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Torts - Contributory Negligence as a Matter of Law

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> Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel today.

Whether other jurisdictions will follow the lead of New York is problematical, but almost any action after such long inaction would be welcome.

N. A. C.

TORTS—CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW

The final judgment in one of the few inharmonious decisions to come from the Supreme Court of Appeals of Virginia this year and one which reflects the consequences and inherent dangers of an appellate court sitting as reviewers of jury conclusions of fact, makes *Simmons* v. *Craig*[1] an important case to the practicing attorney in the negligence field.

Craig initiated an action in the Circuit Court of Roanoke County against Simmons for damages suffered in an automobile collision occasioned by the alleged negligence of Simmons who was driving at night without lights on his vehicle. Judgment was entered in the lower court in favor of Craig on the findings of the jury. On appeal, the Supreme Court of Appeals reversed the decision in favor of Simmons, two judges dissenting.

Two errors were of concern to the court in justification of the appeal; the two questions raised being:

1. Was Simmons guilty of any actionable negligence?
2. Was Craig guilty of contributory negligence as a matter of law?

One mile east of Vinton, Virginia, a collision occurred at a late twilight hour and during a heavy rainstorm. Simmons was driving westwardly toward town and Craig was following an unidentified motor vehicle going east on Route 24. Simmons' testimony placed his speed at 20 miles per hour while Craig claimed to have been travelling at a speed of 25 miles per hour just prior

[1] 199 Va. 338 (1957).

to increasing his speed in attempting to pass the car in front of him. Craig was familiar with the road and had followed the other car for a considerable distance until he had reached a straight stretch of highway before attempting to pass the vehicle. Chisom, a witness at the trial, who was traveling behind Craig had initiated a movement into the left lane immediately behind Craig's truck.

Simmons claims to have had the lights on his vehicle turned on for a much greater distance than was proved by the evidence since the weight of evidence reflects that the lights were not turned on until he was approximately two or three car lengths ahead of Craig. All evidence was to the effect that it was sufficiently dark to require each of the vehicles to have headlights on. On this matter the court did not seek to disturb the findings of the jury.

The majority of the court based their decision on the "Rules of the Road" provided by the Motor Vehicle Code of Virginia.[2] Section 46-225[3] was used as a secondary argument for the decision, this section stating that the driver of a vehicle overtaking another vehicle must sound his horn. In this case the court held that Craig's failure to sound the horn was a proximate cause of the accident and that he was contributorily negligent. This statute was enacted for the benefit of the driver being overtaken so that he will not attempt to turn into the path of the passing car. However, the court held that Simmons would have been warned by the sounding of Craig's horn, had he done so before attempting to pass. Therefore, Craig was found to be negligent as a matter of law. In actuality there is nothing in the statute to give rise to the intent ascribed by the court that it was to warn a driver coming from the opposite direction.

Irvin Chisom's testimony was given varying degrees of weight within this opinion; it ranges from that of an expert to being totally discounted. He had been following Craig, who was traveling a familiar road, for approximately one mile and stated that there was a flash of light immediately before the crash. Chisom stated that he had also initiated a move into the left hand lane by following Craig. His testimony also claimed that the

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[2] Va. Code, §46-220, 46-242 (1950).

[3] Va. Code, §46-225 (1950).

unlighted car of Simmons should have been visible at a distance of one hundred fifty feet; the former evidence was totally disregarded while the latter was accepted to be the opinion of an expert. The majority of the court failed to take into account that in spite of the apparent visibility Chisom had nevertheless intended to pass the same car that Craig had started to pass. It does not seem logical that Chisom's actions could be that of a reasonable and prudent man if he attempted to pass a car while there was a supposedly visible object in the left hand lane. It is a well known fact that the testimony of a lay witness is of little value and should not be given the weight relative to that of an expert.[4] Chisom's testimony was viewed in such a manner as to assume that he was acting as a reasonable man in attempting to pass the unidentified car in front of Craig and thus presumably used as a basis for accepting his remaining testimony as that of an expert. The court made Craig's driving into the left hand lane in front of an unlighted object negligence as a matter of law when it should have been a question for the jury. Although the jury has passed on the question and given a verdict in Craig's favor, the Court of Appeals has decided to reverse a decision in a situation where reasonable people could differ.[5] In the light of all the testimony, the court states that the decision of the lower court was clearly wrong; arguments given to sustain this finding are based upon the fact that Craig did not sound his horn upon attempting to pass and the testimony of Chisom who was seeking to pass the same car as Craig.

