THE "CARE" REQUIRED OF A JAYWALKER

The Iowa Code defines a pedestrian as "any person afoot".[1] Consequently, the myriad situations are easily imaginable in which a pedestrian is required to exercise care for his own safety if he expects to recover for injuries suffered at the hands of an allegedly negligent motorist. However, it is the purpose of this article to discuss the problems of care arising only where the pedestrian chooses to cross a street or highway at a place other than an intersection or marked crosswalk.[2] Such a discussion necessarily involves an inquiry into the aspects of relative conduct—the care required of the pedestrian and the care required of the motorist.

Pre-statutory Development

A chronological study of the Iowa case decisions throughout the formative period of automobile law indicates apparent confusion in the attempt to state the care required of a pedestrian who crosses the street or highway at a place other than an intersection or marked crosswalk. The first Iowa case in which the problem was raised was *Wine v. Jones.*[3] Here the plaintiff crossed a street at a point twenty feet south of an intersection and was struck by defendant's motorcycle. The court held as a matter of law that a pedestrian could cross the street anywhere; that the rights of wayfarers and drivers of motor vehicles in the use of the streets were reciprocal; that the question of plaintiff's contributory negligence was correctly submitted to the jury. However, the uncertainty of the court's position in this early case is found partly in the following excerpt from the opinion:

> *"Nor can it be said that the pedestrian must look both ways or listen for automobiles or motorcycles before undertaking to cross a city street.* . . . All (that is) exacted from one traveling along or across a street is that he exercise ordinary care for his own safety. . . . Of course, one may undertake to pass over a street under circumstances such as to render the attempt negligent; as heedlessly running in front of an approaching automobile. *Ordinarily, it is the duty of a pedestrian to take some precaution in crossing a street, either by listening or looking for passing vehicles."* (Italics supplied).[4]

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[1] IOWA CODE § 321.1(47) (1954).

[2] The importance of the problem is indicated by recent statistics. In the three year period from December 31, 1950, to January 1, 1954, sixty persons were killed in Iowa, and eight hundred thirty one persons were injured while crossing highways or streets at places other than intersections or marked crosswalks. These sixty fatalities comprised 32.6% of all pedestrian deaths during that period. Statistical Summary of Motor Vehicle Traffic Accidents, compiled in Iowa by the Motor Vehicle Statistics Division of the Iowa Department of Public Safety.

[3] 183 Iowa 1166, 162 N.W. 196 (1917).

[4] *Id.* at 1170, 168 N.W. at 198.

The contradiction in terms in the opinion is apparent. The court relied upon three Iowa cases, *Bell v. Town of Clarion*,[5] *Finnegan v. Sioux City*,[6] and *O'Laughlin v. City of Dubuque*[7] in holding that a pedestrian could cross the street at any point without being guilty of contributory negligence. However, it is worthy of note that the cases cited involved a city's liability for defective sidewalks, hence their applicability to a common law action for tort liability in the automobile area is questionable.

In *Livingston v. Dole*,[8] decided the next year, the court cited the *Wine* case and reiterated the proposition that the rights of the pedestrian and the motorist in the streets were reciprocal.[9] However, it is to be noted that the court went further, and clarified its uncertain position in the *Wine* case. It declared that the driver was required to maintain a proper lookout; and that a pedestrian was required to use that care which is commensurate with the circumstances; and because the driver's lookout is relaxed between intersections, greater care should be observed by a pedestrian in crossing a street at a place other than an intersection.[10]

