Neutral Citation Number: [1971] EWCA Civ 6

Case No.:1969 0.No.8005

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL
(Civil Division)
Appeal of plaintiff from judgment of Mr, Justice Thesiger on 22nd October, 1970.

Royal Courts of Justice
30th June 1971.

B e f o r e :

THE MASTER OF THE ROLLS (Lord Denning)
LORD JUSTICE SALMON
and
LORD JUSTICE MEGAW.

Between:

ERIC NETTLESHIP	**Plaintiff Appellant**
and	
LAVINIA WESTON (Married woman)	**Defendant Respondent**

(Transcript of the Shorthand Notes of the Association of Official Shorthandwriters Ltd., Room 392, Royal Courts of Justice and 2, New Square, Lincoln's Inn, London, W.C.2.)

James Fox-Andrews QC and Victor Watts (instructed by Amery-Parkes & Co. for Branson, Bramley & Co. Sheffield) for the plaintiff
Barry Chedlow QC and Hugh Galpin (instructed by James & Charles Dodd.) for the defendant.

HTML VERSION OF JUDGMENT

THE MASTER OF THE ROLLS: Mrs. Weston is a Married woman. She wanted to learn to drive. Her husband was quite ready for her to learn on his car. She asked a friend of hers, Mr. Nettleship, if he would give her some lessons. Mr. Nettleship said he would do so, but, in case there was an accident, he wanted to check up on the insurance. Mr. and Mrs. Weston assured him that they had a fully comprehensive insurance which covered him as a passenger in the event of an accident. This was correct. They showed him the policy and certificate of insurance. Mr. Weston was insured under an ordinary Lloyds policy. By it the underwriters agreed to indemnify Mr. Weston and "'any person driving the car with his permission" against liability at law for damages in respect of bodily injury to any person "including any passenger." On being so assured, Mr. Nettleship said he would give her some lessons.

On 25th October, 1967, Mrs. Weston took out a provisional driving licence. Mr. Nettleship went with her in the car on Sunday, 28th October, and Sunday, 3th November, and gave her driving lessons. He found her very receptive to instruction and a very good learner-driver. On Sunday, 12th November, he went with her on her third lesson. She sat in the driving seat. He sat beside her. She held the steering wheel and controlled the pedals for the clutch and foot brake and accelerator. He assisted her by moving the gear levers and applying the hand brake. Very occasionally he assisted in the steering.

They came to a road junction where there was a halt sign. They had to turn left. She stopped the car. He moved the gear lever into neutral and applied the hand brake. The road was clear. He said to her: "'Move off, slowly, round the corner.' He took off the hand brake. She let in the clutch. He put the gear lever into first gear. The car made a smooth start. She turned the steering wheel to the left and the car moved round the corner at walking pace. He said to her: "'Now straighten out. But she did not do so. She panicked. She held the steering wheel, as he said, "in a vice-like gripe": or, as she said: "my hands seemed to freeze on the wheel." He at once took hold of the hand brake with his right hand and tried to get hold of the steering wheel with his left hand to straighten it out. He nearly succeeded. But by this time the nearside of the car had mounted the kerb. As bad luck would have it, there was a lamp standard just by the kerb at that point. The nearside struck the lamp standard. Mr. Nettleshlp was injured. His left knee-cap was broken.

On 25th January, 1968, Mrs. Weston was convicted by the Sheffield Magistrates of driving without due care and attention. She was fined £10 and her driving licence was endorsed.

Mr. Nettleshlp now claims damages for negligence against Mrs. Weston. She denies negligence, alleges contributory negligence, and also pleads that he impliedly consented to run the risk of injury. The Judge dismissed the claim. He said that the only duty owed by Mrs. Weston to Mr. Nettleship was that she should do her best, and that she did not fail in that duty.

THE RESPONSIBILITY OF THE LEARNER-DRIVER IN CRIMINAL LAW

Mrs. Weston was rightly convicted of driving without due care and attention. In the criminal law it is no defence for a driver to say: "I was a learner-driver under instruction. I was doing my best and could not help it." Such a plea may go to mitigation of sentence, but it does not go in exculpation of guilt. The criminal law insists that every person driving a car must attain an objective standard measured by the standard of a skilled, experienced and careful driver. That is shown by McCrone v. Riding[1938] 1 All ER 137, where a learner-driver "was exercising all the skill and attention to be expected from a person with his short experience", but he knocked down a pedestrian. He was charged with driving "without due care and attention" contrary to section 12 of the Road Traffic Act, 1930; now section 3(1) of the Road Traffic Act, 1960. The Magistrates acquitted him, but the Divisional Court directed them to convict. Lord Hewart, Lord Chief Justice, said that the

> "standard is an objective standard, impersonal and universal, fixed in relation to the safety of other users of the highway. It is in no way related to the degree of proficiency or degree of experience attained by the individual driver."