In the majority opinion the judges are critical of Craig's inability to see Simmons' car whereas there is no mention that Simmons could very well have seen Craig's car and have anticipated the consequences. It is readily apparent that Simmons was at least equally as negligent as Craig since he did not turn on his lights until he was two or three car lengths in front of Craig. This would indicate that he did not see Craig pulling into the left hand lane even though the lights were burning on Craig's car. Simmons could possibly have avoided the crash by being more attentive to his driving and the hazards[6] since it is obvious that he could see Craig's lighted car more easily than Craig could

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[4] Davis v. Reynolds, 280 F. 363 (1922).

[5] Kennedy v. McElroy, 195 Va. 1078, 81 S.E.2d 436 (1954).

[6] McNamara v. Rainey Luggage Corp., 139 Va. 197, 123 S.E. 515 (1924).

see his unlighted car. The combination of the two circumstances would appear to make Simmons negligent on the doctrine of last clear chance and also the doctrine of avoidable consequences. A reasonably prudent man would have attempted to avoid the collision when it became apparent that the passing car did not see the unlighted car in the lane.

As stated in the dissenting opinion, the majority opinion seeks to place the entire responsibility for the accident on the driver seeking to pass in reliance upon §46-228.[7] The majority would make him the insurer of safety even when the driver coming from the opposite direction is obviously negligent by not having his lights burning. The majority admitted the fact that Simmons should have had his lights burning as required by §46-275[8] and that this was the proximate cause of the crash and then state that, nevertheless, the violation of either §46-225[9] or §46-228[10] alone would be sufficient to authorize a verdict in favor of Simmons. Why should this reasoning be applicable to those two statutes and not to §46-275[11] which was not even questioned by the two courts since this was found by the jury to be one of the main reasons for the crash?

It is well settled within this State that the judgment of the trial court cannot be set aside unless plainly wrong or without evidence to support it.[12] The jury in the trial court returned a verdict in favor of Craig for the damages incurred and the Supreme Court of Appeals has undertaken to reverse this decision. Evidence and facts presented before the trial court would make it difficult if not impossible for reasonable men not to differ in their opinion of this case.

Although the doctrine of comparative negligence has been considered taboo in Virginia[13] and is not mentioned in the opinion, this case would appear to be an ideal situation for its application. In cases of comparative negligence, the courts attempt to balance the negligence of the parties. It would appear that the

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[7] Va. Code, §46-228 (1950).
[8] Va. Code, §46-275 (1950).
[9] Va. Code, §46-225 (1950).
[10] Va. Code, §46-228 (1950).
[11] Va. Code, §46-275 (1950).
[12] Va. Code, §8-491 (1950).
[13] Light, Torts, 42 Va.L.Rev. 1197, 1209 (Annual Survey of Virginia Law, 1956).

majority of the court was trying in the instant case to avoid its use, being unwilling to take the first step toward the adoption of this doctrine. Although the Supreme Court of Appeals in this case would be giving a much more equitable solution by adopting this theory and not holding Craig liable for the results of Simmons' negligent act of not turning on the lights of his vehicle at a time when they were clearly needed, it could have accomplished the same result by merely refusing to interfere with the jury's findings at the trial. It is thus apparent that the Supreme Court is advising lower courts not to allow juries to compare negligence in reaching their verdicts for fear of reversal on appeal. As a result, Virginia appears to be, at the present time, on the basis of the decision of the instant case, unalterably opposed to any introduction of the doctrine of comparable negligence either directly through court acquiescence in its principles or indirectly by satisfaction of jury action which might be based upon it.

A. O. D.

TRUSTS–STATUTORY CONSTRUCTION OF ADOPTION LAWS

The Court of Appeals of Kentucky was faced with what they termed to be a $64,000.00 question. Is it lawful for a man to adopt his wife as his *child and heir at law?*[1]

Testatrix executed a will, which set up a trust for the life of her son. At the son's death, the trust was "to be distributed to the heirs at law of my said son according to the law of Descent and Distribution" in force in Kentucky at son's death. In 1941, 18 years after testatrix's death, son adopted his wife "as his legal heir at law and child." The Kentucky Court of Appeals held it to be lawful to adopt a wife as a child and heir at law in entering judgment in favor of the wife.

The largest obstacle placed in the court's path was that the adoption was void as against public policy. Contestants argued that this adoption would vitiate common law unity of husband and wife. The majority of the court held that even though

[1] Bendinger et al. v. Graybill's Executor & Trustees et al., – Ky. –, 302 S.W.2d 594 (1957).