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TORTS—ANIMAL OR VEHICLE— CONTRIBUTORY NEGLIGENCE OF PEDESTRIANS

As the law progresses and evolves, one subject has remained ever plodding along and always present in the annuals of litigation—the jackass. To the agrarian, this domestic beast is his laborer and co-worker and is usually found in the barns or pulling the plow. The courts and the lawyers, however, might presume that the beast's native habitat is the highway.

Many years ago, due to his presence in the middle of a travelled road, he was the subject of landmark litigation in the famous case of *Davies* v. *Mann*[1], an English decision of note in American jurisprudence. Although almost a century has elapsed, the ass, not to be denied his fame, has once again appeared; on the highways, and again provoking litigation.

A 1960 Virginia case[2] involved an action for injuries sustained when a mule that the plaintiff was leading was struck from behind by an automobile driven by the defendant. The defendant testified that he saw the plaintiff and mule about 900 feet away, but could not see that the mule was on the hard surface of the roadway. Defendant alleged that the plaintiff was guilty of contributory negligence under two Virginia statutes,[3] by walking on the right shoulder of the highway, leading the mule, and the man and mule together constituted a pedestrian as defined by statute to face oncoming traffic. The trial court refused to give instructions to this effect and the jury rendered a verdict for the plaintiff.

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[1] Davies v. Mann, 10 M. & W. 545 (Ex. 1842).

[2] Bayne v. Tharpe, 201 Va. 484, 111 S.E. 2d 816 (1960).

[3] Va. Code § 46-183 (1950), as amended, § 46.1-171 (1950): Every person riding a bicycle or an animal upon a roadway and every person driving any animal shall be subject to the provisions of this chapter applicable to the driver of a vehicle, except those provisions which by their very nature can have no application.
Va. Code § 46-247 (1950), as amended, § 46.1-234 (1950).

The real issue of the case was whether or not the mule was a pedestrian as contended by the defendant thereby being contributorily negligent in walking on the hard surface of the roadway. If the mule were not considered a pedestrian, he had the same right to the road as other vehicles.

On appeal it was decided that a man and mule together do not constitute a pedestrian within the meaning of the statute. Persons leading mules are not permitted to use the sidewalks and are, of necessity and common sense, not pedestrians within the meaning of the statute. Therefore, if plaintiff exercised reasonable care in leading the mule and was not negligent, the plaintiff was not precluded from walking on either side of the highway, and there was no error in the lower court's instructions to that effect.

In its opinion the court relied heavily upon *Lawson* v. *Fordyce*,[4] a decision almost on all fours with the instant case. In the *Lawson* case the plaintiff was leading a cow when a car coming from the rear failed to sound its horn. As the car passed it startled the cow, causing it to run over the plaintiff thereby injuring him. The court commented upon statutory law in various states, including Virginia, and said:

> Necessarily the pedestrians required by statute to walk on the left-side of the highway do not include persons afoot who are leading, or are otherwise in charge of, cows, horses, *et al*, for such persons with their charges are not permitted on sidewalks . . .[5]
>
> We doubt very much that the legislatures of the states . . . intended such statutory provisions to apply to persons on foot in charge of horses, cows, and other livestock . . . upon the highways.[6]

Even if the mule were considered a pedestrian, it should not affect the outcome of the case. A violation of a safety statute

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[4] Lawson v. Fordyce, 237 Iowa 28, 21 N.W. 2d 69 (1945).

[5] *Ibid.* at 57.

[6] *Ibid.* at 55.

enacted for the protection of the travelling public should not be conclusive, if there is no other evidence of negligence contributing to the accident.[7]

In an earlier case[8] decided by the same court as decided the present litigation, plaintiff was struck from behind by an automobile while he was walking close to a highway in violation of a statute[9] requiring pedestrians to keep to the far extreme of the shoulder. It was nevertheless held that whether or not such violation be a remote cause which proximately contributes to the injury is a question for the jury. The court instructed the jury that plaintiff would not be guilty of contributory negligence as a matter of law if he were using that degree of care a person of ordinary prudence under like circumstances would use.