Again in Regina v. Evans [1963] 1 Q.B. 412, an experienced driver was overtaking another car at the dip in the road. He crashed head-on into an oncoming car and the driver of it was killed. He was charged with causing death by driving in a Banner dangerous to the public, contrary to section 1 of the Road Traffic Act, 1960. Mr. Justice Salmon, as he then was, directed the jury that "even though the dangerous driving was caused by slight negligence, the slightest negligence on his part, he is guilty." The Court of Criminal Appeal affirmed the conviction, and said:

> "If a driver in fact adopts a manner of driving which the jury think was dangerous to other road-users in all the circumstances, then, on the issue of guilt, it matters not whether he was deliberately reckless, careless, momentarily inattentive, or even doing his incompetent best. Such considerations are highly relevant if it ever comes to sentence."

So the criminal law is clear. No one would dream of throwing any doubt on it. Mrs. Weston was convicted in accordance with it. The conviction is admissible in civil proceedings as prima facie evidence of negligence, see Stupple v. Royal Insurance Co. [1970] 3 W.L.R. at page 223.

THE RESPONSIBILITY OF THE LEARNER DRIVER TOWARDS PERSONS ON OR NEAR THE HIGHWAY

Mrs. Weston is clearly liable for the damage to the lamp-post. In the civil law if a driven goes off the road on to the pavement and injures a pedestrian, or damages property, he is prima facie liable. Likewise if he goes on to the wrong side of the road. It is no answer for him to says "I was a learner-driver under instruction. I was doing my best and could not help it." The civil law permits no such excuse. It requires of him the same standard of care as any other driver. "It eliminates the personal equation and is Independent of the idiosyncrasies of the particular person whose conduct is in question" - see Glasgow Corporation v. Muir[1943] A.C. at page 457 by Lord Macmillan. The learner-driver may be doing his best, but his incompetent best is not good enough. He must drive in as good a manner as a driver of skill, experience and care, who is sound in wind and limb, who makes no errors of judgment, has good eyesight and hearing, and is free from any infirmity: see Richley v. Farrell [1965] 1 W.L.R. 1454 and Watson v. Whitney [1966] 1 W.L.R. 37.

The high standard thus imposed by the Judges is, I believe, largely the result of the policy of the Road Traffic Acts. Parliament requires every driver to be insured against third-party risks. The reason is so that a person injured by a motor-car should not be left to bear the loss on his own, but should be compensated out of the insurance fund. The fund is better able to bear it than he can. But the injured person is only able to recover if the driver is liable in law. So the Judges see to it that he is liable, unless he can prove care and skill of a high standard; see The Merchant Prince [1892] P. 179; Henderson v. Henry E. Jenkins & Sons Ltd.[1970] A.C. 282. Thus we are, in this branch of the law, moving away from the concepts -'No liability without fault". We are beginning to apply the test: "On whom should the risk fall?" Morally the learner-driver is not at faulty but legally she is liable to be because she is insured and the risk should fall on her.

THE RESPONSIBILITY OF THE LEARNER-DRIVER TOWARDS PASSENGERS IN THE CAR

Mrs. Weston took her son with her in the car. We do not know his age. He may have been 21 and have known that his mother was learning to drive. He was not injured. But if he had been injured, would he have had a cause of action?

I take it to be clear that, if a driver has a passenger in the car. he owes a duty of care to him. But what is the standard of care required of the driver? Is it a lower standard than he or she owes towards a pedestrian on the pavement? I should have thought not. But, suppose that the driver has never driven a car before, or has taken too much to drink, or has poor eyesight or hearings and, furthermore, that the passenger knows it and yet accepts a lift from him. Does that make any difference? Mr. Justice Dixon thought it did. In the Insurance Corporation v. Joyce (1948) 77 C.L.R. at page 56, he said?

> 'If a man accepts a lift from a car-driver whom he knows to have lost a limb or an eye or to be deaf, he cannot complain if he does not exhibit the skill and competence of a driver who suffers from no defect. If he knowingly accepts the voluntary services of a driver affected by drink, he cannot complain of improper driving caused by his condition, because it involves no breach of duty."

That view of Mr. Justice Dixon seems to have been followed in South Australia, see Walker v. Turton-Sainsbury [1952] S.A.S.R. 159 but in the Supreme Court of Canada Mr. Justice Rand did not agree with it - see Carr and General v. Seymour, 1956, 2 D.L.R. 369 at page 375.

