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PEDESTRIANS' RIGHTS AND DUTIES--- A REVIEW OF THE WISCONSIN CASES

ALLAN E. MAGEE

WITH the almost universal use of the automobile as a means of transportation, both for pleasure and business, the amount of litigation involving automobiles has increased tremendously. The most cursory examination of the Wisconsin reports reveals how much of the time of our courts, both trial and appellate, is taken up with such litigation. This article is confined to a consideration of a particular phase of automobile law in Wisconsin—that on injuries to pedestrians,¹ and attempts to determine the factors that influence the courts' decisions under particular circumstances.

For about fifteen years after the automobile came into general use the courts attempted to make satisfactory dispositions of cases under negligence law that had been developed before the "automobile age," remarking that, "* * * excepting statutory regulations this use (of automobiles) has not changed the well established rules governing the law of negligence. It has only made it necessary to apply those rules to new conditions."² Gradually it became obvious that these "new conditions" made necessary a clear cut determination of the rights and duties on the part of operators of motor vehicles and other users of the highways. This realization culminated in the legislative enactment of 1929, now section 85.44 of the Statutes, which became effective on Nov. 5, 1929. The provisions pertinent to pedestrians are set forth below,³ and

¹ Even in this field it is limited. The numerous cases on injuries to pedestrians waiting for or alighting from streetcars are not considered, inasmuch as they are a large field in themselves and involve a particular statute, 85.16 (9), not considered here.

² See *Blazic v. Franzwa*, 179 Wis. 260, 191 N.W. 572 (1923).

³ 85.44 (1) PEDESTRIANS RIGHT OF WAY. The operator of any vehicle shall yield the right of way to a pedestrian crossing the highway within any marked or unmarked crosswalk at an intersection except at those intersections where the movement of traffic is being regulated by traffic officers or traffic control signals.

(2) PEDESTRIANS RIGHTS AND DUTIES AT CONTROLLED INTERSECTIONS. At intersections where traffic is controlled by traffic control signals or by traffic officers, operators of vehicles shall yield the right of way to pedestrians crossing or those who have started to cross the highway on a green or "GO" signal and in all other cases pedestrian shall yield the right of way to vehicles lawfully proceeding directly ahead on a green or "GO" signal.

(4) PEDESTRIANS RIGHT OF WAY FORFEITED WHEN JAY WALKING. Every pedestrian crossing a highway at any point other than a marked or unmarked crosswalk shall yield the right of way to vehicles upon the highway.

(5) PEDESTRIANS ON SIDEWALKS. Pedestrians upon any sidewalk shall have the right of way over all vehicles crossing such sidewalk.

(6) PEDESTRIANS TO WALK ON LEFT SIDE OF HIGHWAY. Pedestrians using those highways not provided with sidewalks shall travel on and along the left

since they make rather marked departures from the early law, should be carefully considered in any cases arising after their enactment.

Pedestrian litigation in Wisconsin may be divided into that arising before the 1929 Statutes and that arising afterwards. This article further classifies these two groups with respect to the position or location of the injured pedestrian, for, as will appear, the courts have required different standard of care for different situations. While some of the early cases can no longer be followed because of the subsequent statutory changes, they are here considered briefly to illustrate the progress of the law in this field.

CASES BEFORE 1929

Throughout this period the starting point in the consideration of every case was the proposition that all persons had equal rights in the highways. This was first recognized by the legislature in 1905, when the rule was put into statutory form⁴ and it still obtains, except as modified by the present statutes.⁵

ON CITY STREETS

Pedestrian on a regular cross-walk of an uncontrolled intersection.

In one of the very first cases involving an injury to a pedestrian by an automobile⁶ the trial court was reversed for giving an instruction that "a foot passenger is entitled to the right of way upon a regular street crossing." The Supreme Court was doubtless without choice in deciding on the alleged error in the instruction, for at that time sec. 1636-51 was in effect, and, as pointed out by the court on appeal, "There is no modification giving foot users a right of way over other users." This trial judge perhaps found ample consolation years later in 1929 when the legislature realized the wisdom of his view, and enacted the substance of his instructions into the present sec. 85.44 (1).

