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Torts--Contributory Negligence of an Automobile Passenger

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from the wrongful act of the client. But under the *quantum meruit* rule, why should not the contingent fee be taken into consideration in finding the value of the services? In *Pratt* v. *Kerns,* 123 Ill. App. 86, it was held that the entire *contingent* fee might be recovered if the services were worth that much.

—ROBERT E. STEALEY.

TORTS—CONTRIBUTORY NEGLIGENCE OF AN AUTOMOBILE PASSENGER.—The son of the deceased drove an automobile onto a railroad crossing at a low rate of speed, and due to the fact that the boards along the tracks were not as wide as the highway, the right front wheel of the car dropped over the first rail beyond the ends of the boards and the car was stalled. The deceased was sitting on the front seat. While unable to move, the car was hit by a fast moving train and the father and two other passengers were killed, the driver escaping by jumping. It was mid-day. *Held,* an automobile passenger must use such reasonable care for his own safety as an ordinarily prudent person would exercise; and a passenger failing to warn the driver that the boards between the railroad tracks did not extend the full width of the highway, was contributorily negligent as a matter of law. *Waller* v. *Norfolk & Western Railway Company,* 152 S. E. 13 (W. Va. 1930).

In previous cases the court has said that the negligence of the driver cannot be imputed to a passenger. It is also said that the passenger must use such care for his own safety as an ordinarily prudent person would exercise in like circumstances. *Young* v. *Railroad Company,* 96 W. Va. 534, 123 S. E. 433; *Jameson* v. *Railway Company,* 97 W. Va. 119, 124 S. E. 491; *Pierce* v. *Railroad Company,* 99 W. Va. 313, 128 S. E. 832; 18 A. L. R., note p. 309, and cases there cited and reviewed.

It has been said by our court that the duty of the passenger is less than that of the driver. *Young* v. *Railroad Company, supra,* at p. 537. How much less, one is not able to determine.

As to whether the question of contributory negligence of an automobile driver is a matter for the jury or a matter for the court seems to depend upon the facts in each particular case. "Where the facts which control are not disputed and are such that reasonable minds can draw but one conclusion from them, the question of contributory negligence barring recovery is one of law for the court." *Krodel* v. *B. & O. R. R. Company,* 99 W. Va. 374, 128 S. E. 824.

Four cases have been decided by our court which involved the contributory negligence of a passenger in a car hit by a railroad

train at a railroad crossing. In two cases the question of negligence was left to the jury, *Young* v. *Railroad, supra; Pierce* v. *Railroad, supra;* and in the other cases, the question was decided by the court, *Jameson* v. *Railway Company, supra;* and *Waller* v. *Railway Company, supra.* In the first two cases, the passengers were in the rear seat, they were in cars for hire, and in the first case the passenger remained in the car while in the second he was either thrown or jumped from it. In the last two cases the passengers were in the front seats of privately owned cars.

In the Young Case the court quotes with approval from *Hermann* v. *Rhode Island Company,* 36 R. I. 447, 90 Atl. 813: "It cannot be said as a matter of law that such a guest or passenger is guilty of negligence because he has done nothing. In many cases the highest degree of caution may consist of inaction. In situations of great or sudden peril, meddlesome interference with those having control * * * * may be exceedingly disastrous in its results."

"The duty of the passenger being less than that of the driver and depending on so many different circumstances, is almost always one for the jury." *Young* v. *Railroad, supra.* The court cites the following: "BABBITT ON AUTOMOBILES, (3rd Ed.) par. 1656; *Drouillard* v. *Sou. Pac. Ry. Co.,* 36 Cal. App. 447, 172 Pac. 405; *Carnegie* v. *Gt. North. Ry. Co., supra; Baker* v. *Fields,* 236 *S. W.* 170 (Tex. Ct. App. 1921); *Black* v. *Chicago, Gt. West Ry. Co.,* 187 Iowa 904, 174 N. W. 774; *Howe* v. *Railway Co.,* 62 Minn. 71, 30 L. R. A. 684; 18 A. L. R., note, pp. 322-334."

See also to the effect that contributory negligence is generally a matter for the jury, *Pierce* v. *Railroad, supra; Hines* v. *Johnson,* 264 Fed. 465 (C. C. A. Wash.) (1920); *Weidlich* v. *Railroad Company,* 93 Conn. 438, 106 Atl. 323; *McAdoo* v. *State,* 136 Md. 452, 111 Atl. 476; *Senft* v. *Railway Company,* 246 Pa. St. 446, 92 Atl. 553; *Vocca* v. *Pennsylvania Railroad Company,* 259 Pa. St. 42, 102 Atl. 283; HUDDY ON AUTOMOBILES, par. 688 and cases cited; 45 C. J. 858.

In West Virginia the court has decided the question of negligence as a matter of law in two other cases involving crossing accidents: *Jameson* v. *Railway Company, supra; Krodel* v. *Railroad Company, supra;* cases cited in 18 A. L. R. 317.

In the first of these cases it was held that a person killed at a railroad crossing by a train which the deceased had an opportunity to see and hear in time to warn the driver, so as to enable him to avoid the accident, and he neither warned him nor took any precaution for his own safety, the deceased was guilty of contributory negligence as a matter of law.

While the case denies the doctrine of imputed negligence yet,

as a practical matter, if the passenger is bound to watch (1) for trains on the track, and (2) for defects in the crossing, it would seem that under the language of the court the passenger cannot recover where the driver was negligent unless the negligence consisted of something which the passenger had no opportunity to prevent, such as suddenly swerving the car or stalling it.

The following question seems to be still in doubt: Can a passenger go to sleep or be engaged in something requiring his entire attention while the driver is approaching the crossing? In the Young Case, *supra,* where the passenger was permitted to recover she was holding a baby on her lap. In this case it does not appear what the passenger was doing. It is submitted that the duty on the passenger to be watchful of trains and at the same time to be watchful of defects in the highway is a very severe one and should not be extended to cases where the passenger was doing something else which required his full attention.

—MELVILLE STEWART.

FROM THE PHYSICAL TO THE SOCIAL SCIENCES—Rueff, Jacques, Baltimore: John Hopkins Press, 1929. xxxiv 159 pages.

This book is published under the auspices of the Institute for the Study of Law at Johns Hopkins University, with the intention of presenting a method whereby law may be rendered "scientific". The introduction of twenty-three pages by Herman Oliphant and Abram Hewitt of the Johns Hopkins Institute of Law is probably the only part of the book which will be of interest to the lawyer. Here the principal reasons for the confusion in law are stated with force and illustrated with clarity. Three methods are in common and occasionally conscious use among lawyers, namely the *transcendental,* the *inductive* and the *practical.* The *transcendental* method "starts by assuming the existence of some general 'principles' within which the solution" of the concrete case "is hidden away". (p. xii). Here the authors of the introduction pause to make some very proper jeers about the origin and validity of such transcendental "principles". The method assumes the existence of a "natural law" composed of permanent principles of right. The *inductive* method purports to derive the fundamental principles of justice from an examination of a number of particular cases. The absurdity of this method is stated by the authors thus: "If the principle thus 'induced' is no broader than the sum of the previous cases which it summarizes, it obviously does not and cannot include the case to be decided, which, by