

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. TEODORO JUANILLO, DEFENDANT AND APPELLANT.

G.R. No. 7255. October 03, 1912

Ponente: TRENT, J.

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TRENT, J.:

This is an appeal by feodoro Juanillo from a sentence imposed by the Honorable J. S. Powell, judge of the Court of First Instance at Iloilo, condemning him to one year and one day of presidio correccional, to the payment of P1,000 to the heirs of the deceased, Ponciano Leal, to the corresponding subsidiary imprisonment in case of insolvency, and to the payment of the costs of the cause, for the crime of negligent homicide (*imprudencia temeraria con homicidio*).

It is admitted that Ponciano Leal was killed on the public highway while going from the town of Pavia to Santa Barbara, Province of Iloilo, at about 4 o'clock on the afternoon of April 23, 1911, by being struck by an automobile, of which the appellant was the chauffeur. The contention of the prosecution is that the death of the deceased was due to the reckless driving of the appellant, while counsel for the defense insists that the unfortunate occurrence was purely an accident. The prosecution presented four witnesses and the defense six, including the appellant.

The first witness, Pedro Latoja, 18 years of age, an ordinary laborer, a resident of Lambunao, testified that Juan Labrila, Ponciano Leal, and he, were walking abreast along the road toward Santa Barbara on the afternoon in question; that he was in the middle with Leal on his right and Labrila on his left; that while they were going along in this manner carrying on an ordinary conversation, he heard a noise behind him, and on turning around saw an automobile approaching; that he called out immediately that an automobile was coming and jumped to the left, colliding with Labrila; that when he turned around to look for Leal the latter was lying on the ground, having been knocked down by the automobile, and that at that place the road was higher than the adjacent land for a considerable distance each way. The testimony of this witness is corroborated by that of Juan Labrila in every particular. Labrila also testified that he was knocked into the ditch on the left of the road by Latoja and that when he got up he saw Leal lying on the ground, the automobile having passed. Nicolas Agraviado testified that he had just passed the deceased and his companions going in the opposite direction when the automobile passed him; that on account of its speed he started to turn around to watch it, but when he had done so the machine had passed Leal and his companions and he saw Leal lying on the ground. The last witness presented by the prosecution was Petronio Leal, son of the deceased. He was walking a little ahead of his father when the latter was struck by the machine. This witness did not see the machine strike the deceased, neither did either of the other three witnesses see Leal at the precise moment he was struck.

The defense introduced the testimony of the members of the party riding in the automobile, namely, Henry J. Becker, Charles C. Dean, W. H. Rimmer, Garret A. Hardwood, and Joseph Miller, and that of the chauffeur.

Becker testified that he saw some men in the road at a distance of about 300 yards ahead of the automobile; that at

that time the chauffeur put on his brakes, used his exhaust, and blew his horn; that when they got up to within about 30 feet of the men - some of them having gone to the right and some to the left the deceased, being on the right, started to run across to the left side of the road to join his companions; that the deceased did not clear the machine and was struck by some part of the left side of the machine, knocked down, and died soon thereafter. This witness further testified that at the time of the occurrence the machine was going at a "pretty fair speed;" and that the impact of the machine against the deceased raised him (witness) from his seat. The following questions and answers appear in the transcript of this witness' testimony:

"Q. You could not see the deceased at the time he was hit from the place where you were sitting, could you? - A. I don't see why I couldn't. I was standing up like this. (Indicating a half-sitting posture.)

"Q. There were other people in front of you and there is a glass in front of the automobile and yet you say you could see? - A. I could see a clear road ahead except this man in the ditch on the right-hand side. I paid particular attention because I was looking that way.

"Q. Do you know how fast the automobile was going at the time the man was hit? - A. No, sir; I could not say just how fast we were going. We were going at a pretty fair speed.

"Q. More than an ordinary speed? - A. I don't know; yes, an ordinary speed.

"Q. What do you call ordinary speed? - A. Ordinary speed I should judge is about twenty miles an hour."