Rules laid down in some of these early cases still obtain today, and are frequently referred to by counsel and courts. One of these is the proposition of *Brickell v. Trecker*⁷ that a pedestrian crossing a busy

side of such highway and the pedestrian, upon meeting a vehicle shall, if practicable, step off the traveled roadway.

⁴ "Every owner and operator of an automobile or other similar motor vehicle shall have equal rights upon all public highways of this state with all other users of the highway." Sec. 1636-51, 1905 Statutes. However, the rule seems to have been developed by the courts long before legislative recognition was given, for in 1890 in *Mittlesteadt v. Morrison*, 76 Wis. 265, 44 N.W. 1103, the court says, "The proposition cannot be denied that all persons have an equal right to travel upon a public highway. From this equal right it follows that each person must make a reasonable use of the highway so as not to interfere with the enjoyment of the common right."

⁵ Sec. 85.11, Wis. Stats., 1933.

⁶ *Grimes v. Snell*, 174 Wis. 557, 183 N.W. 895 (1921).

⁷ 176 Wis. 557, 186 N.W. 593 (1922).

city street must look before leaving the curb, and must make another observation upon reaching the center of the street. Failure to do so was held to constitute contributory negligence. The case was decided under the "equal rights" statute, but apparently is still law today.⁸

Another far-reaching rule, developed in this period, holds the violation of a safety statute to constitute negligence as a matter of law. It seems to have been first laid down in *Drahenburg v. Knight*⁹ when the defendant, in turning a corner, failed to keep to the right of the intersection as required by 1636-49b (1) of the 1921 Statutes. Proximate cause was the one issue submitted to the jury. Later in *Brown v. Redmond*,¹⁰ on similar facts, the statute is not mentioned, but that the rule of the *Drahenburg* case still obtains seems clear under later cases.¹¹ It was held error in *Sewart v. Olsen*¹² to admit in evidence city traffic ordinances that were in conflict with this statute.

As might be expected in these cases, one of the defendant's principal contentions is that the plaintiff was contributorily negligent. Before the enactment of the comparatively negligence statute in 1931¹³ a finding of contributory negligence left the plaintiff without remedy. Usually the question is held to be for the jury, and only in a few cases did the court find against the plaintiff as a matter of law.¹⁴ When the plaintiff is a young child different standards are applied, and children under five years of age are, in Wisconsin, conclusively presumed to be incapable of contributory negligence.¹⁵

⁸ See *Salsich v. Beim*, 205 Wis. 524, 238 N.W. 394, 79 A.L.R. 1069 (1931).

⁹ 178 Wis. 386, 190 N.W. 119 (1922).

¹⁰ 187 Wis. 67, 203 N.W. 739 (1925).

¹¹ See *Edwards v. Kohn*, 207 Wis. 381, 241 N.W. 331 (1932).

¹² 188 Wis. 487, 206 N.W. 909, 44 A.L.R. 1292 (1925).

¹³ 331.045, Wis. Stats. (1933).

¹⁴ See *Blazic v. Franzwa*, 179 Wis. 260, 191 N.W. 572 (1923), where the plaintiff was crossing the street carrying an umbrella. On the authority of the *Brichell* case it was held that the plaintiff had as good an opportunity to see that defendant as he had to see her. The jury's finding of negligence and no contributory negligence were set aside and the complaint dismissed.

In *Stewart v. Olson*, *supra*, note (12), plaintiff was running along a sidewalk and saw the defendant's car coming from behind going in the same direction. Plaintiff ran on across an intersecting street, and was struck by defendant's car as the latter turned into that street. Since the plaintiff testified that he thought the defendant might make the turn, the court held that his continuing to cross was contributory negligence as a matter of law.

