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Automobiles: Contributory Negligence as a Matter of Law: Look and Listen Rule Applied to Pedestrians

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the further development of administrative agency, in a slow, orderly way, rather than to attempt to achieve this singularly desirable end, in a single bound by constitutional amendment.

Necessarily, administrative bodies or officers must act, not only within the field of their prescribed statutory powers, but in a reasonable and orderly manner. No administrative agency can properly assume arbitrary and uncontrolled power. Numerous cases of authoritative nature support the above doctrine, the foremost of which are: *Standard Oil Co. v. U.S.* 221 U.S. 1; 31 S. Ct. 502; 55 L. Ed. 619, *U.S. v. American Tobacco Co.*, 221 U.S. 106; 31 S. Ct. 632; 55 L. Ed. 663, *Kansas City So. Ry. v. U.S.* 231 U.S. 423; 34 S. Ct. 125; 58 L. Ed. 296. To cite again the learned words of Justice Rosenberry in *State v. Whitman* supra, "The rule of reasonableness inheres in every law, and the action of those charged with its enforcement must in the nature of things be subject to the test of reasonableness." To exemplify this, it is apparent that no mere administrative officer could properly decide a question of constitutionality, as held in *Pollitz v. Michigan Rd. Comm.* (205 Mich. 549; 172 N.W. 611).

As early as 1863, the Wisconsin Supreme Court had before it questions dealing with the delegation of power to administrative bodies. A tendency bordering on reluctance to develop this theory was prevalent, but slowly a trend appeared in favor of a more constructive attitude on this subject, until today, the Wisconsin statutory system confers many broad and generous powers on its administrative bodies, notably that of the Industrial Commission. There are many Wisconsin authorities to illustrate the almost cautious development of this addition to our state governmental system.

Adams v. Beloit (105 Wis. 363; 81 N.W. 869), *State ex rel. Boycott v. La Crosse* (107 Wis. 654; 84 N.W. 242), *State ex rel. Van Alstine v. Frear* (142 Wis. 320; 125 N.W. 961), *State ex rel. Nehrbass v. Harper* (162 Wis. 589; 156 N.W. 941), *Klein v. Barry* (182 Wis. 255; 196 N.W. 457).

In consequence, something akin to a parallel can be drawn between the gradual, steady and constructive evolution of the principle of administrative legislation and the feature of constitutional law which it embodies, and other similar movements in history which owe their inception and development to the urge of necessity and the capabilities of men.

CHESTER F. KRIZEK

Automobiles—Contributory negligence as a matter of law—Look and listen rule applied to pedestrians.

On May 8, 1928, the Wisconsin Supreme Court gave decisions in three cases which can be considered a trilogy of cases on contributory negligence in automobile accident cases.

In *Mertens v. Lake Shore Yellow Cab and Transfer Co.*¹ the plaintiff was struck while crossing the street. He testified that he looked but saw no automobile as far as he had a clear vision which was 250 feet. Quoting the Court from the decision in the *Mertens* case.

It is apparent that if he had looked when he came flush with the girder of the bridge, he was in exercise of that degree of care which the law requires. *But he is not permitted to say that he looked, when, if he had looked, he must have seen that which was in plain sight.* [Italics ours.]

Court cites, in support of this rule, *Cawley v. LaCrosse City Railway Co.*,² *White v. Chicago N.W. Ry. Co.*,³ and *White v. Minn. St. P. and S.S.M. Ry. Co.*⁴

The first of these cases cited involved injury to a person driving his machine along street car tracks, and the other two invoked the look and listen rules at railroad crossings

In applying the look and listen rule to a pedestrian crossing the street in the *Mertens* case, the Court says:

Courts have said that the look and listen rule does not apply with the same rigor to pedestrians crossing city streets that it does to pedestrians crossing railroad and street car tracks. These views were first expressed in the early days of automobile traffic, when such traffic was not as heavy and when the operator of the automobile was not in especial public favor. Year after year, however, we find greater congestion of automobile traffic in city streets, and the danger to the pedestrian constantly increasing. Changing conditions have laid upon him a greater duty with reference to his own safety when he attempts to cross city streets. . . . While it was formerly said that the presence of a railroad track was a warning of danger, it must be admitted that the dangers attendant upon the crossing of a busy city street are far more numerous, even though they be less serious. At any rate, *the time has come when ordinary care requires the pedestrian to look for approaching automobiles before he leaves the zone of safety.* [Italics ours.]

In *Kleist v. Cohodas*,⁵ the second case in this trilogy, the plaintiff was injured by his automobile colliding with a truck of the defendant. The defendant's truck was parked on a highway after dark without lights. The lights on the plaintiff's car showed at least twenty feet ahead and his speed was such that he was unable to stop after seeing the truck.

¹ 218 N.W. 85; N.W. Rep. Adv. Sheets July 6, 1928.

