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AUTOMOBILES—RELATIVE DUTY OF PEDESTRIANS AND DRIVERS

The plaintiff, a pedestrian, was struck and injured by defendant's automobile, while crossing the street after dark at a proper pedestrians' crossing. Plaintiff had proceeded about three-fourths of the way across the street when she saw defendant's automobile approximately a short block away. She quickened her pace to no avail and was hit two to three steps prior to reaching the safety of a parked automobile toward which she was advancing. Defendant was driving at a lawful rate of speed and had proper lights, but he did not see the plaintiff until upon her. Trial court awarded judgment to the defendant. On appeal, *held,* affirmed. Plaintiff failed to show that defendant had a last clear chance to avoid the accident. *Stark v. Hubbard,* 187 Va. 820, 48 S. E. 2d 216 (1948). *Buchanan, Eggleston, Staples, J. J., dissenting.*

A pedestrian using a crossing has the right of way.[1] However, he is not entitled to exercise that right by advancing in front of an approaching automobile that is dangerously near.[2] A pedestrian must exercise care commensurate with the danger which the situation presents.[3] The doctrine of last clear chance has no application where there has been no showing that the defendant by the use of ordinary care could have avoided the accident after discovery of plaintiff's peril.[4] Where both have an equal opportunity to avoid the accident and the negligence of each contributes to and continues to the time of the accident, there is concurring or contributory negligence and there can be no recovery.[5]

There are no previous decisions in Virginia exactly in point, but the principal case apparently is not in accord with the principles of negligence as expressed in the older Virginia cases, although it is in agreement with the decisions since 1930.[6] The law as expressed by these later cases has not been modified, but the factual situations coming within these principles have been severely limited. In addition, the principle of concurring negligence has been revived as a limiting factor as to recovery under the last clear chance doctrine. This trend is more extensive than that of most jurisdictions and appears to be directly in conflict with the purpose of the statutes enacted to protect the pedestrian.

In the absence of statutes on the subject, operators of vehicles and pedestrians have equal and reciprocal rights in the use of the street.[7] Both are required to exercise reasonable care to avoid injuries and are under a reciprocal duty to respect the other's rights. This rule applies alike to all portions of the streets and obliges a driver to exercise a degree of care commensurate with the danger to be

avoided thus increasing the vigilance demanded of him at intersections.[8] The enactment of statutes such as those in Virginia was specifically designed to change the above rule.[9] The ever-increasing numbers of automobiles demanded a change in the common law. Under the equal and reciprocal rights doctrine, traffic was needlessly stalled and yet pedestrians clearly needed a safe place to cross streets. The statutes were passed to satisfy both requirements.[10]

The Virginia Code provides that "the driver of any vehicle upon a highway within a business or residence district shall yield the right of way to a pedestrian" at any clearly marked crosswalk or any regular pedestrian crossing.[11] This is qualified by a subsequent subsection which provides that the pedestrian is not entitled to enter the intersection, regardless of approaching traffic, "but shall be interpreted to require vehicles to change their course, slow down, or come to a complete stop if necessary to permit pedestrians to safely and expeditiously negotiate the crossing."[12]

Such statutes require greater vigilance on the part of pedestrians when crossing streets between intersections, and greater viligance on the part of vehicle operators when approaching intersections.[13] The statutes made no effort to change the rules of ordinary care which apply to both at all times, but rather have changed the measure of such care. The diligence which the driver must use is greater than that of the pedestrian at crossings, and conversely, the pedestrian, if he chooses to cross in the middle of the block, the ordinary care he is required to exercise is greater than that required of the operator of a vehicle.[14]

These sections have been held to "mean what they say" and to be "too plain to require construction."[15] In spite of this statement, there have been many cases interpreting them. Most of these cases have dealt with the duties and rights of pedestrians. Whereas a pedestrian can neither enter nor cross intersections regardless of approaching traffic, pedestrians do have under the statute the right of way which must be upheld in the absence of abuse.[16] He must exercise such care for his own safety as a person of ordinary prudence would exercise under like circumstances. If a prudent person could reasonably believe from the circumstances that there was no car sufficiently near to put him on notice of approaching danger, he is not required to be looking and listening continuously to see if automobiles are approaching.[17] It is not the duty of pedestrians to make mathematical calculations before crossing the streets in front of automobiles, but only to exercise ordinary care for their safety.[18] The pedestrian crossing at an intersection has the right to assume that a driver approaching an intersection will be cautious.[19]