We have all the greatest respect for Sir Owen Dixon, but for once, I cannot agree with him. The driver owes a duty of care to every passenger in the car, just as he does to every pedestrian on the road: and he must attain the same standard of care in respect of each. If the driver were to be excused according to the knowledge of the passenger, it would result in endless confusion and injustice. One of the passengers may know that the learner-driver is a mere novice. Another passenger may believe him to be entirely competent. One of the passengers may believe the driver to have had only two drinks. Another passenger may know that he has had a dozen. Is the one passenger to recover and the other not? Rather than embark on such enquiries, the law holds that the driver must atbain the same standard of care for passengers as for pedestrians. The knowledge of the passenger may go to show that he was guilty of contributory negligence in ever accepting the lift - and thus reduce his damages - but it does not take away the duty of care, nor does it diminish the standard of care which the law requires of the driver, see Dann v. Hamilton [1939] 1 K.B. 509; Slater v. Clay Cross Co. [1956] 2 Q.B. at page 270.

I would only add this: If the knowledge of the passenger were held to take away the duty of care, it would mean that we would once again be applying the maxims 'Scienti non fit injuria'.

That maxim was decisively rejected by the House of Lords in cases between employer and workmen, see Smith v. Baker & Sons[1891] AC 325, and by Parliament in cases between occupier and visitor, see section 2(4) The Occupiers Liability Act, 195?, over-ruling London Graving Dock Ltd. v. Horton [1951] A.C. 737. We should not allow it to be introduced today in motor-car cases even though it was backed by Sir Owen Dixon. But hat was in 1948. He might think differently today.

THE RESPONSIBILITY OF A LEARNER-DRIVER TOWARDS HIS INSTRUCTOR

The special factor in this case is that Mr. Nettleship was not a mere passenger in the car. He was an instructor teaching Mrs. Weston to drive.

Seeing that the law lays down, for all drivers of motor-cars, a standard of care to which all must conform, I think that even a learner-driver, so long as he is the sole driver, must attain the same standard towards all passengers in the car, including an instructor. But the instructor may be debarred from claiming for a reason peculiar to himself. He may be debarred because he has voluntarily agreed to waive any claim for any injury that may befall him. Otherwise he is not debarred. He may, of course, be guilty of contributory negligence and have his damages reduced on that account. He may, for instance, have let the learner take control too soon, he may not have been quick enough to correct his errors, or he may have participated in the negligent act himself, see Stanley v. Gypsum Mines. Ltd. [1953] A.C. 660. But, apart from contributory negligence, he is not excluded unless it be that he has voluntarily agreed to incur the risk.

This brings me to the defence of volenti non fit injuria. Does it apply to the instructor? In former times this defence was used almost as an alternative defence to contributory negligence. Either defence defeated the action. Now that contributory negligence is not a complete defence, but only a ground for reducing the damages, the defence of volenti non fit injuria has been closely considered, and, in consequence, it has been severely limited. Knowledge of the risk of injury is not enough. Nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendants or, more accurately, due to the failure of the defendant to measure up to the standard of care that the law requires of him. That is shown in England b& Dann v. Hamilton [1939] 1 K.B. 3093 and Slater v. Clay Cross Co. [1936] 2 Q.B. 269x and in Canada by Lehnest v. Stein (1963) 36 DLR (2nd) 139; and in New Zealand by Morrison v. U.S.S. Co. [1964] N.Z.L.R. page 68. The doctrine has been so severely curtailed that in the view of Lord Diplock: "the maxim in the absence of express

contract has no application to negligence simpliciter when the duty of care is based solely upon proximity or 'neighbourship' in the Atkinson sense", see Mooldridxe and Sumner [1963] 2 Q.B. at page 69.

Applying the doctrine in this case, it is clear that Mr. Nettleship did not agree to waive any claim for injury that might befall him. Quite the contrary. He inquired about the insurance policy so as to make sure that he was covered. If and in so far as Mrs. Weston fell short of the standard of care which the law required of her, he has a cause of action. But his claim may be reduced in so far as he was at fault himself as in letting her take control too soon or in not being quick enough to correct her error.

I do not say that the professional instructor - who agrees to teach for reward - can likewise sue. Theremay well be implied in the contract an agreement by him to waive any claim for injury. He ought to insure himself, and may do so, for ought I know. But the instructor who is just a friend helping to teach, never does insure himself. He should, therefore, be allowed to sue.

CONCLUSION THUS FAR

In all that I have said, I have treated Mrs. West as the driver who was herself in control of the car. On that footing, she is plainly liable for the damage done to the lamp-post. She is equally liable for the injury done to Mr. Nettleship. She owed a duty of care to each. The standard of care is the same in either case. It is measured objectively by the care to be expected of an experienced skilled and careful driver. Mr. Nettleship is not defeated by the maxim volenti non fit injuria. He did not agree, expressly or impliedly, to waive any claim for damages owing to her failure to measureup to the standard. But his damages may fall to be reduced owing to his failure to correct her error quick enough. Although the Judge dismissed the claim, he did (in case he was wrong) apportion responsibility. He thought it would be just and equitable to regard them equally to blame. I wocld accept this apportionment.

