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Pedestrian Right of Way and Last Clear Chance - "Safety Island" and "Cross-walk" - State v. Belle Isle Cab Company

PEDESTRIAN RIGHT OF WAY AND LAST CLEAR CHANCE — "SAFETY ISLAND" AND "CROSS-WALK"

State v. Belle Isle Cab Company[1]

This was an appeal from a directed verdict in favor of all the defendants in a wrongful death action. The fatal accident occurred when the pedestrian, plaintiff's decedent, alighted from a streetcar on a safety zone and attempted to cross the street in the darkness of early morning. The plaintiff's decedent was not in the pedestrian's cross walk and when about three-quarters of the way across the street, he was struck by an ice truck, thrown to the ground and subsequently run over by a taxi cab. On appeal, *held*, judgment affirmed as to the driver of the ice truck but reversed as to the driver and owner of the taxi cab. One Judge dissented in part and contended that both directed verdicts should be reversed.

The facts disclosed that the accident had occurred at the intersection of North and Pennsylvania Avenues in Baltimore City when the pedestrian left a safety island on the southwest corner and proceeded with the green light to the northwest corner. The ice truck and the taxi were proceeding westward on North Avenue, and the traffic light had changed by the time the two vehicles reached Pennsylvania Avenue and proceeded to cross the intersection. The pedestrian was about at the northernmost rail of the west bound car tracks on North Avenue when he was struck by the truck whose driver testified that he had been driving at a speed of twenty-five to thirty miles per hour and that the pedestrian was three yards in front of him when first observed. The driver of the taxi which had been at the right and to the rear of the truck testified that his headlights picked up the body of a man lying across the road when twenty or twenty-five feet away, that he put on the brakes but skidded and ran over the recumbent pedestrian. However, the police officer testified that there was a forty-two foot skid mark leading up to the front wheels of the taxi. The deceased had been pinned underneath the car, and the skid mark was over thirteen feet from the north curb line of North Avenue.

In discussing any liability on the part of the truck driver, the Court of Appeals noted that there was an obliga-

[1] 71 A. 2d 435 (Md., 1950).

tion on the driver to give the right of way to any person who had already started to cross in the pedestrian's cross walk, but stressed the fact that this obligation was only applicable when the pedestrian is using the defined right of way to cross the street.[2] There were no marked cross marks at this crossing, but when the pedestrian was struck, he was not in the space between the extension of the building line of Pennsylvania Avenue and the extension of the curb line which would have designated the pedestrian's right of way.[3] Within this space pedestrians have the right of way, and outside of this space vehicles have the right of way.[4] In the instant case the plaintiff's decedent had not yet reached the cross walk, and there was no evidence that the truck driver could have seen him until he was approximately three yards in front of the truck.

In affirming the directed verdict in favor of the truck driver, the Court stated:

> "The truck driver was not bound to anticipate that a pedestrian would cross the street between cross walks, and whether or not the deceased had the green light when he started, if the truck driver did not see him until too late to stop, we are unable to find that the truck driver was guilty of any negligence."[5]

However, in discussing the status of the taxi, the Court found a possible application of the last clear chance doctrine and held that the question of negligence in this instance should be decided by the jury. It was reasoned that any negligence on the part of the pedestrian in this instance continued only until he was lying prostrate in the street. It was at that time that the taxi driver saw him and under these circumstances it was then to be determined whether the driver had an opportunity to avoid striking the recumbent figure. In its reversal, the Court of Appeals considered the lengthy skid marks and also the wide space to the right in which the taxi might have turned, in determining that the question of negligence should be left to the jury.

The dissenting opinion took the view that there were no authorities which outlawed a passenger marooned on a safety island from taking the most direct route of escape,

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[2] Chasanow v. Smouse, 168 Md. 629, 632, 178 A. 846 (1935); Legum v. State, 167 Md. 339, 173 A. 565 (1934).

[3] Md. Code Supp. (1947), Art. 66½, Sec. 2, Subsec. (a) (9). See also: Bond v. Forthuber, 84 A. 2d 886 (Md., 1951) and Johnny's Cabs v. Miller, 85 A. 2d 439 (Md., 1952).

[4] Md. Code Supp. (1947), Art. 66½, Sec. 181.

[5] *Supra*, n. 1, 437.

and since the pedestrian relied on a green light in crossing, the question of negligence as to the truck driver should also go to the jury. It was contended that by construing several statutory provisions, the street car passenger was deprived of the protection he had at common law.

There are two distinctive features which set the case apart from the ordinary negligence case involving the striking of a pedestrian by a motor vehicle: (1) the Court itself rationalized computations involving speed, distance and skid marks; and (2), it extended, in a dicta, the doctrine of the last clear chance.