² 101 Wis. 145; 77 N.W. 179.

³ 102 Wis. 489; 78 N.W. 585.

⁴ 147 Wis. 141; 133 N.W. 148.

⁵ 219 N.W. 366; N.W. Rep. Adv. Sheets June 8, 1928.

At the time of the accident there was a statute in effect which said that a motor vehicle should be provided "with sufficient lights, of such design and so adjusted and operated as to render the use of the highway by such vehicles safe for all the public,"⁶ and "the minimum requirements for head lamps on any automobile or other similar motor vehicle, except motorcycles, while being driven upon the highway, shall be such as to enable the driver to *clearly distinguish a person, vehicle or other substantial object 200 feet ahead*, and the design, adjustment and operation of such head lamps shall be such as to avoid dangerous glare or dazzle."⁷ [Italics ours.]

In an earlier case, *Lauson v Fond du Lac*,⁸ the Superior Court directly held (Page 60, 123 N.W. 63) that, operating an automobile under the conditions presented that night, he was not exercising the ordinary care required of him, if he drives the car at such a speed that he cannot bring it to a standstill within the distance that he can plainly see objects ahead of him; that if his lights be such that he can see objects for only ten feet, then he must so regulate his speed as to be able to stop within that distance, and if he fails to do so, and an accident results from such failure, no recovery can be had; that such is *the minimum degree of care that should be required*.

Since the Lauson case, which was decided in 1909, the statutes have consistently leaned toward more stringent requirements as to lights.

In accordance with the rule as stated in the Lauson case, *supra*, and the statutes involved, the Court decided that the plaintiff had himself violated the law regulating his own use of the highway, and, as a matter of law, it must defeat his right to recover.

In *Knapp v. Sommerville*,⁹ which completes this trilogy of cases, the deceased's automobile was equipped with lights, so that under ordinary conditions its occupants could see an object the size of a man 200 or 300 feet ahead of them. The defendant's truck was parked on the road without any headlights or taillights and with nothing on the rear of the truck which would reflect the lights of an approaching automobile. The testimony showed that the deceased did not see the defendant's truck until he was within twelve or fifteen feet of the point of collision, that he immediately applied the brakes and that the car slid about ten or twelve feet and collided with the defendant's truck causing the driver's death.

In accordance with the rule in the Lauson case, the plaintiff was held to be guilty of contributory negligence as a matter of law. The

⁶ Statutes (Wis.) 85.13 Subsection 1.

⁷ Statutes (Wis.) 85.13 Subsection 2.

⁸ 141 Wis. 57; 123 N.W. 629.

⁹ 219 N.W. Rep. 369; N.W. Adv. Sheets June 8, 1928.

decision in the Lauson case has been often cited and although it has been severely criticized in some jurisdictions, it still stands as the law in Wisconsin.

— ALFRED G. GOLDBERG

Conditional Sales: forfeiture.

In the case of *Schneider v. Allis-Chalmers Mfg. Co.*, 219 N.W. 370; 196 Wis. —, the plaintiff had contracted to buy, on the installment plan from the defendant, certain machinery to be manufactured to order, and had made certain payments on account, aggregating \$24,400. The written contract of conditional sale provided:

Upon failure to make payments, or any of them, as herein specified, the company [i.e., the defendant] may retain any and all partial payments which have been made, as liquidated damages.

Plaintiff being in default, prior to the delivery of any of the machinery, the defendant is alleged to have resold the machinery and to have sustained no actual damage. Whereupon the plaintiff sued for a return of the partial payments, on the theory of unjust enrichment. Defendant demurred. Demurrer sustained.

The Supreme Court of Wisconsin held that:

The parties having lawfully and expressly contracted for just such a situation as arose, the law will make no other contract for them.

Although Wisconsin has both the uniform *sales* act and the uniform *conditional sales* act, the Court unfortunately mentioned neither. As William M. Hargest says on page 181 of the *University of Pennsylvania Law Review* for December, 1927, in his article on "Keeping the Uniform Laws Uniform":

The courts have rather consistently failed to preserve uniformity. There are two rather outstanding reasons for this failure. One is the tendency of courts to adhere to *stare decisis*, and the other the failure to even refer to the statute law of their own state which governs the principle in the case. . . . The courts in states which have adopted the *Uniform Sales Act*, when deciding questions to which that *Act* applied failed to even refer to the *Act* in 353 cases, while 941 cases cited it.

Of course, the *conditional sales* act cannot apply to such a case until the goods have been delivered unless the words "is delivered" in Sec. 1 of that act be construed to mean "is to be delivered." Otherwise, the decision under review might have the effect of removing from the protection of the act all conditional sales of made-to-order goods, for the Court said:

The defendant was certainly under no duty to the buyer to take any steps or legal proceedings either as to the machinery, title