JOINT RESPONSIBILITY

Thus far I have considered the learner as the driver of the car and the instructor as a passenger, albeit a very special kind of passenger. But I doubt whether that is the right way of looking at the problem. I prefer to regard the learner-driver and the instructor as both concerned in the driving. Together they must maintain the same measure of control over the car as an experienced skilled and careful driver would do. That is, I think, obvious. Their joint driving must come up to the high standard required of a single individual. If there is an accident, such as would not have occurred with a careful driver, then one or other, or both, must have been at fault. Either the

instructor did not have as much control over the driving as he should have done or the learner took more on himself than his experience warranted, or did something silly, even for a learner. In the absence of any evidence enabling the Court to draw a distinction between them, they should be held to be both to blame and equally to blame, see Baker v. Market Harborouab Industrial Co-operative Society. Ltd. [1933] 1 W.L.R. l4?2. If they are both equally to blame and one of them is injured, then he can sue the other for negligence, but his damages would be reduced by one-half because of his own contributory negligence - see Stapley v. Gypsum Mines. Ltd. [1953] AC 663. So by this simple route, I arrive at the same result.

FINAL CONCLUSION

In my opinion when a learner-driver is being taught to drive a car under the instruction of an experienced driver, then if the car runs off the road and there is an accident in which one or other, or both of them are injured, it should be regarded as the fault of one or other or both of them. In the absence of any evidence enabling the Court to draw a distinction between them, they should be regarded as equally to blame, with the result that the injured one gets damages from the other, but they are reduced by one-half owing to his own contributory negligence. The only alternative is to hold that the accident is the fault of neither, so that the injured person gets no compensation from anyone. To my mind, that is not an acceptable solution, at any rate in these days of compulsory insurance.

I would, therefore, allow the appeal and hold that the damages (now agreed) be divided half-and-half.

LORD JUSTICE SALMON: I need not recite the facts which have been so lucidly stated by the Master of the Rolls. I entirely agree with all be says about the responsibility of a learner-driver in criminal law. I also agree that a learner-driver is responsible and owes a duty in civil law towards persons on or near the highway to drive with the same degree of skill and care as that of the reasonably competent and experienced driver. The duty in civil law springs from the relationship which the driver, by driving on the highway, has created between himself and persons likely to suffer damage by his bad driving. This is not a special relationship. Nor, in my respectful view, is it affected by whether or not the driver is insured. On grounds of public policy, neither this criminal nor civil responsibility is affected by the fact that the driver in question may be a learner, infirm or drunk. The onus, of course, lies on anyone claiming damages to establish a breach of duty and that it has caused the damages which he claims.

Any driver normally owes exactly the same duty to a passenger in his car as he does to the general public, namely to drive with reasonable care and skill

in all the relevant circumstances. As a rule, the driver's personal idiosyncrasy is not a relevant circumstance. In the absence of a special relationship what is reasonable care and skill is measured by the standard of competence usually achieved by the ordinary driver. In my judgment, however, there may be special facts creating a special relationship which displaces this standard or even negatives any duty, although the onus would certainly be upon the driver to establish such facts. With minor reservations I respectfully agree with and adopt the reasoning and conclusions of Sir Owen Dixon in his judgment in the Insurance Commissioners v. Joyce 77 C.L.R. 39. I do not agree that the mere fact that the driver has, to the knowledge of his passenger, lost a limb or an eye or is deaf can affect the duty which he owes the passenger to drive safely. It is well known that many drivers suffering from such disabilities drive with no less skill and competence than the ordinary man. The position, however, is totally different when, to the knowledge of the passenger, the driver is so drunk as to be incapable of driving safely. Quite apart from being negligent, a passenger who accepts a lift in such circumstances, clearly cannot expect the driver to drive other than dangerously.

The duty of care springs from relationship. The special relationship which the passenger has created by accepting a lift in the circumstances postulated surely cannot entitle him to expect the driver to discharge a duty of care or skill which ex hypothesi the passenger knows the driver is incapable of discharging. Accordingly in such circumstances, no duty is owed by the driver to the passenger to drive safely, and therefore no question of volenti non fit injuria can arise.

The alternative view is that if there is a duty owed to the passenger to drive safely, the passenger by accepting a lift has clearly assumed the risk of the driver failing to discharge that duty. What the passenger has done goes far beyond establishing mere "scienter" If it does not establish "volens", it is perhaps difficult to imagine what can.

