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Torts--Contributory Negligence--Extent of Duty to Protest Against Reckless Driving

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business" for tax lien purposes as did the case of *Harvey Coal & Coke Co. v. Dillon*¹⁰ with respect to property subject to taxation.

K. W., JR.

TORTS — CONTRIBUTORY NEGLIGENCE — EXTENT OF DUTY TO PROTEST AGAINST RECKLESS DRIVING. — *P*'s decedent, riding in the back seat of an automobile driven by *D* at an excessive speed, was fatally injured when the car left the pavement at a curve and struck a telephone pole. The deceased had made no protest to *D*, but there was evidence that another passenger had registered a protest. *Held*, that where one passenger protests in an audible tone of voice against the negligent conduct of the driver, the other passengers are relieved of any duty to protest. *Boyce v. Black*.¹

The driver of a bus, traveling at night at an excessive speed, drove over an uneven portion of the highway, causing the vehicle to lurch in such a manner that *P* was thrown against the side, sustaining injuries. *P*, sitting in the rear of the bus in a relaxed position, had no time to protect herself. She had not warned the driver concerning his excessive speed. The court set aside the verdict for *P* solely because the damages were excessive, but approved the jury finding of no contributory negligence, stating that a passenger seated in the rear of a bus has no duty to look constantly toward the front and protest to the driver. *Miller v. Blue Ridge Transportation Co.*²

These recent decisions are indicative of the extent of the duty of care required of a passenger in a motor vehicle. In previous cases the court has said that the passenger must use such reasonable care for his own safety as an ordinarily prudent person would exercise under like circumstances.³ The standard which our court

¹⁰ 59 W. Va. 605, 633, 53 S. E. 928 (1905): "It is insisted that tax acts must be construed strictly, and if it is doubtful whether the intent is to levy a tax on a thing, the doubt must be solved in favor of the tax payer. (Citing cases.) As a general rule that is so; but there is another rule here fitting. The Constitution positively commands that all property shall be taxed, and we must construe the statute as meant to obey the Constitution, if its words will at all allow it, and this act has a section taxing all property, and specific language covering chattels real. If there were doubt, we must rather resolve it in favor of taxing leaseholds, and 'impute to the general assembly an intent to obey the constitutional mandate, if its enactments fairly admit of such construction.' "

¹ 15 S. E. (2d) 588 (W. Va. 1941).

² 15 S. E. (2d) 400 (W. Va. 1941).

³ *Lewellyn v. Shott*, 109 W. Va. 379, 155 S. E. 115 (1930); *Herold v. Olen-dennen*, 111 W. Va. 121, 161 S. E. 21 (1931); *Oney v. Binford*, 116 W. Va. 242, 180 S. E. 11 (1935); *Broyles v. Hagerman*, 116 W. Va. 267, 180 S. E. 99 (1935).

has determined for the passenger is clearly less exacting than that required of the driver.⁴

The duty of the carrier to look out for the safety of the paying passenger is well settled, and it has repeatedly been held that a passenger may assume that the carrier will use for his protection the degree of care which the law requires.⁵ This assumption of duty on the part of the carrier is not extended to relieve the passenger of the necessity of protecting himself against a known or apparent danger, or one reasonably within his knowledge.⁶ In the *Miller* case the court distinguished the case of *Peters v. Monongahela Transport Co.*⁷ It is submitted that the *Miller* case is within the limits of the duty which the carrier owes the passenger, and that the *Peters* case is an application of the principle that the passenger must protect himself against clearly discernible risks. These decisions indicate that the duty of the passenger in a bus to keep vigilant watch and make protests to the driver is questionable. The basis for the holding of contributory negligence in the *Peters* case was the plaintiff's failure to protect himself from an obviously impending danger rather than his failure to protest to the driver.

There is considerable authority to the effect that a passenger paying for his transportation has no duty to remonstrate with the driver.⁸ It has also been held that the duty of the gratuitous passenger to protest is doubtful, though the court stated that the plaintiff could not recover if his own contributory negligence was an affirmative cause of the injury.⁹ In one instance a court has refused to recognize that a gratuitous passenger has any duty to

⁴ *Warth v. County Court*, 71 W. Va. 184, 76 S. E. 420 (1912); *Young v. White Sulphur & H. R. Co.*, 96 W. Va. 534, 123 S. E. 433 (1924).