In *West v. Day*, 193 Wis. 187, 212 N.W. 648 (1927), plaintiff, believing she had time to cross ahead of an approaching car, did so, but was struck. The court disposed of the defendant's claim of contributory negligence with these remarks, "If a person may not safely proceed to cross a street when there are no autos within half a block, without being guilty of contributory negligence, then indeed, the crossing of a busy street become a dubious undertaking. She (plaintiff) had a right to assume that autos, which she saw, were proceeding with ordinary care, and to act upon the assumption that she could proceed. There is nothing to the contention that plaintiff was guilty of contributory negligence as a matter of law."

¹⁵ *Ruka v. Zierer*, 195 Wis. 285, 218 N.W. 358 (1928). In this case the jury found the defendant not negligent when he struck a child who ran out from the

Pedestrian on a Regular Cross-walk of a Controlled Intersection.

Only two cases in this group came up before the enactment of the 1929 Statutes. In *Bamtio v. Dowling*,¹⁶ the plaintiff was crossing with the traffic and was struck by the defendant who started his car before being signalled by the officer. It was held error to non-suit the plaintiff, the court holding, "It was not only incumbent upon the defendant when starting his car to observe the action of the traffic officer, but also the condition of the highway with respect to vehicles and pedestrians."

In *Raab v. Brzoskowski*,¹⁷ in affirming a judgment for the plaintiff the court held that, "The change of the light from red to amber does not justify the traffic in moving across a crossing until a reasonable opportunity for travelers properly on the street to reach the sidewalk."

In both of these cases it was held that questions of negligence and contributory negligence must be submitted to the jury. No mention is made of city traffic ordinances that probably then were in effect.

Pedestrians in the street at a place other than a regular cross-walk.

While the statute giving all users equal rights in the highway was in effect no distinction was made with regard to the place of the pedestrian's crossing. The questions of his own care and that of the driver are almost without exception submitted to the jury. However, cases coming under this classification have developed under rules of law that are now most important in automobile litigation. One of the outstanding propositions is that set forth in *Ludke v. Burck*,¹⁸ where the plaintiff, a child, ran into the street to recover a hat. It was held that a violation of a statute fixing a speed limit is negligence as a matter of law, but that it does not deprive the defendant of the defense of contributory negligence except where he has been grossly negligent.

Within a period of eleven years, we find the court rejecting a proposed standard for ordinary care of a pedestrian, and then later adopting it in full. In *Klohow v. Harbough*^{18a} the defendant asked that the plaintiff be held contributorily negligent as a matter of law on the ground that if he had looked he would have seen the defendant's car which was in plain sight, that if he did not look, such failure was neg-

sidewalk, but a new trial was ordered for the failure of the trial court to stress the standard of care required when small children are involved. "To hold him (defendant) to an anticipation that some of them might suddenly dart out into the street is not at all unreasonable." Compare *Hanes v. Henneson*, 205 Wis. 16, 236 N.W. 646 (1931) where the jury's finding of no negligence on the part of a driver, who had hit a small child, was sustained.

¹⁶ 186 Wis. 422, 202 N.W. 687 (1925).

¹⁷ 204 Wis. 319, 236 N.W. 133 (1931).

¹⁸ 160 Wis. 440, 152 N.W. 109, L.R.A. 1915D, 968 (1917).

^{18a} 166 Wis. 262, 164 N.W. 999 (1917).

ligence in itself. The court refused to apply this rule, holding that it was an attempt to extend the "look and listen" rule, applied to persons approaching a railroad crossing, to persons crossing a city street. It was dismissed as "going too far."

Then in 1928, when auto traffic had greatly increased, a case on similar facts arose.¹⁹ The plaintiff with a view of 250 feet testified he saw no cars approaching, but was struck within twelve feet of the curb. The court held that the plaintiff was contributorily negligent as a matter of law and incidentally, applied to pedestrians the rule contended for but rejected in the *Klokow* case. No clearer explanation of the changing viewpoint of the court can be made than to quote it directly.²⁰

The case is important because it marks a direct departure from the position of the court in the *Klokow* case, and the reason, as recognized in the opinion, is the greatly increased amount of automobile traffic.

