

## What Would it Mean to Have a Reasonable Woman Standard in Tort Law?

Torts  
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I discuss teaching these materials in "Injured Women before Common Law Courts, 1860-1930," 21 *Harvard Women's L.J.* 79 (1998), available at <http://schlanger.wustl.edu>.

Tort law's stance toward gender raises issues both similar and different than those discussed with reference to the "difference" issues covered in the Epstein casebook. These questions show up especially in circumstances where (a) women are frequent accident victims, and (b) it is commonly (if not universally) believed that women and men have different appropriate roles or different propensities toward accident. This section will deal with three scenarios in the 19th and early 20th century that combined these features and made courts particularly likely to discuss gender and its appropriate place in tort law. The three involve injuries to women drivers of wagons; to women passengers in cars and wagons; and to women getting on and off trains and street cars. The felt gender differences that animated the discussion were clear: compared to men in the same situations, women drivers were thought to be less able, women passengers less accountable for warning male drivers of impending danger, and women getting on an off trains and street cars (which often didn't stop fully or for very long) less agile, given their long skirts and possible "delicacy."

Gender comes up in these cases in two correlative questions: Should the care due from a defendant vary with the gender of the potential accident victim? and Should the level of care due from a plaintiff vary with his or her gender? As you'll see, courts answered both questions both ways. In assessing their approaches, it may be useful also to consider whether a given standard allows a female accident victim to conform her behavior to perceived gender norms, requires her to so conform, or penalizes her for conformity.

Once the doctrinal decisions about appropriate standards were made, the language of gender posed further complications, which are highlighted in some of the cases. For example, what does it mean when a jury charge uses a phrase such as "person like herself"? Does such a charge instruct the jury to think about a gendered, female norm, or is it gender-neutral, or even gender-inclusive? Does the word "man," again in a jury charge, always mean male, or should it be construed to mean "person" or even "person of whatever gender is relevant"?

For a far more extensive treatment of these and other cases, see Margo Schlanger, *Injured Women Before Common Law Courts, 1860-1930*, 21 *HARV. WOMEN'S L.J.* 79 (1998). (It's also posted on my web site, <http://schlanger.wustl.edu>).

**THE LAKE SHORE & MICH. SOUTHERN R.R. CO. v. MARY MILLER,**  
**25 Mich. 274 (1872)**

CHRISTIANCY, CH. J.:

The defendant in error sued the railroad company . . . for injuries received by her in a collision between the locomotive of a passenger train and the wagon in which she was riding with one Eldridge, the owner of the team and wagon, who was driving, or undertook to drive, across the railroad track at the crossing of a highway; claiming that the collision took place and the injury was caused by the negligence of the company. . . . [T]he only negligence which can be claimed in the mode of running the train, must rest upon the ground that the company having obscured the view and deadened the sound of the approaching train [by piling up wood near the track] were bound for that reason, to run at much less than their usual rate of speed in approaching that crossing, or to keep a flagman there, or use some other extra means to warn people traveling the highway, of the approach of trains from the west. . . .

[In general,] if an engineer see a team and carriage, or a man, in the act of crossing the track, far enough ahead of him to have ample time . . . to get entirely out of the way before the approach of the engine . . . , and is not aware that he is *deaf* or *insane*, or from some other cause insensible of the danger, . . . he has a right to rely upon the laws of nature and the ordinary course of things, and to presume that the man driving the team or walking upon the track, has the use of his senses, and will act upon the principles of common sense and the motive of self preservation common to mankind in genera; that they will, therefore, get out of the way . . . ; and he, therefore, has the right to go on, without checking his speed, until he sees that the team or the man is not likely to get out of the way, when it would become his duty to give extra alarm by bell or whistle, and if that is not heeded, then, as a last resort, to check his speed or stop his train, if possible, in time to avoid disaster. If however, he sees a child of tender years, or any person known to him to be, or from his appearance giving him good reason to believe that he is, insane, or badly intoxicated, or otherwise insensible of danger, or unable to avoid it, he has no right to assume that he will get out of the way, but should act upon the belief that he might not, or would not, and he should therefore take means to stop his train in time.

A more stringent rule than this – a rule that would require the engineer to check his speed or stop his train, whenever he sees a team crossing the track or a man walking on it, far enough ahead to get out of the way in time . . . or which would require the engineer to know the deafness or blindness, or acuteness of hearing or sight, or habits of prudence or recklessness or other personal peculiarities of all those persons he may see approaching or upon the track . . . – any such rule, if enforced, must effectually put an end to all railroads, as a means of speedy travel or transportation, and reduce the speed of trains below that of canal-boats forty years ago; and would effectually defeat the object of the legislature in authorizing this mode of conveyance.