The next witness, Charles Dean, testified that at the time of the occurrence he was sitting in the front seat, partly turned around, talking to the three men in the back seat; that when they were about 300 yards away from the deceased and his companions, the chauffeur having blown his horn, turned on his exhaust, and shut off the power, he looked ahead and saw some natives in the road; that these natives stepped out of the road, going to each side, and he then turned back to continue his conversation with his companions ; that when he thought they had about reached the natives, he looked again and saw them about 25 feet ahead; that at that moment the chauffeur put on the brakes very strong; so strong that there was quite a shock in the machine; that at the same moment the deceased started to cross to the other side and was hit by the machine; and that before the machine struck the deceased it had been running under its own momentum for about 150 or 200 yards. This witness also testified that the road at the place where the deceased was killed was full of people at the time.

The witness Rimmer testified;

"Q. How far was the automobile from him (the deceased) when he started to cross the road? - A. When I saw him he was running. He just made a dash. He was about the center of the road and we were about anywhere from ten to twenty feet from him.

"Q. What did the chauffeur do when the man started to cross? - A. Why, he just stopped it as fast as he could. He nearly threw us out of the seats.

"Q. He (the chauffeur) did not put on the brake? - A. Oh, yes, he put on everything. He threw us all forward.

"Q. But you were going fast? - A. Yes, we were going a pretty fair gait. I should judge anyway we were going over 15 miles an hour - about 20 miles."

The witness Harwood says:

"I was sitting in the rear seat, sitting on the left. There were four or five natives about 30 feet away - I believe they were about 20 or 30 feet away from us then, and this one that was hit looked back and went across the road and the left front wheel or fender struck him."

Miller testified that the appellant was a good chauffeur, and had never had an accident before the one which forms

the basis for this action.

The appellant himself, on being asked to tell about the occurrence, stated:

"A. We were on the road to Santa Barbara after we had left Pavia. The road was a straight road, and I noticed up ahead about 80 or 100 brazas some men walking in the road. When I got up to within about 40 or 50 brazas of them I closed off my gasoline and kept tooting my horn and put my foot on the exhaust so I could make a noise. When I got within about 30 brazas of them some of the men turned around and looked back at the machine. We were then going about 10 miles an hour. When we were within about 2 or 3 brazas of the men the man on the right side started to run across the road. I put on my brakes but could not stop right on the spot. Some part of the automobile hit him. I could not see what part. At the time we hit the man we were going about 6 or 8 miles an hour. We ran about 3 or 4 brazas more when the automobile stopped.

"Q. Was there anybody with him (the deceased) when you first saw him on the right hand side of the road? - A. He was alone on the right. His companions were on the left.

"Q. How far were you from him when you saw him? - A. Between 80 and 100 brazas.

"Q. Going very slow then? - A. Between 15 and 20 miles an hour.

"Q. When did you close down the power? - A. About 40 or 50 brazas from him.

"Q. When you saw him about 50 brazas away, was he on the right and his companions on the left? - A. When we were within 30 brazas of them; that is, when they separated.

"Q. Went to the right and his companions to the left? - A. Yes, sir.

"Q. That is when you closed down the power? - A. Yes, sir.

"Q. How was it that you kept on 3 or 4 brazas after you knocked the man down? - A. I ran between 3 and 4 brazas.

"Q. If you could stop going at 8 miles an hour within 2 brazas, why did you run 3 or 4? - A. I don't know, sir; I was going about 8 miles an hour, I should say."

It is very plain that the collision ought to have been avoided, and the inquiry is, who is to blame for it. It almost uniformly happens that in cases of this description different accounts are given of the occurrences by those who were present at or near the scene, and that the courts have difficulty in this conflict of evidence in deciding to which side credence should be given. There are generally, however, in every case some undeniable facts which aid in determining where the blame lies, and this case is one of that character.

There is no dispute that the deceased was struck on or near the left hip by the lamp or fender over the left front wheel of the automobile; that the blow knocked him to the side of the machine; that the machine did not pass over his body; and that as a direct result of the blow the deceased died very soon thereafter on the same day. If it were true that the deceased and his companions were walking abreast, the deceased on the right near the center of the road, Latoja next, and Labrila on the left, then the deceased, on hearing Latoja call out that an automobile was coming, would have turned to the left to escape, thereby placing his left side toward the coming machine. If the theory of the defense be, accepted as true, the deceased could likewise have been struck on the left hip. The position of the deceased after the car had passed will accord with both the theory of the prosecution and that of the defense. So upon these admitted facts neither side can claim an advantage.