More cases involving injuries to infant pedestrians arose, but in two of them the court was not required to go into the question of contributory negligence, finding in the facts that the defendant was not negligent.²¹ In *Schmidt v. Reiss*²² it was held that in Wisconsin a child seven years old may be contributorily negligent, and this question is for the jury under instruction that the child is not held to the same degree of care as adults but is held to that standard of care ordinarily exercised by prudent children of the same age, experience, and intelligence.

¹⁹ *Mertens v. Yellow Cab Co.*, 195 Wis. 646, 218 N.W. 85 (1928).

²⁰ "This court has held many times that such a situation does not present a jury question. Under such circumstances a person is presumed not to have looked or to have heedlessly submitted himself to the danger. He is not permitted to say that he looked when, if he had looked, he might have seen that which was in plain sight.

"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 an 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 pedestrians constantly increasing. Changing conditions have laid upon him a greater duty with reference to his own safety when he attempts to cross city streets. As a practical proposition, his duty to look for approaching automobiles is more imperative when attempting to cross a main city street than when crossing a railroad or street railway track because the danger is more constant. * * * the far greater frequency with which automobiles pass, as a practical proposition, renders the crossing of city streets scarcely less dangerous than the crossing of a railroad or street car track * * *. 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."

²¹ See *Kammas v. Karras*, 179 Wis. 12, 190 N.W. 849 (1922), where the child, behind and to the left of the driver, and therefore out of his view, ran into the side of the car, and *Schmidt v. Heim*, 200 Wis. 608, 229 N.W. 33 (1930), where the plaintiff ran out from behind a parked car which obstructed the defendant's view.

²² 186 Wis. 574, 203 N.W. 362 (1925).

At this time the question of whether the violation of an ordinance constituted contributory negligence as a matter of law was an open one. It arose in *Ford v. Werth*²³ where the deceased had crossed the street at night in the middle of the block in violation of an ordinance, and the court, remarking on the point, says, "The violations of a city ordinance regulating automobile traffic and violations of a similar statutory provision have been held negligence, but not necessarily contributory negligence."²⁴ Failure to submit the question of contributory negligence to the jury was held error.

In *Rang v. Klawun*²⁵ the plaintiff relied on the Ford case to sustain a jury finding of no contributory negligence. The court refused the contention and held the plaintiff contributorily negligent as a matter of law, distinguishing the Ford case on the ground that there the accident happened at night on a busy street, while here it was daylight and traffic was not heavy, and holding that standards of ordinary care vary with circumstances and conditions.

ON COUNTRY ROADS

Before the enactment of sec. 85.44 (6) of the 1929 statutes the cases show instances where pedestrians were walking along either side of country roads. In determining whether they have exercised ordinary care for their own safety, courts and juries inquire, among other things, whether pedestrians have maintained a sufficient observation to the rear. It is a question of fact to be determined under all the circumstances, and it has been held that there is no fixed rule of law to determine the number of such observations required in intervals of either time or space.²⁶

Pedestrians who fail to discover a visible and obvious danger, such as the approach of an automobile, may properly be found contributorily negligent.²⁷ In all but the clearest cases, this question of contributory negligence is for the jury, and it is so held especially when the facts show that the pedestrian was making a determined effort to escape the

²³ 197 Wis. 211, 221 N.W. 729 (1928).

²⁴ Here are cited cases including *Maker v. Lochen*, 166 Wis. 152, 164 N.W. 847 (1917) where the plaintiff passed to the right of a truck loaded with long iron beams which extended over the rear, and when the truck turned to the left, the beams struck plaintiff's car. Statutes 1636-49b prohibited such passing to the right, but such a violation was held not conclusively to establish contributory negligence since no causal connection between the violation and the accident appeared. Compare *Ludke v. Burck*, 160 Wis. 440, 152 N.W. 109, L.R.A. 1915D 968 (1915).

²⁵ 198 Wis. 1, 223 N.W. 121 (1929).

