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Private Law: Torts - Traffic Cases

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the effect of the boy's negligence by finding that the defendant lifeguard had the last clear chance to save the victim. In order to adopt this attack it was necessary to deal with the temporal sequence between the time at which the patron became helpless and the time when his danger was obvious to the lifeguard.

This writer suggests that the right to recovery in cases of this kind should not be made to depend upon the fortuities of last clear chance. Should contributory negligence ever operate as a defense in a suit based upon the inattention of a professional lifeguard? If the patrons of a public pool could always be expected to shepherd their own welfare with the care of the mythical reasonable man there would be little basis for the universal requirement of lifeguards at such places. The expectable risk of heedlessness by patrons is the most prominent danger that faces the proprietor of a pool. He therefore must undertake to afford a safeguard against this very hazard and to watch over those who get into danger irrespective of whether they are or are not to blame for their own predicament. If the duty is to protect the patron against the consequences of his own carelessness, it would seem highly inappropriate to allow the defendant to set up that same carelessness as a bar to recovery.³⁵ There is no policy whatever to support the defense of contributory negligence in a case of this kind, and resort to the confusion of last clear chance should be unnecessary.

TORTS—TRAFFIC CASES

*William E. Crawford**

In *Monger v. McFarlain*,¹ the court held the defendant's conduct to be negligent *per se*, but found no liability because the negligence was passive, which, as two dissenting opinions pointed out, is contrary to the landmark case of *Dixie Drive-it-Yourself*.² A casenote³ in the prior issue discusses the problem thoroughly.

35. Cf. *Dixie Drive It Yourself System v. American Beverage Co.*, 242 La. 471, 137 So.2d 298 (1962) (duty to avoid obstructing highway exists to protect against the risk that car approaching later might strike obstruction through driver's failure to be alert; although the problem in this case centered on the issue of proximate cause, the problem is basically the same where contributory negligence is involved: Whenever the purpose of the defendant's duty is to protect against the prospect of someone else's carelessness, that same carelessness should not be asserted by defendant in order to defeat recovery.)

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1. 204 So.2d 86 (La. App. 3d Cir. 1967).

2. *Dixie Drive-it-Yourself System v. American Beverage Co.*, 242 La. 471, 137 So.2d 298 (1962).

3. Note, 29 LA. L. REV. 167 (1968).

*Aetna Cas. & Sur. Co. v. Texas & Pac. R.R.*⁴ held that a motorist was contributorily negligent for driving at a rate of speed which, while within the legal speed limit, was such that he was unable to stop in time to avoid a train which appeared in a blind crossing protected by red signal lights that were not in operation at the time of the accident. No bell, horn, or whistle was sounded by the train. The majority opinion found that the plaintiff was within 400 feet of the crossing when the locomotive came into view. He applied his brakes and left 151 feet of skid marks before striking the rear of the first car behind the locomotive, which was going 28 miles per hour. The court found as a fact that the red signal lights were not working at the time of the accident.

It is difficult to imagine a more sinister trap than an already dangerous crossing protected by prominently displayed, but inoperative, red signal lights; yet, this case lays down the rule that a motorist must approach such crossings at a speed which will enable him to stop should a train suddenly and without warning appear at the crossing. Contributory negligence, under the rule would be virtually automatic for the motorist, since in the case at hand the motorist was driving within the legal speed limit and applied his brakes at the earliest possible moment after he had notice of the train. No statutes required him to stop for the crossing. May a motorist rely even to the slightest degree on the red signal lights? Apparently not.

The court in the instant case relied heavily on a 1952 opinion by the Fifth Circuit Court of Appeal,⁵ which in turn relied on jurisprudence going back as early as 1909 and 1902.⁶ In the case at hand, the dissenting opinion vainly protested that a more contemporary balancing of duties was called for. Perhaps a rule akin to that permitting motorists to assume that others will obey traffic control signals would be in order. Then, if the red signal light were not operating, a motorist could assume no train was approaching and need not prepare to stop unless in some way he was alerted to danger. It might well be that the public's driving habits are in that vein and are irreversible, since the very pres-

4. 209 So.2d 561 (La. App. 2d Cir. 1968).

5. *Audirsch v. Texas & P. Ry.*, 195 F.2d 629 (5th Cir. 1952).

6. *Gibbins v. New Orleans Terminal Co.*, 159 La. 347, 105 So. 367 (1925) (gates did not close); *Barnhill v. Texas & P. Ry.*, 109 La. 43, 33 So. 63 (1902) (decendent was one-legged pedestrian with obscured view of track); *Kentucky & I. Bridge & R.R. v. Singheiser*, 115 S.W. 192 (1909) (plaintiff in horse-drawn wagon was struck by gate as it lowered).

ence of the red signal lights so strongly encourages reliance on them.

In *Piquet v. Stiaes*,⁷ the court barred a plaintiff for failure to avail himself of the last clear chance in a typical intersectional collision in which the defendant came through the neutral ground section of a divided boulevard and was struck by the plaintiff. The doctrine of last clear chance evolved to relieve a negligent plaintiff of the harshness of the contributory negligence doctrine. The court used it here to bar the plaintiff. It would seem a more simple approach to hold that this plaintiff was guilty of contributory negligence in not keeping a proper look-out and for not having his car under sufficient control to stop in time to avoid the defendant; however, the result reached by the court in finding against the plaintiff on the facts shown seems unquestionably correct.

SECURITY DEVICES

*Joseph Dainow**

SURETYSHIP

In *Fireman's Fund Ins. Co. v. Richard*¹ the debtor failed to meet certain scheduled payments and the creditor did nothing about it until he called upon the surety after the debtor had physically departed from the jurisdiction. The surety's plea of release by reason of a time extension without his consent was dismissed because the facts did not show any agreement for valuable consideration which would have precluded the creditor's right of action for any stipulated length of time. It is sometimes difficult to evaluate the facts but the court had no difficulty in this case in concluding that there had been a gratuitous forbearance or mere indulgence, and therefore the surety was not released. There was no dispute about the law, and both sides agreed that the governing law was stated in the previous case of *O'Banion v. Willis*² (which actually held the other way and with a strong dissent), but it is surprising that there is no mention in the court's opinion of Civil Code Article 3063,³ which is the real basic law for this situation.

7. 198 So.2d 496 (La. App. 4th Cir. 1967).

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1. 209 So.2d 95 (La. App. 1st Cir. 1968).

2. 14 La. App. 638, 129 So. 440 (1st Cir. 1930).

3. "The prolongation of the terms granted to the principal debtor without the consent of the surety, operates a discharge of the latter."