Such a case seems to me to be quite different from Smith v. Charles Baker & Sons 1891 AC 325, and Slater v. Clay Cross Co. Ltd,. 1936 2 Q.B. 264. Like Sir Owen Dixon, I prefer to rest on the special relationship between the parties displacing the prima facie duty on the driver to drive safely rather/on the ground of volenti non fit injuria. Whichever view is preferable, it follows that, in spite of the very great respect I have for any judgment of Lord Asquith, I do not accept that Dann v. Hamilton 1939 1 K.B. 509, was correctly decided. Although Sir Owen Dixon's judgment was delivered in 1948, I cannot think of anything which has happened since which makes it any less convincing now than it was then.

I should like to make it plain that I am not suggesting that whenever a passenger accepts a lift knowing that the driver has had a few drinks, this displaces the prima facie duty ordinarily resting on a driver, let alone that it establishes volenti non fit injuria. Indeed; Sir Owen Dixon dissented in Joyce's case, because he did not agree that the evidence was capable of establishing that the plaintiff passenger knew that the driver was so drunk as to be incapable of exercising ordinary care and skill. In practice it would be rare indeed that such a defence could be established.

There are no authorities which bear directly on the duty owed by a learner-driver to his instructor. I have dwelt upon the authorities concerning the relationship between a drunken driver and his passenger because to some extent there is an analogy between those two classes of case. But the analogy is by no means exact. The drunken driver is in sole charge of the car. His condition may be such that the passenger knows that it is impossible for him to drive with any care or skill. On the other hand, the learner-driver and his instructor are jointly in charge of the car. The instructor is entitled to expect the learner to pay attention to what he is told, perhaps to take exceptional care, and certainly to do his best. The instructor, in most cases as the present, knows, however, that the learner has practically no driving experience or skill and that, for the lack of this experience and skill, the learner will almost certainly make mistakes which may well injure the instructor unless he takes adequate steps to correct them. To my mind, therefore, the relationship is usually such that the beginner does not owe the instructor a duty to drive with the skill and competence to be expected of an experienced driver. The instructor knows that the learner does not possess such skill and competence. The alternative way of putting the case is that the instructor voluntarily agrees to run the risk of injury resulting from the learner's lack of skill and experience.

The point may be tested in this way: suppose that the instructor is paid for the lessons he gives and there is a contract governing the relationship between the parties, but the contract is silent about the duty owed by the learner to the instructor. It is well settled tha5 the law will not imply any term into such a contract unless it is necessary to do so for the purpose of giving to the contract ordinary business efficacy. Could it really be said that in order to give this contract ordinary business efficacy, it is necessary to imply a term that the learner owed the instructor a duty to drive with the degree of skill and competence which both parties know that he does not possess? If the law were to imply such a term, far from it giving the contract business efficacy, it would, in my view, only make both itself and the contract look absurd.

Nor can I think that even when there is no payment and no contract, the special relationship between the parties can as a rule impose any such duty upon the learner. Indeed such a duty is excluded by that relationship.

If, however, the learner, for example, refuses to obey instructions or suddenly accelerates to a high speed or pays no attention to what he is doing and as a result the instructor is injured, then, in my view, the learner is in breach of duty and liable to the instructor in damages. The duty is still the duty to use reasonable care and skill in all the relevant circumstances. What is reasonable depends, however, on the special relationship existing between the learner and his instructor. This relationship, in my view, makes the learner's known lack of skill and experience a highly relevant circumstance.

I do not think that the learner is usually liable to his instructor if an accident occurs as a result of some mistake which any prudent beginner doing his best can be expected to make. I recognise that on this view, cases in which a driving Instructor is Injured whilst his pupil is driving may raise difficult questions of fact and degree. Equally difficult questions of fact and degree are, however, being assessed and decided in our Courts every day. The law lays down principles but not a rule of thumb for deciding issues arising out of any special relationship between the parties. A rule of thumb, if it existed, might no doubt remove difficulties, but could hardly produce justice either in practice or in theory.

It does not appear to me to be incongruous that a learner is responsible for acts or omissions in criminal law and indeed to the public at large in civil law and yet not necessarily responsible for such acts or omissions to his instructor. The learner has no special relationship with the public. The learner is certainly not liable to his instructor if his responsibility is excluded by contract. I can see no reason why, in the absence of contract, the same result should not follow from the special relationship between the parties.

For the reasons I have stated, I would, but for one factor, agree with the learned Judge's decision in favour of the defendant.

I have, however, come to the conclusion, not without doubt, that this appeal should be allowed. Mr. Nettleship when he gave evidence was asked:

> "Q. Was there any mention made of what the position would be if you were involved in an accident?
>
> "A. I had checked with Mr. and Mrs. Weston regarding insurance, and I was assured that they had fully comprehensive insurance which covered me as a passenger in the event of an accident."