²⁶ *Davis v. West*, 179 Wis. 279, 191 N.W. 506 (1923); see also *Seitz v. Ott*, 174 Wis. 60, 182 N.W. 333 (1921).

²⁷ *Vanden Hewel v. Schultz*, 182 Wis. 612, 197 N.W. 186 (1924).

danger.²⁸ When the plaintiff is found contributorily negligent it is then immaterial that the defendant was violating a statute fixing the speed limit in passing school houses.²⁹ A plaintiff who, carrying an open umbrella in front of him, crosses in front of defendant's car when it was but thirty feet away, is so clearly careless that he must be held contributorily negligent as a matter of law.³⁰

The motorist who parks his car on the left side of the road to examine the motor, is entitled to an instruction that such an act is not contributory negligence.³¹ And an occupant of a stalled car, who is walking on the roadway to keep warm, may, to escape being hit by defendant's approaching car, take refuge in the ditch, and if struck there is not barred of recovery, for he is in a place where he has a right to be.³²

MISCELLANEOUS

The above classifications do not cover a number of noteworthy cases on injuries to pedestrians. Chief among them are those involving injuries to workmen on the street, and a quite different standard of care for their own safety has been established, namely, "That which an ordinarily careful laborer similarly occupied and situated would exercise under the same or similar circumstances."³³

While this standard does not exact a very high degree of care for his own safety from the workman, its application necessarily requires a higher one from the driver. Still it is quite possible to find a set of facts that allows the plaintiff workman no recovery. Thus in *Quinn v. Hartmann*,³⁴ the street laborer was crossing in front of a street car, and was struck by defendant's car coming along the side of the street car. The complaint was dismissed, the court holding that this driver had no reason to anticipate that the workman would step from in front of the street car into defendant's path on a busy downtown street.

²⁸ *Kuebler v. Klug*, 191 Wis. 259, 210 N.W. 701 (1926).

²⁹ *Bentson v. Brown*, 186 Wis. 629, 203 N.W. 380, 38 A.L.R. 1417 (1925). The statute involved was 85.08 of the 1925 statutes fixing a speed limit in such districts at twelve miles an hour.

³⁰ *Kroehler v. Arntz*, 197 Wis. 195, 221 N.W. 727 (1928).

³¹ *Schact v. Quick*, 178 Wis. 330, 190 N.W. 87, 25 A.L.R. 130 (1922).

³² *Clifton v. Smith*, 188 Wis. 560, 206 N.W. 923 (1926).

³³ *Isgro v. Plankinton Packing Co.*, 176 Wis. 507, 186 N.W. 606 (1922). See also *Trutenwald v. Wis. Lakes Ice and Cartage Co.*, 121 Wis. 65, 98 N.W. 948 (1904), where the plaintiff, a street cleaner, suddenly swerved from his path and was run over by defendant's team which was being allowed to take its own course without the care of the driver. The trial court's directed verdict for the defendant was set aside, the court saying, "Probably the trial court did not give proper significance to the circumstances that appellant's duties required him to move about without any regard to taking any particular course along the street, and to make frequent trips to the side of the street to empty his shovel, that his situation was quite different from that of any ordinary traveler on the street."

³⁴ 210 Wis. 551, 246 N.W. 587 (1933).

Neither do the courts require as high a degree of care from workmen on the streets to others who may get in their way. Where the plaintiff, a building inspector, stepped into a barricaded street, gazed at a building, and while so doing was run over by the defendant's steam roller, the plaintiff was denied recovery, the court holding that the barricading of the street was a sufficient warning to the public to keep off, and holding, too, that the plaintiff had no right to expect that the rollerman, who was backing the steam roller, would keep a constant lookout.³⁵

Pedestrians on sidewalks may feel a greater sense of security than when crossing streets, but injuries have occurred in such situations. In *Hughes v. Rentschler Floral Co.*³⁶ the plaintiff was struck by a car which had rolled away from its parking place on a hill. A directed verdict for the defendant was held error and a jury trial was ordered to determine negligence in the manner of parking and setting the brake.