⁵ *Isbell v. Pittsfield Electric St. Ry.*, 196 Mass. 296, 82 N. E. 3 (1907); *Piper v. New York Cent. & H. R. R.*, 156 N. Y. 224, 50 N. E. 851, 66 Am. St. Rep. 560 (1898).

⁶ *Devine v. Chicago & A. E. R.*, 177 Ill. App. 360 (1913); *United Bys. & Elec. Co. v. Riley*, 109 Md. 327, 71 Atl. 970 (1909).

⁷ 109 W. Va. 417, 155 S. E. 178 (1930). Here the passenger clearly saw a car careening downhill toward the bus, veering from side to side. He failed to brace himself for the expected collision, although another passenger had directed driver's attention to the oncoming vehicle; the latter had replied that he was watching, and immediately pulled the bus to the right, partly off the road. Held, that the passenger was contributorily negligent.

⁸ *Arkansas Power & Light Co. v. Boyd*, 188 Ark. 254, 65 S. W. (2d) 919 (1934); *Reitz v. Yellow Cab Co.*, 248 Ill. App. 287 (1928); *Chaput v. Lussier*, 132 Me. 48, 165 Atl. 573 (1933); *Scales v. Boynton Cab Co.*, 198 Wis. 293, 223 N. W. 836, 69 A. L. R. 978 (1929); but see *Wiley v. Green Cab Co.*, 41 Ohio App. 88, 179 N. E. 419 (1931), in support of the proposition that a duty devolves upon the passenger in a taxicab to remonstrate and demand greater care when he discovers that the driver is operating the vehicle carelessly.

⁹ *Director General of Railroads v. Lucas*, 130 Va. 212, 107 S. E. 675 (1921).

look out for his own safety;¹⁰ conversely, it has been held that the standard of duty of the invited guest is equal to that of the driver of the automobile.¹¹

By language in the decisions involving contributory negligence, West Virginia is committed to the standard of reasonable care on the part of a passenger; however, a review of the facts involved discloses a tendency to burden him with more stringent requirements in order to conform to the standard than are generally imposed by other jurisdictions which postulate the standard of reasonable care.¹² In a recent case the court retreated somewhat, adopting a position more in conformity with the majority interpretation of the standard of reasonableness, and admitting that passengers need not be at the height of attention and alertness in order to warn the driver of danger.¹³ The court in both of the cases under discussion seems to have adopted this rule.¹⁴

The court concluded its discussion of the issue of contributory negligence of the plaintiff in the *Boyce* case as follows: "Where there is a duty to protest, an unheeded protest made in an audible tone of voice by one of several passengers will relieve fellow passengers from the duty to make protest."¹⁵ It would seem that in thus stating the law our court has gone further in this respect than many other jurisdictions.¹⁶ One question is in doubt: How will our court interpret the above rule when presented with the problem of a protest from one passenger, it being obvious that a protest from the plaintiff would have been decidedly more influential with the driver?

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¹⁰ *Burgess v. Crafts*, 184 Minn. 384, 238 N. W. 798 (1931).

¹¹ *Glick v. Poska*, 122 Neb. 102, 239 N. W. 626 (1931).

¹² *Waller v. Norfolk & W. Ry.*, 108 W. Va. 576, 152 N. E. 13 (1930); *Herold v. Clendennen*, 111 W. Va. 121, 161 S. E. 21 (1931); *Oney v. Binford*, 116 W. Va. 242, 180 S. E. 11 (1935).

¹³ *Darling v. Browning*, 120 W. Va. 666, 200 S. E. 737 (1938).

¹⁴ *Miller v. Blue Ridge Transportation Co.*, 15 S. E. (2d) 400, 404 (W. Va. 1941); *Boyce v. Black*, 15 S. E. (2d) 588, 591 (W. Va. 1941).

¹⁵ 15 S. E. (2d) at 591.

¹⁶ *Dale v. Jaeger*, 44 Idaho 576, 258 Pac. 1081 (1927); *Shea v. Horn*, 132 Me. 361, 171 Atl. 248 (1934); *Whyte v. Lindblom*, 216 Wis. 28, 255 N. W. 267 (1934); but see *Ragland v. Snotzmeier*, 186 Ark. 778, 55 S. W. (2d) 923 (1933). In this case the court held that an invited guest, hearing the protest of another passenger and the driver's reply, is not required to caution the driver.