law: *Williams v. Henderson*, 230 N. C. 707, 55 S. E. 2d 462 (1949). *Hamilton v. Henry*, 239 N. C. 664, 80 S. E. 2d 485 (1954). Plaintiff-motorist, after looking and seeing no other vehicles, slowed down to twenty miles per hour as he entered an intersection. After getting inside the intersection he saw defendant-motorist coming at him to his left about 100 feet away at the rate of about 50 miles per hour, and the left front of defendant's vehicle crashed into the left rear of plaintiff's vehicle as plaintiff's vehicle was two-thirds of the way across the intersection. There was some evidence that just prior to the collision defendant had been looking out of his side window. (Note the similarity between this case and the *Garmon* case, and the fact that the plaintiff in the *Garmon* case was almost across the highway.) *Goodson v. Williams*, 237 N. C. 291, 74 S. E. 2d 762 (1953). Defendant-motorist struck deceased pedestrian just before deceased had cleared the hard surface on defendant's right. Just before the collision defendant had met another car whose headlights had blinded him, and defendant did not see deceased until he was about five feet away. *Bryant v. Watford*, 240 N. C. 333, 81 S. E. 2d 926 (1954). Defendant stopped his truck on the highway at night without lights and plaintiff-motorist ran into back of the truck.

⁶ Note, 33 N. C. L. REV. 138, 142 (1954).

Courts have no trouble with the general rule, for that is established beyond doubt.⁷ The real problem of the court is determined whether or not more than one reasonable inference as to negligence may be drawn from the facts. Courts in any jurisdiction that still retains contributory negligence as a defense have trouble at this point,⁸ whereas, jurisdictions that have comparative negligence have no such problem.⁹ The "reasonable deductions" or "reasonable inferences" that may be drawn from a given set of facts will naturally vary, for such reasoning is subjective in nature—although the objective "reasonable man" is the ultimate criterion. It would take one with divine omniscience to explain why a certain inference is the only permissible one the "reasonable man" would draw in a given case. Split decisions in this area indicate that judges disagree as to when only one inference may be drawn.¹⁰

⁷ 65 C. J. S. § 251 (3) at 1126; DEERING, LAW OF NEGLIGENCE § 12 (1886); BARROWS, HANDBOOK ON THE LAW OF NEGLIGENCE, 35 (1900): "Nor should the court withdraw the case from the jury for the reason that to its mind the facts were so weak as to give no support to the proposition of negligence, either of plaintiff or defendant. The question is, rather, are the facts so weak in the estimate of fair, sound minds, that the law would not tolerate a verdict founded upon them. If but one inference can be drawn from the evidence, it is, of course, purely a question of law for the decision of the court." SALMOND, THE LAW OF TORTS 38 (1924). Garmon v. Thomas, 241 N. C. 412, 85 S. E. 2d 589 (1954). Bartek v. Grossman, 365 Pa. 522, 52 A. 2d 209 (1947). Sargent v. Williams, 152 Tex. 413, 258 S. W. 2d 787 (1953).

⁸ Bartek v. Grossman, 365 Pa. 522, 52 A. 2d 209 (1947), commented on in Note, 21 TEMP. L. Q. 66 (1947). Prospective lessee followed defendant's agent into a dark room to inspect the house he was thinking about renting and fell into a trap door, *held*, contributory negligence as a matter of law. Gills v. New York, C. & St. L. R. Co., 342 Ill. 455, 174 N. E. 523 (1930), commented on in Note, 26 ILL. L. REV. 453 (1931). Plaintiff-motorist waited for the eastward train to pass, and then proceeded across the tracks where he was struck by a westward train along the outer track which train had given no warning, *held*, no contributory negligence as a matter of law: since where there is any evidence which tends to show the use of due care, the question of contributory negligence is one for the jury. Sargent v. Williams, 152 Tex. 413, 258 S. W. 2d 787 (1953), commented on in Notes, 5 BAYLOR L. REV. 391 (1954) and 32 TEX. L. REV. 469 (1954). Two girls, aged 13 and 14, voluntarily rode with a 13 year old boy, who drove 110 miles per hour, and who had a reputation for recklessness, *held*, the girls were contributorily negligent as a matter of law. See strong dissent. 152 Tex. 413, 422, 258 S. W. 2d 787, 791.

⁹ Jurisdictions that have abolished contributory negligence as a defense and now have comparative negligence simply submit the case to the jury, in every instance, and let the jury determine what percentage of the total damage was attributable to the negligence of the respective litigants. See Note, 24 N. Z. L. J. 300 (1948). For a suggested comparative negligence law for North Carolina see: *Proposals for Legislation in North Carolina* 11 N. C. L. REV. 51, 52, 59 (1932). Such a statute has been introduced a number of times before the North Carolina General Assembly, the last time being in 1953, and has always been defeated.