Latoja, Labrila, and Agraviado were country people with no personal experience in the handling of automobiles. This was the first time that Latoja had been in the city of Iloilo for ten years. Latoja and Labrila told a plain, simple story. They were walking along the road abreast, Latoja heard a noise, looked back, and called out that an

automobile was approaching. He then jumped to the left to get out of the way of the machine, colliding with Labrila and knocking him into the ditch on the left-hand side. Becker says that he saw a man in the ditch on the right side. There is nothing else in the record to show that there was any other person in the ditch on either side. All the witnesses for the defense testified that the middle of the road was clear at that place and time and that the deceased, as well as all others, were in perfectly safe places and that the deceased would not have been killed if he had not attempted to cross from the right to the left side of the road. These facts show that Becker, was mistaken when he stated that he saw a man in the ditch on the right side. Labrila was in the ditch on the left side. Becker also says that the machine was about 300 yards from the man when the chauffeur put on his brakes, and that putting on the brakes raised him in his seat, meaning that the application of the brakes checked the machine so suddenly that he was thrown forward. Again, he says that he was in a half-sitting posture at the time the deceased made a dash for the left side of the road, and also that the impact of the machine against the deceased raised him from his seat. The result is that Becker was raised in his seat when the brakes were put on, some 300 yards away. He either remained standing or sat down and got up again, as he was standing when the machine was within about thirty feet of the deceased. He must have sat down before the machine ran the 30 feet, as he was raised from his seat when the collision took place. Again, Becker says that the machine was going about 20 miles an hour when the brakes were first applied with great force, yet it ran about 300 yards with the brakes on, and after going that distance it still had sufficient momentum to strike the deceased with such force as to fatally injure him.

Dean says that the machine was about 300 yards away from the deceased and his companions when the defendant blew his horn, turned on the exhaust and shut off the power; that when they were about 25 feet away the brakes were applied with such force that he and his companions were all thrown forward, and that the machine had been running when it struck the deceased under its own momentum for about 150 or 200 yards. The defendant says that when he was about 80 or 100 yards away he cut off the gasoline, blew his horn, and put his foot on the exhaust, that when he was within about 4 or 6 yards (2 or 3 brazas) the deceased made a dash for the other side and he then put on the brakes; that at that time he was going 6 or 8 miles an hour; and that the machine ran about 3 or 4 brazas after hitting the deceased before he could stop it.

According to Becker, the impact of the machine against the deceased was so hard that he was raised in his seat, notwithstanding the fact that the brakes had been applied with great force 300 yards away. According to Dean, the brakes were applied with force 25 feet away and the machine had been running under its own momentum for about 150 or 200 yards when the deceased was struck. According to the defendant, the machine had been running without gasoline for about 100 yards and the brakes were applied when he was about 18 feet from the deceased. All agree, however, that the deceased was struck on the left hip by the fender or lamp with such force that he died within a short time thereafter, and that the machine did not pass over his body.

Taking the statement of the defendant himself, the machine had been going for 100 yards without gasoline, 18 feet of the last part of the hundred yards with the brakes strongly applied, when the deceased was struck, and continued for some 25 feet before he could stop. That so fatal results could have been accomplished by the automobile without passing over the body of the deceased under these circumstances, we think highly improbable, if not impossible. In view of all the admitted facts and circumstances, and the unreasonableness of the stories told by the defendant and his witnesses we are fully satisfied that the trial court was justified in accepting the testimony of Latoja, Labrila, and Agraviado as to how the collision took place. This being true, the deceased was killed just a little to the left of the center of the road. Just before the machine struck him he had been walking abreast with his companions. Neither Latoja nor Labrila heard the blowing of the horn or any other warning whatever until the machine was so close that Latoja and Labrila barely had time to make their escape, while the deceased, being on the left, did not have sufficient time. The road at the place where the collision took place was about 24 feet wide, a little higher than the adjacent country, and clear of obstacles which might obstruct the view,

for quite a long distance each way.

