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Torts--Negligence Per Se.

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TORTS — NEGLIGENCE *Per Se.* — Plaintiff alighted from a west-bound street car in the middle of a city block at about 11:30 P. M., and walked to the north curb. After a brief pause she took about ten steps along the curb to the west in order to ascertain if there were any approaching automobiles. Seeing only the street car which was about two hundred feet to the west and at a point where the street curved slightly to the north, plaintiff turned, looked to the east for traffic, started to cross, and after having taken about four steps into the street, looked to the west and saw the dim lights of defendant's bus bearing down upon her at from forty-five to fifty miles per hour. In order to avoid being hit, plaintiff jumped forward and into the path of *W*'s car by which she was struck. The bus had followed *W* who was driving at twenty-five to thirty miles per hour up the street to the east for some distance, and had pulled around *W* immediately after having passed the street car about two hundred feet west of the point of the accident. In an action for negligence the jury gave plaintiff a verdict for $5,000. Defendant appealed. *Held*, that plaintiff was guilty of contributory negligence as a matter of law and could not recover. *Yoder v. Charleston Transit Co.*[1]

Plaintiff, working with another employee of a contractor employed by defendant, was told by defendant, that a certain elevator was for the exclusive use of the contractor and his two employees. Plaintiff, after removing packages from the elevator and allowing the door to close, reopened the door after performing some brief duties and, while looking behind and talking to his fellow employee, stepped into the shaft, not knowing that the car had been removed by an employee of the defendant, and fell causing injuries. Trial court gave judgment for defendant, finding the plaintiff contributorily negligent as a matter of law. Plaintiff appealed. *Held*, that contributory negligence is a question for the jury where an invitee is injured while relying on a promise made by the invitor. *McHugh v. First Huntington National Bank.*[2]

One is negligent as a matter of law if the "negligence and the necessary damage proximately flowing from it are so clearly proved, both in fact and inference, that there is no room for an honest difference of opinion between reasonable men . . . ."[3] These

1 192 S. E. 349 (W. Va. 1937).
2 191 S. E. 844 (W. Va. 1937).
3 Hogan v. Manhattan Ry. Co., 149 N. Y. 23, 43 N. E. 403 (1896), cited in Reilly v. Nicoll, 72 W. Va. 193, 77 S. E. 897 (1913), 47 L. R. A. (N. S.) 1199 (1914).

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two cases well illustrate the difficulty which confronts a court in applying this general proposition to concrete sets of facts.

The rule laid down in the *Yoder* case, that one is negligent as a matter of law if, before crossing the street, he looks to ascertain if there are any vehicles approaching, but fails to see that which, in the ordinary and reasonable use of his senses, he should see, is one well recognized in the law,[4] but there is some basis for believing that its application to the fact of the principal case stretches the rule beyond its reasonable and intended limits. Courts generally in the application of this rule have limited it to cases of undisputed contributory negligence, as for example, where plaintiff failed to see an automobile which was approaching toward her at the slow rate of from five to eight miles per hour[5] or where the plaintiff in broad daylight had an unobstructed view for two hundred and fifty feet and failed to observe the approaching cab.[6] Furthermore, the Iowa court in deciding a case presenting substantially the same facts as the *Yoder* case, held the question of contributory negligence to be one for the jury.[7] In view of the fact that the jury found that the plaintiff was not guilty of contributory negligence, and that one of the judges in the appellate court dissented from the holding of the majority,[8] it seems that the facts of this case hardly present a situation in which ". . . . there is no room for an honest difference of opinion between reasonable men. . . ."[9]

The *McHugh* case presents another situation in which courts frequently apply the doctrine of negligence *per se*. Here, however,

[4] Fulton Bldg. Co. v. Stichel, 135 Md. 542, 109 Atl. 434 (1920); Craft v. Fordson Coal Co., 114 W. Va. 295, 171 S. E. 886 (1933).

[5] Molda v. Clark, 236 Mich. 277, 210 N. W. 203 (1926).

[6] Mertens v. Lake Shore Yellow Cab & Transfer Co., 195 Wis. 646, 218 N. W. 85 (1928).

[7] Rolfs v. Mullins, 179 Iowa 1223, 162 N. W. 783 (1917). In this case deceased and her husband were crossing from the north side of *H* street at a point about sixty feet east of the intersection of *H* and *T* streets, *H* street here curving sharply to the south. At the moment they looked before crossing, the sight of defendant's automobile was blocked by a street car which had come north on *T* street and was turning west on *H* street. After taking a few steps from the curb, deceased was struck by defendant's car.

[8] The dissenting judge argues that it is very likely plaintiff did not see the two approaching vehicles, basing this on the fact that only three seconds would have been required for the bus to have covered the distance between the point at which it emerged from behind the street car and the point at which it struck plaintiff and that this brief period might easily have been consumed by plaintiff in performing her duty of looking to the left before crossing the street.

[9] Hogan v. Manhattan Ry. Co., 149 N. E. 23, 43 N. E. 403 (1896).

the court found sufficient facts, distinguishing this case from those falling within the general rule, to hold the determination of contributory negligence to be for the jury.

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