When the pedestrian is struck by an automobile driven over the sidewalk, it is held that the standard of care for both parties varies with the circumstances and place of the collision. The courts will take judicial notice that such a pedestrian may be engaged in thought of other matters, but if he is duly warned by means of horn or lights, a verdict may properly be directed for the defendant.³⁷

CASES AFTER 1929

ON CITY STREETS

Pedestrian on the cross-walk of an uncontrolled intersection.

After the enactment of sec. 85.44 of the 1929 statutes, effective Nov. 5, 1929, it might be expected that there would be a considerable change in the decisions in this type of litigation. This has been true to a large extent. In few cases have the parties and the court placed no

³⁵ *Ashton v. P. F. Coughlin Co.*, 179 Wis. 307, 191 N.W. 561 (1923).

³⁶ 193 Wis. 49, 213 N.W. 625 (1927).

³⁷ *Henderson v. O'Leary*, 177 Wis. 130, 187 N.W. 994, 24 A.L.R. 942 (1922). Here the defendant was driving slowly over the walk into his private garage, and it was found that the plaintiff had due warning when his lights flashed on her path. An interesting bit of evidence in this case, which arose when automobiles were comparatively new, was that when the defendant, upon seeing the plaintiff, instead of sounding his horn, yelled, "Whoa, woman!"

Compare this case with *Jones v. Nolan*, 197 Wis. 311, 222 N.W. 229 (1928) where the defendant was driving over a walk into a filling station and the plaintiff walked into the side of his car. Jury findings that the defendant was not negligent and that the plaintiff was not contributorily negligent were sustained. "The degree of care which a pedestrian is required to use while passing over a crossing must be commensurate with the dangers he is liable to encounter. What might be ordinary care with respect to a private crossing leading to a dwelling might be insufficient to constitute ordinary care for a quasi-public crossing leading into a place of business like the one here involved."

particular emphasis on this statute. The purpose and effect of the new statutes is well stated in *McDonald v. Wichstrand*,³⁸ where the jury found the defendant negligent in not yielding the right of way to the plaintiff as required by the statute, which finding was affirmed.

A short time later the court had occasion to consider the effect of the violation of the safety statutes. It was held that they impose an absolute duty on drivers to yield the right of way, and that no question may be submitted to the jury to determine whether the driver was exercising ordinary care in failing to yield the right of way. It was also held in this case, "Where negligence is predicated on the violation of a safety statute, the question of reasonable anticipation or foreseeability does not enter into the question of whether such violation constitutes negligence."³⁹

Through volume 212 of the Wisconsin Reports, no cases on injuries to pedestrians on the crosswalk of a controlled intersection appear.

Pedestrians on the street at a place other than a regular crosswalk.

As the Edwards case calls attention to the absolute duty of drivers to obey the safety statutes, *Brewster v. Ludtke*⁴⁰ shows that a similar duty devolves on pedestrians. Upon a showing that plaintiff was crossing the street twenty-five feet north of the crosswalk, and therefore in a position so that she could not see the car and yield the right of way as required by statute, she was held contributorily negligent as a matter of law. In cases under these circumstances, a jury finding of negligence on the part of the driver cannot be sustained when the plaintiff walks into his car. No duty can be imposed upon a driver requiring him to maintain a lookout ahead, diagonally to the right and to the left, and directly to the side as well.⁴¹

PEDESTRIANS ON COUNTRY ROADS.

The most interesting feature of this group of cases is the court's somewhat varying treatment of sec. 85.44 (6) requiring pedestrians to

³⁸ 206 Wis. 58, 238 N.W. 820 (1931). "The difficulties arising from administering a rule which sought to give the automobile and a pedestrian equal rights at a crossing resulted in disadvantage and some misfortune to the pedestrian. The rapid movement and the bulk of the automobile, the thoughtlessness of some drivers, and the determination of the travelers on foot brought conflicts, if not collisions, which resulted in the feeling that pedestrians in the nature of things ought to have a reasonable opportunity when properly on the street at a cross walk, to reach the sidewalk. This feeling eventually refined into a public opinion that found expression in the legislation." But it is pointed out that the pedestrian cannot rely entirely on the fact that he has the right of way.