Subsequent to the *Livingston* case, the court heard three cases in which it affirmed lower court decisions to direct a verdict for the defendant. In *Sheridan v. Limbrect*,[11] the court held that the plaintiff pedestrian had a right to cross the street at any place, and that in doing so he would not be guilty of contributory negligence.[12] The court went on to say, however, that he had the duty to use ordinary care; that the diligence required by ordinary care is proportionate to the known dangers present; that he was crossing at an unusual place and knew he was in danger of collision; and as between the pedestrian and the automobile, the pedestrian has the better opportunity to stop.[13] In *Whitman v. Pilmer*[14] and *Spaulding v. Miller*[15] the court again cited the rule announced in the *Wine* case, *i.e.*, that the rights in the street are equal, and that the pedestrian was bound to use such care as is required by the circumstances and the known dangers present. However, in each of these cases, the court, in reviewing the facts, went on to state that had the plaintiff looked for oncoming cars, he could not have failed to see the approaching vehicles, and if he did not look, he was contributorily negligent as a matter of law.[16]

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[5] 113 Iowa 126, 84 N.W. 962 (1901).
[6] 112 Iowa 232, 83 N.W. 907 (1900).
[7] 42 Iowa 539 (1876).
[8] 184 Iowa 1340, 167 N.W. 639 (1918).
[9] *Id.* at 1345, 167 N.W. at 642.
[10] *Id.* at 1346, 167 N.W. 642.
[11] 205 Iowa 573, 218 N.W. 278 (1928).
[12] *Id.* at 576, 218 N.W. at 279.
[13] *Id.* at 577, 218 N.W. at 279. For this proposition, the court cited the *Wine* and *Livingston* cases. It seems clear that in the *Wine* case no duty to look was imposed upon the jaywalking pedestrian.
[14] 214 Iowa 461, 239 N.W. 686 (1931).
[15] 216 Iowa 948, 249 N.W. 642 (1933).
[16] *Compare* Whitman v. Pilmer, 214 Iowa 461, 239 N.W. 686 (1931) *with* Spaulding v. Miller, 216 Iowa 948, 249 N.W. 642 (1933).

A possible conclusion to be drawn from the foregoing cases, which were decided by the court from 1918 to 1933 is that a greater duty was gradually placed upon the pedestrian even though the court ostensibly at least clung to the rule announced in *Wine v. Jones*. It is apparent that the court began to take notice of the unequal "bargaining power" that the pedestrian had in the use of the streets.

But in 1933 and 1934, the court exhibited a trend in which the comparative duty of lookout on the part of the driver was emphasized. In *Lorimer v. Hutchinson Ice Cream Company*,[17] the plaintiff's decedent walked northeast through the city park in an easterly direction. The body was found some forty feet south of the intersection. There were no eyewitnesses. The evidence failed to show whether the decedent was struck at the intersection and carried to the point where the body was found.[18] The court, in reversing the trend previously mentioned, held that the question of the decedent's contributory negligence was for the jury. It is worthy of some note that the court applied the same test to the driver here that had been previously applied to the pedestrian in the *Whitman* and *Spaulding* cases, saying that had the driver looked, he could have seen the decedent, and if he did so see the decedent and could not stop within the assured clear distance ahead, he was guilty of negligence.[19] It might be considered that the case is factually distinguishable from the prior cases for two reasons: because the accident happened so near the intersection that the driver was required to exercise a greater degree of care towards persons in the street as he approached the intersection,[20] and because there were no eyewitnesses and the decedent was presumed to be exercising due care.[21] However, it is questionable whether the application of the no-eyewitnesses rule was necessary to present a jury question, because the court once again intimated that the decedent had a right to cross the street at any place and would only be required to use ordinary care in so doing.[22]

The latter contention is born out by the subsequent cases of *Minks v. Sternberg*[23] and *Orth v. Gregg*.[24] In the *Minks* case, the court was presented with the problem of whether a seventy-one year old man who jaywalked to catch a streetcar and walked into the path of an oncoming car was contributorily negligent. The record discloses that the pedestrian saw the car coming at a rate of from 25 to 40 miles per hour at a distance of 150 feet and still proceeded in front of it. It appears that the plaintiff looked before he left the curb and again when he was in the middle of the street.