In regard to the skid marks, the Court went into some detail to negative the testimony of the taxi driver that he had been going between fifteen and twenty miles per hour and had not seen the pedestrian until he was twenty or twenty-five feet away. Since the driver had testified that he had skidded over the deceased and pushed him three or four feet, the Court deducted the four feet from the total skid mark of forty-two feet, and it was assumed that the beginning of the skid mark was made by the rear wheel and the end by the front wheel (of which there was no evidence). It was also assumed that the distance between the wheels was approximately ten feet (of which there was no evidence) and thus, deducting the fourteen feet from the total skid mark of forty-two feet, it was reasoned that the brakes must have been applied when the taxi was twenty-eight feet from the prostrate form of the pedestrian. In determining when the taxi driver first saw the pedestrian, some extra distance was added to compensate for the feet traveled by the taxi after the driver saw the figure but before the wheels began to skid. It was not estimated exactly how far this would be, but it was noted that no matter how quick the driver's reflexes, the car must have traveled some distance after the eye observed the figure and before the brakes caused the tires to skid. This space added to that shown by the skid marks made it apparent that the driver saw the pedestrian when he was at least several car lengths away. In addition the Court observed that the driver had thirteen feet to his right in which he might have turned and concluded that the question of negligence in this instance was one for the jury.

In many Maryland automobile accident cases, skid marks have been introduced in evidence in an attempt to raise an inference of excessive speed, but as a rule very little is done to translate skid marks into approximations

of miles per hour or to estimate the distance between the driver and the object struck at the point the driver testifies that he first observed it. *Bozman v. State*,[6] is a typical case in which skid marks were used merely to show evidence of excessive speed. There the driver swore that he was driving between thirty-five and forty miles per hour when he saw the plaintiff's infant son at a distance of about seventy-five feet. The driver further testified that he put on the brakes immediately, pulled to the left and had almost stopped when he struck the child. The defendant driver requested a directed verdict, but in view of the fact that the skid marks started fifteen feet south of the point of impact and extended diagonally seventy-five feet to the rear wheels of the automobile, the Court stated that excessive speed could be inferred.[7] There was no need to make special calculations here as the skid marks were very lengthy under the circumstances. Another case, *Jackson v. Forwood*,[8] stated that long skid marks indicated the driver of the automobile did not have his car under control. Again no special calculations were made as the skid marks were grossly excessive under the circumstances. The principal case went a step further than the previous cases and demonstrated a relationship between the skid marks and the distance that was covered according to testimony.

Until 1933 the Court of Appeals had made little calculation in automobile collision cases with regard to comparative speeds, distances and time, but *Paolini v. Western Mill & Lumber Corp.*[9] marked a new trend.[10] This was the first case in which the Court employed a mathematical formula to arrive at the speed of one of two vehicles involved in an accident at an intersection. It is true that this case involved no skid marks, but the case is significant because of the aforementioned feature. This type of calculation has been criticized on the ground that the premises upon which they are founded vary with the accuracy of the testimony.[11] However, if skid marks are properly measured following an accident, it would seem that much of this error could be eliminated. It is true that few people can accurately

[6] 177 Md. 151, 9 A. 2d 60 (1939).

[7] *Ibid*, 155:

"The skidding of an automobile after a collision is also a circumstance of evidential value in reference to the rate of speed or whether the machine was under control."

[8] 186 Md. 379, 47 A. 2d 81 (1946).

[9] 165 Md. 45, 166 A. 2d 609 (1933).

[10] Due and Bishop, *Automobile Right of Way*, 11 Md. L. Rev. 159, 169 (1950).

[11] *Ibid*, 170.

judge speed and distance, but if accurately measured skid marks become the premise of the calculations, it would seem that the computations would be even more valuable in this type of case. The instant case is the first in which the Court of Appeals uses the skid marks together with the testimony and calculates the distance between the driver and the object struck at the time it was first observed. In a very recent case, *Johnny's Cabs v. Miller*,[12] it was held that skid marks of only nine feet are not necessarily evidence of speed of over fifteen or twenty miles per hour (even though the pedestrian's body was thrown 54 feet) and the principal case was cited as authority. Whether considering skid marks along with testimony and ascertaining approximate distances and speeds with a few simple calculations is a sound method of employing this evidence would seem to depend upon how much information the court has of the extent to which the length of the skid mark is affected by atmospheric conditions, the surface of the street, the kind of rubber in the tire of the car and all such factors which might affect the marks made on the street.

The doctrine of the last clear chance has been employed in several unusual situations in Maryland to enable a plaintiff, himself guilty of contributory negligence, to recover, and the principal case extends the doctrine in a dicta. The majority of the Court in the instant case started with the premise that if there had been any contributory negligence on the part of the pedestrian, it continued only until the end of the impact with the ice truck when he was lying prostrate in the street. Hence, the contributory negligence, if any, ceased at that moment; and yet the Court in discussing the status of the taxicab stated that there was a possible application of the doctrine of the last clear chance, and in support of this contention cited *Jendrzejewski v. Baker*.[13] However, that case held that the doctrine of the last clear chance was not applicable as there was no evidence in the case that the defendant by the exercise of ordinary care and caution saw the plaintiff in time to avoid the accident.[14]

The doctrine of the last clear chance is generally stated as follows:

> ". . . the contributory negligence of the injured person will not defeat recovery if defendant, by exer-

[12] *Supra*, n. 3.
[13] 182 Md. 41, 31 A. 2d 611 (1943).
[14] *Ibid*, 46.