³⁹ *Edwards v. Kohn*, supra, note 11. Ordinarily the question of proximate cause, however, must be submitted but here it was held to appear as a matter of law. Compare with *Brewster v. Ludtke*, infra., note 40.

⁴⁰ 211 Wis. 344, 247 N.W. 449 (1933).

⁴¹ *Wachsmuth v. Wachsmuth*, 210 Wis. 683, 247 N.W. 327 (1933).

walk on the left side of the highway. The proposition was first presented in *Leckive v. Ritter*⁴² where the testimony was conflicting as to whether the plaintiff was walking on the left side of the road. After holding that the question of contributory negligence was for the jury the court says, "We have grave doubts as to whether the legislature intended to require a pedestrian walking along a narrow, one track country highway to travel only along the left side thereof with the incidental consequence that a pedestrian not so traveling would be guilty of a want of ordinary care as a matter of law even though run down by an automobile approaching from the rear."

At the same time *Tillier v. Swette*⁴³ came to the court's attention. The plaintiff was on the left side of the road, but because he was looking back and did not see the defendant's car coming toward him, he failed to step aside. The appellate court held that the trial judge had erroneously non-suited the plaintiff, pointing out that under the statute a pedestrian must step aside only when practicable, and deciding that the jury would be entitled to believe it had not been practicable for this pedestrian to step aside.⁴⁴

The exact duties of a pedestrian under this statute were not further clarified until the opinion in *Hanson v. Matos*⁴⁵ was handed down. Here the plaintiff, whose hearing was impaired, was standing in the middle of a very narrow country road, and not knowing of the defendant's approach, failed to step aside. The jury's finding of contributory negligence was sustained and the court explains its remarks in the *Leckive* case, pointing out that they must be construed with reference to the circumstances under which they were made, and holding that narrow country roads are within the provision of the statute, and that here the plaintiff was bound to comply with it for compliance was neither impossible nor dangerous.⁴⁶ Therefore it seems that it is only where the road is so narrow that a car could not pass a pedestrian without striking him, whether he was to the right or to the left of the center,

⁴² 207 Wis. 333, 241 N.W. 339 (1932).

⁴³ 207 Wis. 373, 241 N.W. 341 (1932).

⁴⁴ See also *Feller v. Leonard*, 207 Wis. 43, 239 N.W. 498 (1932). To the same effect, where the court further held that a violation of sec. 85.40 (5) requiring that when traversing a curve where the driver does not have a clear view, his speed shall be such that he can stop within one half the range of his vision, might properly give rise to a jury's inference of negligence.

⁴⁵ 212 Wis. 275, 249 N.W. 505 (1933).

⁴⁶ For a more elaborate explanation of the remarks in the *Leckive* case, see *Weise v. Polzer*, 212 Wis. 337, 343, 248 N.W. 113 (1933) in which case the rule that a safety statute fixes a standard of ordinary care is affirmed. In the *Hanson* case, the jury's finding of contributory negligence was held proper on another ground also—plaintiff's violation of sec. 85.44 (9), 1931 statutes, forbidding a person "to stand or loiter on any roadway other than in a safety zone if such act interferes with the lawful movement of traffic."

that his failure to walk on the left could not be held to be contributory negligence. In other cases he must comply with the statute.⁴⁷

In other cases in this group it is shown that a pedestrian who crosses a country highway is not contributorily negligent as a matter of law in failing to look again upon reaching the center of the road. *Brichell v. Trecher*, is distinguished on the ground that it applies only to busy city streets and not to country highways where the traffic is not heavy. Thus the duties of the pedestrian in the latter situation are lightened.⁴⁸