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17 216 Iowa 384, 249 N.W. 220 (1933).
18 *Id.* at 391, 249 N.W. at 224.
19 *Id.* at 390, 249 N.W. at 224.
20 *Id.* at 390, 249 N.W. at 224.
21 *Id.* at 391, 392, 249 N.W. at 224.
22 *Id.* at 391, 392, 249 N.W. at 225.
23 217 Iowa 119, 250 N.W. 883 (1933).
24 217 Iowa 516, 250 N.W. 113 (1933).

The court held that the contributory negligence of the defendant was a jury question. It would seem that the court adopted a criterion of care on the part of the jaywalking pedestrian considerably less stringent than that of the previous cases. The criterion here was that generally assumed by bench and bar: "that amount of care and caution which would be exercised by a reasonably prudent man under the same or similar circumstances".[25] But it should be emphasized that the plaintiff in this case saw the car approaching and thought he could proceed with safety. Considering this fact, the court was reluctant to hold that he was negligent as as a matter of law.[26]

The facts are similar in the *Orth* case. Here the plaintiff started to cross the street at an alley near the middle of the block. He saw the defendant's car a half-block away before he left the curb line but hesitated long enough to let another car go past, then proceeded into the other lane where he was struck by defendant's car. The court suggested that the plaintiff had a right to assume that the defendant would obey the law. However, it should be noted that there is no evidence in the opinion that the defendant was disobeying the law, except a reference by the court that the jury could hardly do other than find that the defendant had failed to keep a proper lookout.[27]

The *Minks* case and the *Orth* case present an obvious departure from the *Spaulding* and *Whitman* cases, *supra,* where it was held that if the plaintiff had looked he was bound to see, and if he did not look he was contributorily negligent as a matter of law in proceeding into the street. While the *Minks* case might be factually distinguishable in that the plaintiff was jaywalking diagonally across two streets at an intersection, the same cannot be said for the *Orth* case.[28] It is somewhat anomalous that the cases should turn on the fact that the plaintiffs did in fact see the approaching automobiles at a comparatively short distance. The result in this latter line of cases is that if the plaintiff can prove that he looked and saw the approaching automobile, walked in front of it and was injured, he is not accountable for mere bad judgment and the question of his contributory negligence will go to the jury. By comparison, in the former line of cases, if the plaintiff failed to look, he was contributorily negligent as a matter of law, and apparently so even though if he had looked he might not have seen the approaching danger.

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[25] 217 Iowa at 125, 250 N.W. at 886.
[26] *Id.*
[27] 217 Iowa at 520, 250 N.W. at 115.
[28] In the *Orth* case, it should be noted that there was an ordinance in Sioux City at the time which provided: "No pedestrian shall cross a public street of this city except at a crossing and at right angles with said street and at the end of the block." 217 Iowa at 517, 250 N.W. at 114. *See* discussion of Kisling v. Thierman, *infra,* note 32, text supported thereby.

Post-statutory Development

In 1937, the legislature passed a number of automobile statutes of which one, pertinent to the problem here discussed, declared:

> "Every pedestrian crossing a roadway at any point other than a marked crosswalk or within an unmarked crosswalk at an intersection *shall yield the right of way to all vehicles* upon the roadway except that cities and towns may restrict such a crossing by ordinance.
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> "Any pedestrian crossing a roadway at a point where a pedestrian tunnel or overhead pedestrian crossing has been provided *shall yield the right of way to all vehicles* upon the roadway.
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> "Where traffic control signals are in operation at any place not an intersection pedestrians *shall not cross* except in a marked crosswalk." (Italiacs supplied).[29]

The next section reaffirms the duty of a driver to exercise due care in avoiding collision with pedestrians.[30]

The emphasized portions of the quoted section would seem to create a mandatory duty [31] on the part of the pedestrian to yield the right of way to a vehicle, hence a failure to so yield the right of way should, under the rule of *Kisling v. Thierman*,[32] be considered negligence per se, in the absence of any of the excuses [33] propounded in the *Kisling* case. Logically, then, the only problem for the

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[29] IOWA CODE § 321.328 (1954). The 55th General Assembly amended the original section by adding the words following "roadway" in the first paragraph. Iowa Laws 1953, 55th G.A. c. 136.