Now, do these facts constitute a violation of article 568 of the Penal Code? This article reads:

"ART. 568. Any person who by reckless imprudence shall commit any act which, had it been intentional, would constitute a grave felony shall suffer a penalty ranging from arresto mayor in its maximum degree to prision correccional in its minimum degree; if it would have constituted a less grave felony, the penalty of arresto mayor in its minimum and medium degree shall be imposed."

Counsel for the appellant insists that the court erred, first, in taking judicial notice of the power of stopping appliances of automobiles; and second, in its conception of reckless negligence as applied to the rights of vehicles and parties on foot on public highways.

In support of the first assignment of error, counsel cites that part of the decision appealed from wherein the court says:

"Everybody knows that all first-class cars turned out at the shops have appliances that will stop a machine going at 15 miles an hour within 5 feet."

It is true that there is nothing in the evidence to warrant this statement or deduction. But this was a casual observation made by the court, and did not form the basis upon which the judgment rests. If this statement of the trial court were material, it might constitute a reversible error. It has been held, however, that courts will take judicial notice that an automobile makes an unusual noise; that it can be driven at a great velocity at a speed many times greater than that of ordinary vehicles drawn by animals, and that it is highly dangerous when used on country roads. (*Brazier vs. Philadelphia*, 215 Pa., 297. *Ex parte Berry*, 147 Cal., 523.) In the latter case the court said:

"There is nothing in the record which shows with any particularity what an automobile is, and, of course, a court could not declare unreasonable a regulation about something of which it has no knowledge; therefore, in order to at all consider the question here involved, we must assume judicial knowledge of an automobile and its characteristics and the consequences of its use under the statutory provision that courts take judicial notice 'of the true significance of all English words and phrases.' (Sec. 1875, Code Civ. Proc.) We may assume, therefore, to have what is common and current knowledge about an automobile. Its 'use as a vehicle for traveling is comparatively recent. It makes an unusual noise. It can be and usually is made to go on common roads at great velocity at a speed many times greater than that of ordinary vehicles hauled by animals; and beyond doubt it is highly dangerous when used on country roads, putting to great hazard the safety and lives of the mass of the people who travel on such roads."

In support of the second assignment of error, counsel calls this court's attention to that part of the trial court's decision wherein it is stated:

"It (the automobile) has no right to run at a greater speed along the public highway in passing people afoot or in vehicles than it can stop when danger arises. A footman has the right of way in public highways and people in vehicles have no right to ride him down."

It is generally held that the rights and duties of pedestrians and vehicles are equal. Each may use the highway, and each must exercise such care and prudence as the circumstances demand. (20 L. R. A., n. s., 32 [232], Note.) Owners of automobiles have the same rights in the streets and highways that pedestrians and drivers of horses have. Automobile drivers or the drivers of animals are not to use the means of locomotion without regard to the rights of others having occasion to travel on the highway. While an automobile is a lawful means of conveyance and has equal rights upon the roads with pedestrians, horses, and carriages, its use cannot be lawfully countenanced unless accompanied with that degree of prudence in management and consideration for the rights of

others which is consistent with safety.

Judge Cooley, in his work on Torts (3d ed.), § 1324, defines negligence to be:

"The failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury."

Negligence is want of care required by the circumstances. It is a relative or comparative, not an absolute term, and its application depends upon the situation of the parties, and the degree of care and vigilance which the circumstances reasonably impose. Where the danger is great a high degree of care is necessary, and the failure to observe it is a want of ordinary care under the circumstances. (*Ahern vs. Oregon Tel. Co.*, 24 Ore. 276.) The operator of an automobile is bound to exercise care in proportion to the varying danger and risks of the highway and commensurate with the dangers naturally incident to the use of such vehicle. He is obliged to take notice of the conditions before him, and if it is apparent that by any particular method of proceeding he is liable to work an injury, it is his duty to adopt some other or safer method if within reasonable care and prudence he can do so. In determining the degree of care an operator of an automobile should use, when on the highway, it is proper to take into consideration the place, presence or absence of other travelers, the speed of the automobile, its size, appearance, manner of movement, and the amount of noise it makes, and anything that indicates unusual or peculiar danger.