But how are railroad companies, or their engineers or employes, to know the personal peculiarities, the infirmities, personal character or station in life, of the hundreds of persons crossing or approaching their track? By inspiration or intuition? And if they do not know, then how and why shall the company be required to run their road, or regulate their own conduct, or that of their servant, by such personal peculiarities of strangers, of which they know nothing?

These questions suggest their own answers; and these considerations sufficiently show, that the [trial] court erred in adopting, as the standard of reasonable care on the part of Eldridge and the plaintiff, “such care as persons *of their situation or condition in life*, would ordinarily exert under like circumstances,” and in charging that “any greater care than this she was not required to exercise.” . . . .

I think the judgment should be reversed, with costs, and a new trial awarded.

The other Justices concurred.

**CALVIN DANIELS v. RICHARD CLEGG, 28 Mich. 32 (1873)**

CHRISTIANCY, CH. J.:

This was an action . . . brought by Clegg against Daniels. [After a jury trial,] the plaintiff recovered a judgment for fifty dollars, which Daniels brings to this court by writ of error and bill of exceptions. . . .

On the trial in the circuit the plaintiff gave evidence tending to show that while his daughter, aged about twenty years, was driving a horse and buggy of the plaintiff's, . . . and being in great haste to find her father on account of the dangerous illness of a sister, she came to a hill which she commenced to descend, when she observed the defendant driving on [the same side of the road as she was] coming up the hill with two horses and a wagon; that defendant did not turn out for her at all, but drove directly on, and although she turned as far as she possibly could to the [side], a collision ensued by which the buggy or carriage in which she was riding was overturned and damages, and the daughter was thrown out . . . ; that the horse was a gentle family horse, that the buggy was injured to the amount of ten dollars, and the horse damaged to the amount of fifty dollars.

The defendant gave evidence tending to show that [although he was driving on the left side of the road, he drove appropriately, and that the accident was the plaintiff's daughter's fault]. . . .

The trial court was correct in charging [the jury] that "in deciding whether the plaintiff's daughter exercised ordinary care in driving the horse, or was guilty of [contributory] negligence, the jury should consider the age of the daughter, and the fact that she was a woman;" and "that she would not be guilty of negligence if she used that degree of care that a person of her age and sex would ordinarily use;" and in refusing to charge, that "for the purpose of this case, the daughter should be held to the same degree of care and skill that would be required of the plaintiff himself, had he been driving at the time of the collision."

The case, upon this point, does not, as to the defendant, stand upon the same, or even similar grounds with respect to the plaintiff's daughter, as the case of a railroad engineer or conductor in respect to person approaching a railroad track while the train is in rapid motion, with teams and wagons which cannot be seen, or the persons driving be recognized, until so close to the track as to render any knowledge of the character or the capacity of such persons of any avail; as in the case of the *Lake Shore and Mich. Southern R.R. Co. v. Miller*, 25 Mich. 274. . . . And yet, even in that case, as to children upon the track, ahead of the train, who could be seen by the engineer, or other persons known to him to be incompetent or deprived of any of their faculties necessary to their safety under such circumstances, it was held that the engineer was bound to act with reference to the incapacity of such persons thus appearing or known to him, and so far as in his power, to govern his train accordingly, until such persons were out of danger. And the same principle [has been] recognized with respect to the rights and duties of street railway companies towards children upon, or getting on or off, their cars. [Cite]

These cases fully recognized the principle that, in deciding upon the degree of diligence

to be required of children, or other persons more or less incompetent, that incompetency must be taken into account; and no higher degree of diligence must be required of such persons than we have a right to expect, or than experience has shown such persons generally would be likely to exercise under like circumstance; and that other persons to whom that incompetency is apparent, or who know or have good reason to believe it, are bound to exercise towards such persons a correspondingly higher degree of care, according to the degree of that incompetency, so far as, under the circumstances, it may be reasonably within their power. This principle, thus limited, is one of simple justice, of common sense and common humanity, too obvious to require comment, and has often been recognized by courts in various forms. [Cites.]

The charge in this case comes directly within this principle. The defendant saw the plaintiff's daughter approaching, driving the horse and carriage. No one would ordinarily expect, and the defendant had no right to expect, from a young woman thus situated, the same amount of knowledge, skill, dexterity, steadiness of nerve, or coolness of judgment, in short the same degree of competency, which he would expect of ordinary men under like circumstances; nor, consequently, would it be just to hold her to the same high degree of care and skill. The incompetency indicated by her age or sex, – without evidence (of which there is none) of any unusual skill or experience on her part, – was less in degree, it is true, than in the case of a mere child; but the difference is in degree only, and not in principle. . . .

Upon the whole case, therefore, we think the judgment should be affirmed, with costs.