Pedestrian is defined in § 321.1(47) as, "any person afoot."; roadway in § 321.1(50) as, "that portion of a highway improved, designed, or ordinarily used for vehicular traffic."; crosswalk in § 321.1(55) as, "that portion of a roadway ordinarily included within the prolongation or connection of the lateral lines of sidewalks at intersections or any portion of the roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface."; right of way in § 321.1(66) as, "the privilege of the immediate use of the highway."

The Code appears to make no distinction between city streets and the open highway, for § 321.1(48) uses the terms interchangeably. However, there is dictum in Scott v. McKelvey, 228 Iowa 264, 275, 290 N.W. 729, 734 (1940), indicating that the court would recognize such a distinction.

[30] IOWA CODE § 321.329 (1954): "Notwithstanding the provisions of section 321.328 every driver shall exercise due care to avoid colliding with any pedestrians upon any roadway and shall give warning by sounding the horn when necessary and shall exercise due care upon observing any child or any confused or incapacitated person upon a roadway."

[31] It is a misdemeanor to violate any of the provisions of chapter 321 except those specified as felony. IOWA CODE § 321.482 (1954).

[32] 214 Iowa 911, 243 N.W. 552 (1932). The doctrine of the *Kisling* case has been expressly approved—and in relation to plaintiff's contributory negligence—in the following recent cases: Becker v. City of Waterloo, 245 Iowa 666, 63 N.W.2d 919 (1954); Florke v. Peterson, 245 Iowa 1031, 65 N.W.2d 372 (1954); Reed v. Willison, 245 Iowa 1066, 65 N.W.2d 440 (1954). In Orth v. Gregg, *supra*, which was tried before the opinion in the *Kisling* case was filed, the court mentioned the *Kisling* doctrine, but held that any error relating thereto had not been properly preserved by exceptions.

[33] These "legal excuses" are: "1. Anything that would make it impossible to comply with the statute or ordinance. 2. Anything over which the driver has no control which places his car in a position contrary to the provisions of the statute or ordinance. 3. Where the driver

jury to determine in respect to plaintiff's negligence would be whether the negligence did in fact contribute to plaintiff's injury.[34]

The Iowa court has not, however, been persuaded to apply section 321.328 in its fullest import. It has, on the other hand, tended to emphasize the next section, 321.329, and hence the affirmative duties of the driver.[35]

The Iowa court has in fact cited section 321.328 in but three reported cases.[36] In the first of these, *Scott v. McKelvey,* the decedent, a girl fifteen years old, attempted to cross highway 30 in Ames at a point just west of what the court denominated an unmarked crosswalk. The trial court submitted the question of the defendant's negligence and the decedent's contributory negligence to the jury with instructions which were apparently intended to conform to sections 321.328 and 321.329.[37] The Supreme Court approved these instructions, albeit somewhat equivocally.[38]

In *McMurry v. Guth,* the court held that section 321.328 did not command jaywalking pedestrians to yield the whole roadway and, so long as the driver had the use of the rest of the street, then the pedestrian's contributory negligence was a jury question.[39] In *Andrew v. Clements,* the trial court directed a verdict for the defendant. The Supreme Court reversed on the grounds that the evidence conflicted as to whether the plaintiff was actually in the crosswalk. The opinion cites section 321.328, but without com-

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of the car is confronted by an emergency not of his own making, and by reason thereof he fails to obey the statute. 4. Where a statute specifically provides an excuse or exception." 214 Iowa at 916, 243 N.W. at 554.

[34] Becker v. City of Waterloo, 245 Iowa 666, 63 N.W.2d 919 (1954).

[35] Tobin v. Van Orsdol, 241 Iowa 1331, 45 N.W.2d 239 (1950).