¹⁰ The following are some of the recent split-decisions: Garmon v. Thomas, 241 N. C. 412, 85 S. E. 589 (1954); Winfield v. Smith, 230 N. C. 392, 53 S. E. 2d 251 (1949); McIntyre v. Monarch Elevator Co., 230 N. C. 539, 54 S. E. 2d 45 (1949); Powell v. Lloyd, 234 N. C. 481, 67 S. E. 2d 664 (1951); Badders v. Lassiter, 240 N. C. 413, 82 S. E. 2d 357 (1954); Singletary v. Nixon, 239 N. C. 634, 80 S. E. 2d 676 (1954); Beck v. Hooks, 218 N. C. 105, 10 S. E. 2d 608 (1940); Bartek v. Grossman, 365 Pa. 522, 52 A. 2d 209 (1947); Sargent v. Williams, 152 Tex. 413, 258 S. W. 2d 787 (1953).

At one time the court would automatically declare plaintiff contributorily negligent as a matter of law when he "outran his headlights."¹¹ This was called the "mathematical rule" or "mathematical formula."¹² In effect, the "mathematical rule" said that contributory negligence is the only inference that may be drawn where plaintiff "outran his headlights." There was opposition to the "rule" in the courts,¹³ and writers were critical of it.¹⁴ In 1953 the General Assembly saw fit to abolish the "mathematical rule" by amending G. S. § 20-141.¹⁵

The "mathematical rule" as applied to "outrunning headlights" cases was commendable in that litigants would know what the court would hold once it was established that plaintiff had been "outrunning his headlights." But the obvious fallacy to such a rule is that there may be "outrunning headlights" situations in which the plaintiff is not guilty of contributory negligence. Such being true, the "rule" clearly violates the single inference idea. By nature, then, it seems that the rule of "contributory negligence as a matter of law" defies any such restrictions as the "mathematical formula."

Failure to yield the right of way on the open highway has been held not to be contributory negligence per se,¹⁶ and contributory negligence of the pedestrian is not presumed from the mere fact that he is killed.¹⁷ Therefore, it seems that anything like the "mathematical rule" is excluded from this area.

Rules such as the "mathematical formula" have been applied to other areas. In the famous case of *Baltimore & Ohio R. R. v. Good-*

¹¹ *Beck v. Hooks*, 218 N. C. 105, 10 S. E. 2d 608 (1940). See also *Tyson v. Ford*, 228 N. C. 778, 47 S. E. 2d 251 (1948); *Cox v. Lee*, 230 N. C. 155, 52 S. E. 2d 355 (1949); and *Chaffin v. Brame*, 233 N. C. 377, 64 S. E. 2d 276 (1951).

¹² Notes, 27 N. C. L. Rev. 153 (1948) and 31 N. C. L. Rev. 412, 415 (1953).

¹³ *Beck v. Hooks*, 218 N. C. 105, 115, 116, 10 S. E. 2d 608, 614 (1940). Clarkson, J. (dissenting), joined by Seawell and Devin, J. J., said: "It was not the intention of the court that this case should depart from the rule of reasonable prudence and substitute for it a mathematical form. . . . The practice of making out a case against the plaintiff on his evidence taken as a whole is unwarranted in an appellate court, necessarily involving a consideration of the weight of testimony. For the same reason it is even worse to make out a case against him upon the defendant's evidence, however uncontradicted."

¹⁴ See note 12 *supra*.

¹⁵ N. C. GEN. STAT. § 20-141 subsection (e) was amended to provide, "that the failure or inability of a motor vehicle operator who is operating such vehicle within the maximum speed limits prescribed by G. S. § 20-141 (b) to stop such vehicle within the radius of the lights thereof or within the range of his vision shall not be considered negligence per se or contributory negligence per se in any civil action, but the facts relating thereto may be considered with other facts in determining the negligence or contributory negligence of such operator." See *Gantt v. Hobson*, 240 N. C. 426, 82 S. E. 2d 384 (1954) where inability of motorist to stop within the radius of his lights was held not to be insulating negligence.

¹⁶ *Simpson v. Curry*, 237 N. C. 260, 74 S. E. 2d 649 (1953).