In the case of *Indiana Springs Co. vs. Brown* (165 Ind., 465), it was said:

"The quantum of care required is to be estimated by the exigencies of the particular situation; that is, by the place, presence or absence of other vehicles and travelers; * * * whether the conveyance and power used are common or new to the road."

Also, the degree of care required to be exercised varies with the capacity of the person endangered to care for himself. Thus, it has been held not to be negligence in a boy of six to play on the highway, where an automobile came up on him under circumstances which produced fright and terror, and thus caused an error of judgment by which the boy ran in front of the automobile. (*Thies vs. Thomas*, 77 N. Y. Supp., 276.) And in *Apperson vs. Lazaro* (Ind. App.), 87 N. E., 97, where an automobile approached an infirm person from the rear at a high rate of speed and startled him so that in order to avoid the injury he jumped aside and was struck by the automobile, the court said that the conduct of the operator of the automobile was an unreasonable abridgment of the pedestrian's right to the road.

The testimony of all the parties in the case at bar as to the surrounding conditions of this occurrence was to the effect that the road on which they were traveling was dotted with simple rural folk. It was Sunday afternoon and the road connected two rather populous towns that were close together. In his brief, counsel for the appellant says:

"Two native farmers who all their lives have seen nothing that moves faster than a bull cart, except on the two or three occasions on which they testify they have visited Iloilo, cannot be expected to give an intelligent idea of speed of an automobile, train, or even a fast horse. They testify that they did not see or observe the deceased after hearing the automobile until after he was struck. If they had never seen an automobile save in two or three occasions in their lives, and looked back and saw one coming in a road not at all wide, with even fifty or a hundred yards intervening, it would but be natural for them to rush to the sides of the road. And finding himself alone on the right hand side, which had been the most accessible to him at the moment, it would be perfectly natural for an ignorant farmer at such a, to him, hazardous moment to decide suddenly to cross and join his companions on the other side. And it is not surprising if such a man should miscalculate the time necessary for an automobile, even running at only a very slow pace, to cover an intervening distance."

Under such conditions appellant being in charge of the powerful machine, capable of doing great damage if not

skillfully manipulated, was bound to use a high degree of care to avoid injuring these native farmers, who had a common right to the highway. A driver of an automobile, under such circumstances, is required to use a greater degree of care than drivers of animals, for the reason that the machine is capable of greater destruction, and furthermore, it is absolutely under the power and control of the driver; whereas, a horse or other animal can and does to some extent aid in averting an accident. It is not pleasant to be obliged to slow down automobiles to accommodate persons riding, driving, or walking. It is probably more agreeable to send the machine along and let the horse or person get out of the way in the best manner possible; but it is well to understand, if this course is adopted and an accident occurs, that the automobile driver will be called upon to account for his acts. An automobile driver must at all times use all the care and caution which a careful and prudent driver would have exercised under the circumstances. The appellant was aware of and is chargeable with the knowledge that the deceased and his companions were simple country people and were lacking in the capacity to appreciate and to guard against the dangers of an automobile driven at a high rate of speed, and he was bound to enlarge to a commensurate extent the degree of vigilance and care necessary to avoid injuries which the use of his machine made more imminent. In the case of *State vs. Watson* (216 Mo., 420), the court said:

"Individuals as well as corporations in the use and operation of dangerous machines, should have a due regard to the preservation of the rights of the public in the use of the public streets, as well as the protection of persons using such streets from injury, and if they fail in this, and should in the operation of a vehicle which is always attended with more or less danger, negligently, carelessly and recklessly destroy human life, it is but in keeping with the proper and impartial administration of justice that the penalties should be suffered for the commission of such acts.