SUMMARY

Reviewing the results of the foregoing decisions it would seem that if there is any noticeable tendency in the law in this field, it is to enlarge the rights of pedestrians and the duties of motorists. This is particularly true when it is considered that the comparative negligence statute, 331.045, 1931 statutes, must now be applied in all these cases. The chief enlargement of the *duties* of pedestrians is the adoption of the rule expressed in *Mertens v. Yellow Cab Co.*⁴⁹ to the effect that a pedestrian will not be allowed to say he has looked, whereas if he had looked, he must have seen that which was in plain sight. Certainly sec. 85.44 of the 1929 statutes has determined and clarified the correlative rights and duties in much more well-defined terms than previously existed, and should be a marked aid to the courts, attorneys, and juries. Since a violation of a safety statute is now held negligence as a matter of law, it is now necessary to submit to the jury only the question of causation in such instances. The court in *Ford v. Werth*⁵⁰ pointed out that the violation of a safety statute had never then been held contributory negligence as a matter of law. Upon examination of later cases, the practitioner would find it difficult to see why this should not follow

⁴⁷ But even this may be subject to some qualification under peculiar facts. In *Bump v. Voights*, 212 Wis. 256, 249 N.W. 508 (1933), the plaintiff was running down the road to recover a lost cap and ran just a bit to the left of the center of the road, and was hit by the defendant's car coming from the rear. Refusing to accept the defendant's contention that this plaintiff should have been held contributorily negligent as a matter of law the court says of sec. 85.44 (6), "It is true that the deceased was not at the extreme left of the highway * * * but the purpose of this statute is to make a practical use of the watchfulness of both pedestrians and drivers approaching each other with the hope of reducing a likelihood of accident. We do not consider that this was intended in any way to interfere with one's rights to recover property which accidentally gets on the highway. Under such circumstances the conduct of the actors must be regulated by the rules of ordinary care. The difference between a traveler moving steadily in a given direction toward the oncoming car and one who seeks to retrieve a lost article, who to do so must invade the other portion of the highway is obvious."

⁴⁸ *Salsick v. Bunn*, 205 Wis. 524, 238 N.W. 394, 79 A.L.R. 1069 (1931).

⁴⁹ *Supra*, note 19.

⁵⁰ *Supra*, note 23.

as the converse of the rule of *Edwards v. Kohn*.⁵¹ In any of the cases relied on in the Ford case, the court's only apparent reason for not holding the plaintiff contributorily negligent as a matter of law was that no *causal connection* appeared, and in other cases this might be found by a jury. Apparently such reasoning has now been adopted by the courts and the case of *Brewster v. Ludke*⁵² may be taken as establishing the rule that the violation of a safety statute now constitutes contributory negligence as well as negligence as a matter of law. When no safety statute is involved, the question of negligence should go to the jury in all but the clearest cases. The other important features of the law shown by the cases are that pedestrians may assume automobiles to be approaching at a lawful rate of speed. They may lawfully seek safety at the side of the highway. They are to step off the highway when practicable. A driver's failure to blow his horn is a circumstance to be considered by the jury in determining whether he exercised ordinary care. Juries must be properly instructed as to the standard of care required of children or workmen on the street, which standards are not as high as those for adults and ordinary pedestrians. Different standards of care for both parties are applied when the defendant's car crosses a sidewalk. Different standards apply on country roads as distinguished from busy city streets. As yet no case has been found where both driver and pedestrian are at a controlled intersection, proceeding with the signal lights or officer's direction in their favor, and an accident occurs when the driver makes a right turn across the pedestrian's path. It would seem that the question of negligence and contributory negligence should go to the jury, although it might well be held that the driver is under a duty to yield the right of way to the pedestrian on the regular crosswalk, and only the question of proximate cause should be submitted.

This is particularly a "factual" field of the law, and if a study of the reported cases fails in a particular situation to establish the rights and duties of the parties as a matter of law, the cases may be helpful in anticipating how a jury may decide on similar facts.

⁵¹ *Supra*, note 11.

⁵² *Supra*, note 40.