The Virginia courts have held a pedestrian non-negligent where

he had seen an automobile approaching at distances of 400,[20] 70,[21] and 60,[22] feet and the pedestrian had distances of 27, 47, and 14 feet respectively to negotiate before reaching safety. In a situation similar to the instant one, the court said, "there is no rule of law or usage that would require plaintiff, if he had seen a car a block or a half-block away, with an intersection between, to stand and wait to ascertain what the car would do or where it would go, particularly when the plaintiff had only about 20 feet left in crossing the street.[23] Some of the cases have even gone so far as to hold that if the plaintiff started across the street before the defendant entered the intersection, he has the right of way and it is the driver's duty to change course, slow down, or stop to avoid injuring the plaintiff.[24]

On comparing the uncontradicted evidence, in the instant case and the previous decisions above cited, this writer believes that a holding of contributory negligence was contrary to the law and evidence as presented in the trial court.

But assuming the plaintiff was negligent, one man may not run another down merely because he was negligent. This principle is the the basis of the last clear chance doctrine.[25] If the defendant knew of the negligence of the plaintiff, and could have avoided injuring him in his position of peril by the use of ordinary care, then the proximate cause of the injury was the negligence of the defendant.[26]

The above is a statement of the doctrine as first accepted by the Virginia courts. There have been many amplifications of the doctrine in line with its humane purpose. The defendant need no longer see the plaintiff's peril; liability attaches if he should have seen it.[27] Nor must the peril of the plaintiff be a physical inability to escape; mere ignorance of the danger will suffice.[28]

Under the general rule, continuing and concurring negligence will defeat a recovery even under the last clear chance doctrine. But Virginia follows the minority rule that even though the negligence of the plaintiff continues to the moment of injury, this will not defeat recovery, if there be some circumstances or superadded fact which would make reliance upon it inhumane and culpable; in other words recovery is defeated unless and until it is established that if the defendant had kept such a lookout, as he was required by law to keep, he would or ought to have been aware of the plaintiff's condition.[29]

A pedestrian, crossing the street between intersections, is charged with knowledge that an automobile is approaching which he should see. He is not charged with the knowledge that the motorist is not keeping a lookout. He has the right to assume that any motorist proceeding along the street will keep a reasonable lookout. Whether

the motorist had a clear chance to avoid striking the pedestrian is a question for the jury.[30]

In the present case, after crossing three-fourths of the street the plaintiff saw the defendant's car approaching. She had the choice of either returning to the middle of the street, which would be a distance of one-fourth the width of the street, plus the consideration of possibly confusing the driver by making such a return; or she could hasten her steps, continuing in the direction she was going, and have only one-fourth the width of the street less the width of the parked automobile at the curb toward which she was proceeding for safety. In addition, by continuing across she gave the driver a chance to turn to the left and thereby miss her, whereas turning to the right would have been impossible for him. This the court held to be "throwing herself into the path of an automobile dangerously near." It must be realized that the same considerations are not present here as there would be if this were a train or streetcar with a fixed path. When the plaintiff made this decision, she was already in a position of peril and unable to extricate herself therefrom as the afterevents proved. At this time the defendant was more than a short block away, running at the proper speed, and under a duty to keep a vigilant lookout.

If from all the evidence the jury could reasonably find that, regardless of the state of negligence of the plaintiff, the defendant, by exercise of ordinary care, had a clear chance to avoid the accident and failed to do so, then an instruction on last clear chance is justified.[31]

It is submitted that in the instant case the jury not only could have reasonably found, but were logically bound to find that the defendant had a clear chance to save the plaintiff. This court's interpretation destroys the protective force of the statute, and a pedestrian ventures upon the streets at his peril.