In the case reported in volume 53 of the Criminal Jurisprudence of the supreme court of Spain, p. 157 (decision of October 1, 1894), it appeared that the driver of a public vehicle attempted to pass a street car and for that purpose turned to the right. In doing so he collided with an omnibus moving in the opposite direction, the vehicle striking the omnibus in front. As a result one of the passengers who was on the front platform of the omnibus and who had one of his legs sticking out from the side of the omnibus was injured. It was held that the defendant was guilty of reckless negligence for the reason that the collision was the result of his violation of the municipal ordinance under which he should have turned to the left instead of turning to the right, thereby attempting to pass between the curb of the street and the omnibus, where there was hardly room enough for both vehicles between the sidewalk and the street car.

In the case reported in volume 22 of the Criminal Jurisprudence of the same court, page 84 (decision of January 20, 1880), the crime was homicide committed through "reckless negligence." It appears from the findings of the court that the defendant, together with some friends, was horseback riding; that as soon as they reached the public highway they spurred their horses into a hard gallop; that while going at such speed the defendant's horse struck a pack horse which was proceeding in the opposite direction; that as a result of the collision the packer, who was in the rear, was seriously injured, dying seven days later. The defendant knew that his horse was hardbitted and, therefore, rather difficult to control. The supreme court of Spain held that such conduct on the part of the defendant showed "reckless negligence" on his part; and the fact that he saw the pack horse approaching and did not change his course, together with the fact that he knew that the horse he was riding was hardbitted and difficult to control, made such negligence all the more apparent. The court further held that the fact that the deceased did not get out of the way when he saw the defendant approaching at such an unusual speed did not affect the latter's liability.

In the case reported in volume 73, Criminal Jurisprudence of said court, page 305 (November 12, 1905), it appeared that the defendant, who was driving a public vehicle at a short trot, ran over a boy six years old, fracturing one of his legs. It was proved that the defendant was not a duly licensed driver and had not had the six

months' experience required by the rules relating to the registration of public drivers. It was alleged by the appellant that he did, not notice the boy, who just at that moment had run away from his sister by whom he was being led at the time. The court held that appellant's failure to see the child, the fact that he gave no warning of his approach, and the fact that he was not a duly licensed driver with the necessary experience required by the rules, constituted reckless negligence and the judgment of conviction, was accordingly affirmed.

In the case reported in volume 33, Criminal Jurisprudence of the same court, page 545 (December 4, 1884), it appeared that the defendant, who was a tramcar driver, was driving his car apparently at an unusual rate of speed and while thus engaged collided with an omnibus which was moving in the opposite direction. As a result one of the passengers who was on the front platform of the omnibus fell to the ground and was run over by the tramcar, sustaining fracture of one of his legs and several other injuries. The supreme court, in sustaining the judgment of the trial court convicting the defendant of the crime of lesiones graves committed through reckless negligence, held that the fact that the defendant failed to stop his car or slacken its speed, so as to allow the omnibus to get off the car track, which the latter was trying to do, constituted reckless negligence.

The negligence of the defendant in the case at bar consisted in his failure to recognize the great injury that would accrue to the deceased from the collision. He had no right, it seems to us, after he saw the deceased and his companions walking in the road ahead of him to continue at so great a speed, at the eminent hazard of colliding with the deceased. Great care was due from him by reason of the deadliness of the machine he was propelling along the highway. When one comes through the highways with a machine of such power as an automobile, it is incumbent upon the driver to use great care not to drive against or over pedestrians. An automobile is much more dangerous than a street car or even a railway car. These are propelled along fixed rails and all the traveling public has to do to be safe is to keep off the track. But the automobile can be turned as easily as an individual, and for this reason is far more dangerous to the traveling public than either the street car or the railway train. We do not feel at liberty, under the evidence, to say that this defendant was free from reckless negligence. In failing to so check the speed of his machine when he saw the deceased in front of him to give him sufficient control to avert the injury or to stop it entirely, when he knew that if he continued at the same speed at which he was going he would collide with the deceased, not only shows negligence but reckless negligence in a marked degree.

The judgment appealed from being strictly in accordance with the law and merits of the case, the same is hereby affirmed with costs against the appellant.

Arellano, C. J., Torres, Mapa, Johnson, and Carson, JJ., concur.

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