Mrs. Weston agreed, when she gave evidence, that this assurance had been given before Mr. Nettleship undertook to teach her. In my view this evidence completely disposes of any possible defence of volenti non fit injuria. Moreover, this assurance seems to me to be an integral part of the relationship between the parties. In Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.. 1964 AC 465, the House of Lords decided that the relationship which there existed between the parties would have imposed a duty of care upon the defendants in giving the plaintiffs information but for the fact that the defendants gave the information "without responsibility". This disclaimer of responsibility was held to colour the whole relationship between the parties by negativing any duty of care on the part of the defendants.

Much the same result followed when a passenger accepted a lift in a car which exhibited a notice stating; "Warning. Passengers travelling in this vehicle do so at their own risk". Bennett v. Tugwell. 1971 2 W.L.R. 84. This case is perhaps the converse of the cases of Hedley Byrne and Bennett v. Tugwell. On the whole, I consider, although with some doubt that the assurance given to Mr. Nettleship altered the nature of the relationship which would have existed between the parties but for the assurance. The assurance resulted in a relationship under which Mrs. Weston accepted responsibility for any injury which Mr. Nettleship might suffer as a result of any failure on her part to exercise the ordinary driver*s standards of reasonable care and skill.

As for contributory negligence, I agree with the Master of the Rolls that the learned Judge's finding on this issue should not be disturbed. Mrs. Weston had only twice before the occasion in question sat at the wheel of a car. She was very careful and did her best, but she could not even change gear. Mr. Nettleship did this for her. All she did, under his instruction, was to depress and release the clutch pedal, apply the footbrake, use the accelerator, and attempt to steer as directed. Mr. Nettleship manipulated the gear lever, applied the hand brake and on occasion had to take hold of the steering wheel to correct her errors. At the time of the accident the car was travelling only at about 4 miles per hour. At this pace, it could be stopped almost Instantaneously by the hand brake. If, when Mr. Nettleship saw her driving straight at the lamp post about 20 feet away, he had applied the hand brake a little more quickly, no accident would have occurred. This was a natural inference which the learned Judge was in my view entitled to draw, and which indeed I would have drawn myself, whatever the instructor or his friend, the learner, may have said to the contrary. In my view, neither was guilty of any serious negligence, but both were at fault and equally to blame. She panicked as beginners sometimes do, and he did not react as quickly as he should have done. This was the learned Judge's conclusion and I can find no reason for disagreeing with it. I would accordingly allow the appeal and

order that judgment should be entered for the plaintiff for half the amount of the agreed damages.

LORD JUSTICE MEGAW: The relevant facts have already been stated.

The important question of principle which arises is whether, because of Mr. Nettleship's knowledge that Mrs. Weston was not an experienced driver, the standard of care which was owed to him by her was lower than would otherwise have been the case.

In The Insurance Commissioner v. Joyce (1948) 77 C.L.R. 39, at pages 56 to 60, Mr. Justice Dixon stated persuasively the view that there is, or may be, a "particular relation" between the driver of a vehicle and his passenger resulting in a variation of the standard of duty owed by the driver. "The case of a passenger in a car", he says at page 60, "differs from that of a pedestrian not in the kind of degree of danger which may come from any want of care or skill in driving but in the fact that the former has come into a more particular relation with the driver of the car. It is because that relation may vary that the standard of duty or of care is not necessarily the same in every case... The gratuitous passenger may expect prima facie the same care and skill on the part of the driver as is ordinarily demanded in the management of a car. Unusual conditions may exist which are apparent to him or of which he may be informed and they may affect the application of the standard of care that is due. If a man accepts a lift from a car driver he knows to have lost a limb or an eye or to be deaf, he cannot complain if he does not exhibit the skill and competence of a driver who suffers from no defect.

He summarised the same principle in these words, at page 59:

> "It appears to me that the circumstances in which the defendant accepts the plaintiff as a passenger and in which the plaintiff accepts the accommodation in the conveyance should determine the measure of duty...."

Theoretically, the principle as thus expounded is attractive. But, with very great respect, I venture to think that the theoretical attraction should yield to practical considerations.

As I see it, if this doctrine of varying standards were to be accepted as part of the law on these facts, it could not logically be confined to the duty of care owed by learner-drivers. There is no reason, in logic, why it should not operate in a much wider sphere. The disadvantages of the resulting unpredictability, uncertainty and, indeed, impossibility of arriving at fair and

consistent decisions outweigh the advantages. The certainty of a general standard is preferable to the vagaries of a fluctuating standard.