[36] Scott v. McKelvey, 228 Iowa 264, 290 N.W. 729 (1940); McMurry v. Guth, 229 Iowa 776, 295 N.W. 133 (1940); Andrew v. Clements, 242 Iowa 144, 45 N.W.2d 861 (1951).

[37] 228 Iowa at 269, 273, 290 N.W. at 733. The following excerpts are taken from the instructions: ". . . if you find that Bonnie Scott was crossing said Lincolnway at a place other than a marked or unmarked crosswalk, nevertheless the defendant was duty bound to avoid colliding with her . . . and a failure upon the part of (the defendant) to exercise such care would be negligence. . . .

"If Bonnie Scott was walking across said Lincolnway at some other place than an unmarked crosswalk, she was duty bound to yield the right of way to vehicles upon said Lincolnway and was also duty bound to use that degree of care that a reasonable and prudent and cautious person would use under like and similar circumstances. Greater care must be observed by a pedestrian crossing the street at a point other than a crosswalk. . . . "

[38] "The question presented is not free from doubt, but we hold that the court correctly construed the statute, and if this were not so, we are unable to see how there could be reversible error in the way the courts (sic) submitted the case under the record." 228 Iowa at 274, 290 N.W. at 733.

[39] "The statute cannot be interpreted as commanding the yielding of the whole street. The jury could have found that the portion of the street defendant had chosen to use in exercising his right of way was yielded to him. If the jury so found the statute was not as a matter of law violated." 229 Iowa at 779, 295 N.W. at 135. *Quaere:* Although somewhat restricting the statutory definition of right of way, (*See* note 29, *supra*), has not the court by inference at least recognized the mandatory characteristics of § 321.328?

ment, and there is no indication whether, had he been in fact a jaywalker, the plaintiff would have been contributorily negligent as a matter of law.

Hayes v. Stunkard [40] and *Tobin v. Van Orsdol* [41] are pedestrian-vehicle cases which bear enough similarity to warrant their joint consideration. In neither case was it alleged that the pedestrian was in a crosswalk.[42] And in neither opinion did the Supreme Court consider section 321.328, although in both cases the application of the statute was strenuously urged.[43]

In the *Hayes* case, a motion for a directed verdict was granted by the trial court on the grounds that plaintiff had not only failed to meet the burden of proving the defendant's negligence, but also had failed to prove decedent's freedom from contributory negligence. The Supreme Court reversed, holding that circumstantial evidence of defendant's negligence was alone sufficient to carry that question to the jury, and that the no-eyewitness rule entitled decedent to a presumption of due care which was sufficient to create a jury question as to her freedom from contributory negligence.

The *Tobin* case presented a factual situation in which, according to the plaintiff's own testimony, he had started to cross at other than a crosswalk [44] on a clear day [45] when he was struck by defendant's automobile. Although the evidence was undisputed that defendant had run a red light at an intersection which was between one hundred and one hundred sixty-two feet from the site of the accident—and this at an excessive rate of speed—the evidence was also undisputed that, had plaintiff looked, he could have seen defendant's approaching car. The opinion, however, absolves plaintiff from contributory negligence on the grounds that, when he looked before he left the curb, he was only bound to notice that the light was red at the intersection.[46] The conflict in plaintiff's own testimony as to when and where he again looked in the direction of defendant's approaching car was resolved in his favor.[47]

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[40] 233 Iowa 582, 10 N.W.2d 19 (1943).

[41] 241 Iowa 1331, 45 N.W.2d 239 (1950).

[42] In *Hayes v. Stunkard*, the plaintiff pleaded that the decedent was not in a crosswalk. Transcript of Record, p.2, Hayes v. Stunkard, *op. cit.*

[43] Brief for Appellee, pp.33 et seq., Hayes v. Stunkard, *op. cit.*; Brief for Appellant, pp. 15 et seq., Tobin v. Van Orsdol, *op. cit.*

[44] The plaintiff placed the location of the accident at one hundred feet from the intersection. Transcript of Record, p.34, Tobin v. Van Orsdol, *op. cit.*

[45] *Id.*, at p. 34.