¹⁷ *Goodson v. Williams*, 237 N. C. 291, 74 S. E. 2d 485 (1953).

man,¹⁸ Justice Holmes delivering the opinion, it was decided that before crossing a railroad track the motorist must stop, look, listen and get out of vehicle if necessary. Six years later *Pokora v. Wabash Ry* overruled the Goodman case, Justice Cardozo saying:

"If the driver leaves his vehicle when he nears a cut or curve, he will learn nothing by getting out about the perils that lurk beyond. By the time he regains his seat and sets his car in motion, the hidden train may be upon him."¹⁹

The opinion criticized "rules artificially developed, and imposed from without."²⁰ The 1937 General Assembly of North Carolina—no doubt with the *Pokora* case in mind—passed two statutes which provided that failure of the motorist to stop at railroad crossings²¹ or to stop before entering a main highway from a servient road²² is not to be considered contributory negligence per se.²³ In view of those two statutes and the recent amendment to G. S. § 20-141, the North Carolina courts should be less prone to nonsuit plaintiffs on the ground of contributory negligence as a matter of law.

There is no simple solution to the problem. As long as we retain the rule that certain cases are to be resolved by the court pursuant to the single inference idea we are going to have close decisions, frustrated litigants, and sometimes actual violations of the jury's prerogative—not to mention irreconcilable cases. One solution might be the General Assembly's passage of a comparative negligence law, in which event negligence would always be a jury question.²⁴ At least we would have stare decisis unencumbered in that every case would go to the jury.

As the rule of contributory negligence as a matter of law remains in use we may as well reconcile ourselves to inconsistent and irreconcilable cases.²⁵ At present it seems that the only thing that we can

¹⁸ 275 U. S. 66 (1927). See Note, 43 HARV. L. REV. 926 (1930).

¹⁹ 292 U. S. 98, 104 (1933).

²⁰ *Id.* at 105 (after giving illustrations of hazards involved in leaving the vehicle to observe the track): "Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without."

²¹ N. C. GEN. STAT. § 20-143.

²² N. C. GEN. STAT. § 20-158.

²³ Nonsuit of the plaintiff for failure to stop before entering a main road is proper if plaintiff is contributorily negligent as a matter of law. *Badders v. Lassiter*, 240 N. C. 413, 82 S. E. 2d 357 (1954).

²⁴ Note, 24 N. Z. L. J. 300 (1948) and *Proposals for Legislation in North Carolina* 11 N. C. L. REV. 51, 52 (1932).

²⁵ Those who dislike the confinement of consistency may find consoling this quotation from Ralph Waldo Emerson: "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With

do is rest each case upon its own peculiar facts and hope that a more consistent policy will develop.²⁶

GERALD CORBETT PARKER

Torts—Contributory Negligence—Standard of Care Required of Persons under Physical Disability

In the principal case¹ the plaintiff, a 76-year-old blind man, was suing for injuries sustained when he slipped and fell on the unfinished curbing of a street being repaired in the city of Winston-Salem. The trial court granted a nonsuit on the ground of contributory negligence because the plaintiff knew that the road was being repaired and was thus under notice of its dangerous condition. On appeal before the supreme court the nonsuit was affirmed.

The plaintiff in this case was nonsuited because he failed to use due care. Just what the words due care mean in regard to any given set of circumstances is often difficult to determine. The interpretation becomes even more difficult when applied to circumstances involving a person under physical disability. However, the court states in its opinion that due care is "that standard of care which the law has established for everybody."²

In regard to standard of care the *Restatement of Torts* has this to say:

"Unless the plaintiff is a child or an insane person, the standard of conduct to which he should conform is the standard to which a reasonable man would conform under like circumstances."³

One widely accepted authority in the field of torts gives this insight into the problem:

"The standard required of an individual is that of the supposed conduct, under similar circumstances, of a hypothetical person, the reasonable man of ordinary prudence, who repre-

consistency a great soul has simply nothing to do. He may as well concern himself with his shadow on the wall." THE WORKS OF RALPH WALDO EMERSON 58 (E. E. Emerson ed. 1883).

²⁶ Decisions, 14 BROOKLYN L. REV. 137, 140 (1947). *Cole v. Koonce*, 214 N. C. 188, 191, 198 S. E. 637, 638 (1938), cited in Note, 29 N. C. L. REV. 301, 305 (1951) in passing upon the conduct of the plaintiff and his ability, by the exercise of due care, to avoid the consequences of defendant's negligence, the court said: "where the factors of decisions are numerous and complicated . . . and estimates of witnesses play a prominent part . . . practically every case must 'stand on its own bottom.'"

¹ *Cook v. Winston-Salem*, 241 N. C. 422, 85 S. E. 2d 696 (1954).

² *Id.* at 431, 85 S. E. 2d at 702.

³ RESTATEMENT, TORTS, § 464 (1) (1934).