> cise of ordinary care, might have avoided the consequence of the injured person's negligence . . ."[15]

It is generally conceded that all of the necessary elements of the doctrine must be present in order to bring it into play, and if any element is absent the case is governed by the ordinary rules of negligence and contributory negligence. Thus it can be seen that the doctrine presupposes negligence on the part of the injured person. In the instant case, therefore, the application of the doctrine by the majority presupposes that this prior negligence has left the pedestrian in a helpless position from which, with the exercise of reasonable care, he cannot escape. If the driver of the cab discovers the pedestrian's danger in time to avoid injury by using ordinary care, he is said to have the last clear chance and may be held liable for the subsequent injury notwithstanding the plaintiff's prior negligence. The most usual explanation of liability is that the defendant's negligence after he discovers the plaintiff's peril is a "wilful" or "wanton" wrong.

The dissenting opinion noted that there was a lack of contributory negligence, and hence no possibility of an application of the doctrine and remarked:

> "The confused subject of 'last clear chance' becomes only more confused if applied outside of its proper field."[16]

Stafford v. Zake[17] was an interesting negligence case in which the Court refused to infer excessive speed on the part of the defendant but did approve a prayer containing the last clear chance doctrine. A girl of seven had been playing in a narrow alley and ran across in front of an oncoming truck. When almost across the alley she was warned of the truck, decided to run back and was struck by the right fender of the defendant's vehicle. The Court of Appeals considered the evidence that children frequently played in the alley, that the truck driver frequently used the alley and had just seen a boy run across and concluded that the question of the driver's negligence on a last clear chance to avoid the accident was properly for the jury. In view of the fact that the alley was only 11.8 feet wide and the truck 7.5 feet wide, this seems a strange application

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[15] 65 C. J. S., Negligence, Sec. 136, pp. 756-7.
[16] *Supra*, n. 1, 441.
[17] 179 Md. 460, 20 A. 2d 144 (1941).

of the doctrine as there was little the driver could do except to apply the brakes when he saw the child, but the lower court's ruling was not disturbed, and a verdict for the plaintiff was affirmed.

Another Maryland case[18] illustrates a difference in opinion between the judges of the Court of Appeals in regard to the application of the doctrine. In this case the plaintiff had started to cross a street with the green light and got to the center of the street, when an automobile, held up by a traffic light, stopped in front of him on the crossing line with another car immediately in the rear. The pedestrian stopped there and was hit by a truck coming around the corner from another street. The plaintiff had looked in that direction when he had started to cross the street but had not continued to do so. The plaintiff's second prayer embodying the doctrine was approved by a majority of the Court.[19] The writer of the opinion failed to find the plaintiff guilty of any negligence and did not think the doctrine was appropriate on the additional ground that there was not time after the driver discovered the plaintiff's peril to avoid striking him. Thus it can be seen that the subject of last clear chance, when applied to automobile negligence cases, can be as confusing as the dissenting judge in the principal case thought, and when not essential to an opinion may well be omitted.

State v. Belle Isle Cab Co. is another point in the line of cases in a previous article in the REVIEW concerning statutory right of way as applied to motorist and pedestrians.[20] In that article, illustrated by a series of Maryland automobile negligence cases, it was pointed out that although the pedestrian is given his preferential right of way at intersections as provided by statute,[21] the motorist has difficulty in obtaining the "right of way" between the

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[18] Shaivitz v. Etmanski, 164 Md. 125, 164 A. 168 (1933).

[19] *Ibid*, 126:.

"The Court instructs the jury that even if they find that there was want of ordinary care and caution on the part of the plaintiff, yet he is entitled to recover, provided they find that the agent or servant of the defendant could have avoided striking the plaintiff down by the exercise of ordinary care, after he saw, or by the use of ordinary care might have seen, that the plaintiff was walking on the street and in danger of being struck by the truck."

[20] Due and Bishop, *Motorists and Pedestrians*, 11 Md. L. Rev. 1 (1950).

[21] *Supra*, n. 4:

"All pedestrians shall have the right-of-way at street crossings in the towns and cities of this State, except where traffic is controlled at such crossings by traffic officers, or traffic control devices. Between street crossings in such towns and cities, vehicles shall have the right of way."

street crossings that the statute says he is entitled to. In the principal case the Court of Appeals cited the statute referred to, noted the fact that the accident had not occurred at an intersection, as the pedestrian was not within the area that would have marked the pedestrian's right of way, but failed to base the decision on any statutory right of way. It is still not known exactly how far the Court will go in vindicating a motorist who exercises his right of way between intersections, as the Court decided that the truck driver was not guilty of negligence under the circumstances, but determined that the question of negligence of a taxi driver who just a few feet behind him should be decided by the jury.