As a first example of what is involved, consider the converse cases the standard of care (including skill) owed not by the driver to the passenger, but by the passenger-instructor to the learner-driver. Surely the same principle of varying standards, if it is a good principle, must be available also to the passenger, if he is sued by the driver for alleged breach of the duty of care in supervising the learner-driver. On this doctrine, the standard of care, or skill, owed by the instructor, vis-a-vis the driver, may vary according to the knowledge which the learner-driver had, at some moment of time, as to the skill and experience of the particular instructor. Indeed, if logic is to prevail, it would not necessarily be the knowledge of the driver which would be the criterion. It would be the expectation which the driver reasonably entertained of the instructor's skill and experience, if that reasonable expectation were greater than the actuality. Thus, if the learner-driver knew that the instructor had never tried his hand previously even at amateur instructing, or if, as may be the present case, the driver knew that the instructor's experience was confined to two cases of amateur instructing some years previously, there would, under this doctrine, surely be a lower standard than if the driver knew or reasonably supposed that the instructor was a professional or that he had had substantial experience in the recent past. But what that standard would be, and how it would or should be assessed, I know not. For one has thus cut oneself adrift from the standard of the competent and experienced instructor, which up to now the law has required without regard to the particular personal skill, experience, physical characteristics or temperament of the individual instructor, and without regard to a third party's knowledge or assessment of those qualities or characteristics.

Again, when one considers the requisite standard of care of the learner-driver, if this doctrine were to apply, would not logic irresistibly demand that there should be something more than a mere, single, conventional, standard applicable to anyone who falls into the category of learner-drivers that is, of anyone who has not yet qualified for (or perhaps obtained) a full licence? That standard itself would necessarily vary over a wide range, not merely with the actual progress of the learner, but also with the passenger's knowledge of that progress: or, rather, if the passenger has in fact over-estimated the driver's progress, it would vary with the passengers reasonable assessment of that progress at the relevant time. The relevant time would not necessarily be the moment of the accident.

The question, what is the relevant time, would itself have to be resolved by reference to some principle. The instructor's reasonable assessment of the skill and competence of the driver (and also the driver's assessment of the

instructor's skill and competence) might alter drastically between the start of the first lesson and the start of a later less a, or even in the course of one particular spell of driving. I suppose the principle would have to be that the relevant time is the last moment when the plaintiff (whether instructor or driver) could reasonably have refused to continue as passenger or driver in the light of his then knowledge. That factor in itself would introduce yet another element of difficulty, uncertainty and, I believe, serious anomaly.

I for my part, with all respect, do not think that our legal process could successfully or satisfactorily cope with the task of fairly assessing, or applying to the facts of a particular case, such varying standards, depending on such complex and elusive factors, including the assessment by the Court, not merely of a particular person's actual skill or experience, but also of another person's knowledge or assessment of that skill or experience at a particular moment of time.

Again, if the principle of varying standards is to be accepted, why should it operate, in the field of driving motor vehicles, only up to the stage of the driver qualifying for a full licence? And why should it be limited to the quality of inexperience? If the passenger knows that his driver suffers from some relevant defect, physical or temperamental, which could reasonably be expected to affect the quality of his driving, why should not the same doctrine of varying standards apply? Mr. Justice Dixon thought it should apply. Logically there can be no distinction. If the passenger knows that his driver, though holding a full driving licence, is blind in one eye or has the habit of taking corners too fast, and if an accident happens which is attributable wholly or partly to that physical or that temperamental defect, why should not some lower standard apply, vis-a-vis the fully informed passenger, if standards are to vary?

Why should the doctrine, if it be part of the law, be limited to cases involving the driving of motor cars? Suppose that to the knowledge of the patient a young surgeon, whom the patient has chosen to operate on him, has only just qualified. If the operation goes wrong because of the surgeon's inexperience, is there a defence on the basis that the standard of skill and care was lower than the standard of a competent and experienced surgeon? Does the young, newly qualified, solicitor owe a lower standard of skill and care, when the client chooses to instruct him with knowledge of his inexperience?

True, these last two examples may fall within the sphere of contract, and a contract may have express terms which deal with the question, or it may have implied terms. But in relationships such as are involved in this case, I see no good reason why a different term should be implied where there is a contract from the term which the law should attach where there is, or may

be, no contract. Of course, there may be a difference -not because of any technical distinction between cases which fall within the law of tort and those which fall within the law of contract - but because the very factor or factors which create the contractual relationship may be relevant on the question of the implication of terms. Thus, if it is a contract because of consideration consisting of the promise of payment, that very fact may be relevant. I do not say that it is relevant. I do say that it may be relevant. Or the amount or the circumstances of the payment may be relevant. That is not a question which arises here, and I think that it would be unwise to consider it hypothetically.