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FOOTNOTES

1. VA. CODE ANN. 2154 (123) (c), (126) (Michie, 1942).
2. Arlington & Fairfax Motor Transp. Co. v. Simmonds, 182 Va. 796, 30 S. E. 2d 381 (1944); Thornton v. Downes, 177 Va. 451, 14 S. E. 2d 345 (1941).
3. Nelson v. Dayton, 184 Va. 154, 36 S. E. 2d 535 (1946); Thornton v. Downes, supra note 2.
4. Jenkins v. Johnson, 186 Va. 191, 42 S. E. 2d 319 (1947); Paytes v. Davis, 156 Va. 229, 157 S. E. 557 (1931); Green v. Ruffin, 141 Va. 628, 125 S. E. 742 (1924).
5. Jenkins v. Johnson, supra note 4; Meade v. Saunders, 151 Va. 636, 144 S. E. 711 (1928); Green v. Ruffin, supra note 4; Con-

sumers' Brewing Co. v. Doyle's Adm'r. 102 Va. 399, 46 S. E. 390 (1904).

6. 26 Va. L. Rev. 963 (1940).

7. South Hill Motor Co. v. Gordon, 172 Va. 193, 200 S. E. 637 (1939); Core v. Wilhelm, 124 Va. 150, 98 S. E. 27 (1919).

8. Va. Elec. etc., Co. v. Blunt's Adm'r, 158 Va. 421, 163 S. E. 329 (1932).

9. Moore v. Scott, 160 Va. 610, 169 S. E. 902 (1933).

10. Indep. Cab Assn. v. Barksdale, 177 Va. 587, 15 S. E. 2d 112 (1941).

11. VA. CODE ANN. 2154 (123) (c) (Michie, 1942).

12. VA. CODE ANN. 2154 (126) (Michie, 1942).

13. Moore v. Scott, 160 Va. 610, 169 S. E. 902 (1933); Va. Elec., etc., Co. v. Blunt's Adm'r. 158 Va. 421, 163 S. E. 329 (1932).

14. **Ibid.**

15. Lucas v. Craft, 161 Va. 228, 110 S. E. 836 (1933); Moore v. Scott, **supra** note 13.

16. Miller v. Jones, 174 Va. 336, 6 S. E. 2d 607 (1940); McGuown v. Phaup, 172 Va. 419, 2 S. E. 2d 330 (1939).

17. Sawyer v. Blankenship, 160 Va. 651, 169 S. E. 551 (1933).

18. Green v. Ruffin, 141 Va. 628, 125 S. E. 742 (1924).

19. Ebel v. Traylor, 158 Va. 557, 164 S. E. 721 (1932).

20. Miller v. Jones, 174 Va. 336, 6 S. E. 2d 607 (1940).

21. Bethea v. Va. Elec., etc., Co. 183 Va. 873, 33 S. E. 2d 681 (1945).

22. Ebel v. Traylor, 158 Va. 557, 164 S. E. 721 (1932).

23. Heindl v. Perrit, 158 Va. 104, 163 S. E. 93 (1932).

24. Va. Elec., etc., Co. v. Steinman, 177 Va. 468, 14 S. E. 2d 313 (1941); Lucas v. Craft, 161 Va. 228, 170 S. E. 836 (1933).

25. Paytes v. Davis, 156 Va. 229, 157 S. E. 557 (1931).

26. Tarley's Adm'r v. Richmond & D. R. R. 81 Va. 783, (1886); Richmond D. R. R. v. Yeamans 86 Va. 860, 12 S. E. 946 (1890).

27. E.g. Dobson-Peacock v. Curtis, 166 Va. 550, 186 S. E. 13 (1936); Perkinson v. Persons, 164, Va. 172, 178 S. E. 682 (1935).

28. Va. Ry. & Power Co. v. Wellons, 133 Va. 350, 112 S. E. 843 (1922).

29. E.g. Stuart v. Coates, 186 Va. 227, 42 S. E. 2d 311 (1947); Barnes v. Ashworth, 154 Va. 218, 153 S. E. 711 (1930).

30. Dobson-Peacock v. Curtis, 166 Va. 550, 186 S. E. 13 (1936).

31. Keeler v. Baumgardner, 161 Va. 507, 171 S. E. 592 (1933).