A pedestrian lawfully on the highway may rely upon reasonable care of automobile drivers and is not negligent as a matter of law in failing to anticipate a driver's negligence.[10] Merely because a pedestrian is walking on the side of the road in violation of a safety statute, does not render him contributorily negligent and as a matter of law barring recovery, since recovery can still be had under the "last clear chance doctrine."[11] This doctrine is not foreign to the Virginia courts and has been applied to pedestrians and their use of the highways in violation of safety statutes.[12]

Statutes regulating the travel of pedestrians along public highways generally prescribe that the pedestrian shall keep to the left hand edge of the highway. The courts are not entirely in accord as to the effect of a pedestrian's failure to comply with such statute in determining liability for injuries. Some courts[13]

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[7] *Salmond on Torts*, 8th Ed., 382 (1934).

[8] Crouse v. Pugh, 188 Va. 156, 49 S.E. 2d 421 (1948).

[9] Va. Code § 2154 (126) (g) (1942).

[10] Colton v. Stolley, 124 Neb. 855, 248 N.W. 384 (1933).

[11] Hooker v. Schuler, 45 Idaho 83, 260 P. 1027 (1927): Greear v. Noland Co., 197 Va. 233, 89 S.E. 2d 49 (1955).

[12] Clay v. Bishop, 182 Va. 746, 30 S.E. 2d 585 (1944).

[13] Perhaps the leading case which holds a violation of a statute which applies to the facts of "negligence per se" is Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920).

have taken the view that such violation is negligence as a matter of law, while other courts[14] have declared it prima facie negligence, or merely evidence of negligence. However, all courts agree that the mere violation of a statute, whether negligence *per se*, *prima facie* negligence, or evidence of negligence, will not bar recovery on the ground of contributory negligence unless the violation was a proximate cause of the injuries sustained by the pedestrian.[15] It is generally agreed that the question as to whether the violation was a proximate cause is for the jury, and recovery will not be precluded on the ground of contributory negligence if the violation of the statute is not a proximate cause of the injury.[16]

Why the decision of the court in the instant case revolved around whether the mule would or would not be considered a pedestrian is not fully apparent. The "last clear chance doctrine" was not mentioned in the opinion though this case would appear to be an ideal situation for its application.

Starting with *Davies* v. *Mann*,[17] it was held that the contributory negligence of the party injured will not defeat the action if it is shown that the defendant might by the exercise of reasonable care and prudence have avoided the consequences of the injured party's negligence. In that case Lord Abinger, C.B., said:

> The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there. But, even were it otherwise, it would have made no difference, for as the defendant might by proper care have avoided injuring the animal and did not, he is liable for the consequences of his negligence, though the animal might have been improperly there.[18]

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[14] For a well reasoned opinion rejecting the per se rule, and holding a violation of a criminal statute designed to avoid injuries of the kind which occurred, is only evidence of negligence, see, Evers v. Davis, 86 N.J.L. 196, 90 A. 677 (1914).

[15] 4 A.L.R. 2d 1256 (1944).

[16] Gregory v. Daniel, 173 Va. 442, 4 S.E. 2d 786 (1939).

[17] Davies v. Mann, 10 M. & W. 545 (Ex. 1842).

[18] *Ibid.* at 547.

And as Park, B. further observed:

> Although the ass might have been wrong fully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief.[19]

Although in the present case and in more recent times it is usually not necessary to go as far as the court did in the *Davies* case, it is sufficient to say that the principle therein announced has met with almost universal favor. Although it has been criticized by some text writers, there has girdled the globe a band of sympathy for Davies's immortal "critter." The law as enunciated in that case has come to stay, and the principle has been clearly and accurately stated as: "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it . . ."[20]

In the instant decision,[21] the defendant observed the plaintiff and the mule 900 feet away. He discovered the plaintiff in a position where injury was possible unless he used ordinary care to prevent it, and the duty to use such care arose wholly without reference to the character of his conduct before the discovery.[22] Defendant was clearly negligent which the court and jury rightly found.

The decision seems to be consistent with the prior cases, although it solved the matter on more anomolous considerations. Why the court deemed to place the mule in a vehicular category, rather than basing its consideration on more established doctrines is not fully perceived. Justice was effectuated by a unique application of the law.

J. J. Mc.

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[19] *Ibid.* at 547.

[20] 2 Quarterly Law Review, 207 (1955).

[21] Bayne v. Tharpe, 201 Va. 484, 111 S.E. 2d 816 (1960).

[22] Sisti v. Thompson, 149 Tex. 189, 229 S.W. 2d 210 (1954).