In my judgment, in cases such as the present it is preferable that there should be a reasonably certain and reasonably ascertainable standard of care, even if on occasion that may appear to work hardly against an inexperienced driver, or his insurers. The standard of care required by the law is the standard of the competent and experienced drivers and this is so, as defining the driver*s duty towards " passenger who knows of his inexperience, as much as towards a member of the public outside the car; and as much in civil as in criminal proceedings.

It is not a valid argument against such a principle that it attributes tortious liability to one who may not be morally blameworthy. For tortuous liability has in many cases ceased to be based on moral blameworthiness. For example, there is no doubt whatever that if Mrs. Weston had knocked down a pedestrian on the pavement when the accident occurred, she would have been liable to the pedestrian. Yet so far as any moral blame is concerned, no different considerations would apply in respect of the pedestrian from those which apply in respect of Mr. Nettleship.

In criminal law also, the inexperience of the driver is wholly irrelevant. In the phrase commonly used in directions to juries in charges of causing death by dangerous driving, the driver may be guilty even though the jury think that he was "doing his incompetent best". (See R. v. Evans [1963] 1 Q.B. 412, at page 4l8, and R. v. Scammell. 31 Cr. App. R. 398, at page 400). There can be no doubt that in criminal law, further, it is no answer to a charge of driving without due care and attention that the driver was inexperienced or lacking in skill. (See McCrone v. Riding [1938] 1 All ER 157.) In the present case, indeed, there was a conviction for that offence.

If the criminal law demands of an inexperienced driver the standard of care and competence of an experienced driver, why should it be wrong or unjust or impolitic for the civil law to require that standard, even vis-a-vis an injured passenger who knew of the driver's inexperience?

Different considerations may, indeed, exist when a passenger has accepted a lift from a driver whom the passenger knows to be likely, through drink or drugs, to drive unsafely. There may in such cases sometimes be an element of aiding and abetting a criminal offence, or, if the facts fall short of aiding and abetting, the passenger's mere assent to benefit from the commission of a criminal offence may involve questions of turpis causa. For myself, with great respect, I doubt the correctness on its facts of the decision in Dann v. Hamilton [1939] 1 K.B. 309. But the present case involves no such problem.

It is submitted on behalf of Mrs. Weston that even if the standard of care be, as I think it is, the same for a learner-driver vis-a-vis a passenger as it is vis-a-vis a member of the public outside the car, yet in this case the doctrine of volenti non fit injuria applies and provides a defence. If there were special facts and circumstances which showed that the passenger not merely was aware of, but accepted for himself the risk of Injury caused by the driver's lack of skill or experience, that doctrine would provide a defence. But the mere fact that the passenger knows of the driver's inexperience is not enough.

In the present case, so far from there being such special facts and circumstances, the indications are all the other way. I have no doubt that the proper inference of fact to be drawn from the care which Mr. Nettleship took to investigate the comprehensiveness of Mr. Weston's insurance policy is that he would have declined to undertake the task of teaching Mrs. Weston if he had been told:

> "If you are injured as a result of Mrs. Weston's lack of skill or experience, you will have to hear your loss without remedy against anyone".

That is not a case of volenti non fit injuria.

On the question of contributory negligence, with all respect to my Lords and to the learned Judge, I find myself unable, having read and re-read the evidence, to see in what respect Mr. Nettleship fell below the standard of care and skill of a competent instructor supervising a learner-driver. There is no conceivable reason why, having regard to what he had seen of Mrs. Weston's driving during the three lessons, he should not have permitted her to undertake the manoeuvre which she undertook, at the time and place where she undertook it. From the first warning of trouble to the collision with the lamp post, on the uncontradicted evidence of distance and speed, the time which elapsed could not have exceeded three seconds. Only one wheel of the car went over the kerb, and that by a cotter of inches only. The suggestion that Mr. Nettleship could and should have switched off the ignition, as well as using his hands on the brake and the steering wheel

during those three seconds, is, I venture to think, quite unrealistic. Apart altogether from the well-known factor of "thinking time", any sudden or dramatic action in such circumstances may well accentuate the panic and thus actually Increase the danger. In short, I can see nothing done by him which he ought not to have done, and nothing left undone by him which he ought to have done. Moreover, Mrs. Weston herself said, in examination-in-chief, that Mr. Nettleship "did all he could to stop the vehicle before it crashed". Where, as here, the only participants and the only eye witnesses say that the plaintiff did all he could, how can that evidence be overridden?

I would allow the appeal in full and hold that Mr. Nettleship is entitled to the whole of the agreed amount of damages.

Appeal allowed. Judgment of Mr. Justice Thesiger set aside. Judgment for the plaintiff for the sum of £510.26 (being half the agreed damages), with costs in the Court of Appeal and in the Court below.