[46] 241 Iowa at 1335, 45 N.W.2d at 242. This conclusion was based on the familiar principle that all men are bound to obey the law. But *quaere:* Does not the court overlook the factual possibility that a car could have turned on to the street with the green light and then hit a jaywalker?

[47] 241 Iowa at 1336, 45 N.W.2d at 242. Thus the court adroitly avoided the rule of the pre-statutory case of Sheridan v. Limbrect, *supra*, note 11, which demands that a pedestrian will not be heard to say he looked and saw no car when under the circumstances by looking he could not fail to see the car in close proximity to him.

Both the *Hayes* and *Tobin* cases are subject to the criticism that the plaintiffs failed to produce sufficient evidence of their due care. In the *Hayes* case, as previously noted, an evidentiary presumption was relied upon as sole and conclusive evidence of due care. In the *Tobin* case, to say the least, the facts and case precedent seem to have been somewhat stretched in order to establish the plaintiff's due care.

But a more fundamental criticism is that the court, in both cases, utterly failed to consider the effect of section 321.328 on the problems presented.[48] It is submitted that this statute was intended by the legislature to be a "safety statute"; that its violation is negligence per se;[49] that the pedestrian's due care or want thereof is not an issue to be decided by either court or jury.[50] It is further submitted that the Iowa court, in resorting to pre-statutory case precedent to determine the relative duties of jaywalking pedestrians and motorists,[51] has done violence to a clear legislative mandate. By ignoring legislation, the court has in effect legislated.

It is not meant to suggest that the duties of a motorist, as outlined in section 321.329,[52] should be or would be in any degree lessened by the suggested interpretation of section 321.328. There is nothing inconsistent in the requirement that a jaywalking pedestrian yield the right of way to a motorist and that notwithstanding this, the motorist use due care in avoiding collision with pedestrians. It is suggested that section 321.329 is but a restatement of the familiar principle that even lawful holders of the right of way are bound to exercise due care in their use of the right of way.

Conclusion

Practical necessity as well as logic would seem to dictate that, in this era of fast moving, heavy traffic, with safety experts constantly warning against the perils of jaywalking,[53] the Iowa Su-

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[48] In both cases, the application of § 321.328 was argued to the court. *See* note 43, *supra*.

[49] In Florke v. Peterson, 245 Iowa 1031, 1037, 1038, 65 N.W.2d 372, 376 (1954), the Iowa court quotes with approval the following: "Since the failure to comply with a safety statute constitutes negligence per se, a party guilty . . . cannot excuse himself . . . by showing that 'he did or attempted to do what any reasonably prudent person would have done under . . . similar circumstances.' A legal excuse . . . must be something that would make it impossible to comply with the statute. Bush v. Harvey Transfer Co., 146 Ohio St. 657, 664, 665, 67 N.E.2d 851, 856."

[50] Florke v. Peterson, 245 Iowa 1031, 1038, 65 N.W.2d 372, 376 (1954).

[51] In the *Tobin* case, the court cited Whitman v. Pilmer, 214 Iowa 461, 239 N.W. 686 (1932), for the proposition that pedestrians have ". . . equal rights with a motorist when crossing the highway . . ." 241 Iowa at 1333, 45 N.W.2d at 241.

[52] *See* note 30, *supra*.

[53] *e.g.*, "Walk Warily", (Liberty Mutual Insurance Co., Boston).

preme Court re-examine its position in respect to jaywalking. No cogent reason presents itself why motorists should not be entitled to rely on pedestrians' obedience to the law. For, to quote the Iowa court itself, "All lawful users of the highway are entitled to rely . . . on obedience to . . . (the) laws of the road."[54]

DIRK C. VAN ZANTE (June, 1955)