**EICHHORN v. MISSOURI, K. & T. RY. CO.**

130 Mo. 575, 32 S.W. 993 (1895)

Action by Hannah Eichhorn against the Missouri, Kansas & Texas Railway Company to recover for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

GANTT, P. J.:

This is an action to recover damages resulting from personal injuries received by the plaintiff, a married woman, in attempting to board one of defendant's passenger trains at Harriston station, on defendant's railroad, in Cooper county, Mo., on February 19, 1892. The petition alleges that on said 19th day of February, and for a long time prior thereto, the defendant had carelessly and negligently failed to construct and maintain any platform or provide any other means suitable and safe to enable passengers to get on and off the cars of the defendant at said station; that the plaintiff took passage on one of defendant's passenger trains at Harriston, to go to Pilot Grove; "that plaintiff was at the time pregnant with child, and while getting aboard of defendant's train as aforesaid, through the carelessness and negligence of the defendant in not having any platform or other suitable and safe means for getting onto defendant's said passenger train, the plaintiff, without any fault on her part, slipped from one of the steps of one of the cars in defendant's said passenger train, and was strained and wounded in the spine, and the right side and right arm, leg, and foot, by reason of which," etc., to her damage in the sum of \$10,000, for which she asked judgment. The answer was a general denial and a plea of contributory negligence, to which the plaintiff replied in a general denial. Upon the trial, the plaintiff got a verdict and judgment for \$3,000. Defendant, having unsuccessfully moved for a new trial, brings the case here by appeal.

At the trial the following facts were substantially established: . . . . Some time in the month of September, 1891, [the Harriston] depot building was destroyed by fire. Thereafter the trains stopped at a point north of where the depot had stood originally, and at a place where a county road crossed the railroad track. At this point the evidence showed that it was from 30 inches to 3 feet from the ground to the lowest step on the passenger coaches. Harriston was a regular station on the line of this railroad. . . . No platform or other means of any kind had been erected or provided by the railroad company to aid passengers in getting on and off its cars after the depot was burned. A small pine box had at one time been placed by one of the neighbors on the west side of the track, that passengers might step on, in order to get on and off the cars. Some time prior to the 19th day of February, 1892, the wife of the witness Nixon had stepped on this box in attempting to get on the train, and had crushed it; and on the 19th day of February, and for some time prior thereto, this box had not been in use, and was not at the place.

[On the day in question,] Mrs. Meisel preceded the plaintiff into the car, and boarded it without any difficulty. The plaintiff, in attempting to get on the train, took hold of the iron bar with her right hand, placed her right foot on the step, which was some 30 inches or 3 feet high, and, in attempting to get on the cars, she slipped, and fell from the steps, and, in falling, sprained her ankle, and twisted her body and spine, and the jar and shock seriously injured her, and caused her much suffering, and resulted in a permanent injury to the spine, which has produced a partial paralysis of her entire right side. . . .After her foot had slipped and she had fallen, she testified that the porter came out of the cars, stepped down on the east side, where she was standing, and aided her in getting aboard the

cars. The evidence tends to show that, prior to this date, the plaintiff was a strong, healthy Norwegian woman, who, unaided, had done all of her own housework; and the evidence further shows that, immediately upon entering the car, she complained of having sprained her ankle; that her right foot began to swell, and so pained her that she was forced to unbutton her shoe. A few days afterwards she began to discover pains in her spine, just below the shoulders; and when she would attempt to lift any article of weight, or lean back suddenly in her chair, the pain in her spine was so intense that it would bring on spells of fainting and sickness. . . .

Upon the conclusion of the evidence, the court gave the following instructions for the plaintiff, over the defendant's objections:

“(1) . . . [I]f you . . . believe from the evidence that plaintiff, while getting aboard said train, through the carelessness and negligence of the defendant in not having any platform or other reasonably safe and suitable means for getting onto said train, and without any fault or negligence on her part, the plaintiff slipped from one of the steps of one of the cars in said train, and was [injured] then you will find the issues for the plaintiff, unless you further find from the evidence that plaintiff's injuries, if any, were caused by her own negligence contributing directly thereto . . . (2) The jury are instructed that the words 'carelessly,' 'negligently,' and 'negligence,' used in the instruction, mean the lack of such care and caution as reasonable and prudent men would exercise under like circumstances.”

[In addition, at the request of the defendant, the court added the following:] “The court instructs the jury that if you believe from the evidence that the plaintiff was injured in attempting to get upon one of defendant's trains at Harriston station, and that such injury was occasioned in whole or in part by the plaintiff's failure or neglect to exercise such care, caution, and foresight as a woman of ordinary care, caution, and foresight would have exercised under the circumstances surrounding the plaintiff at the time, then such injury was due to the plaintiff's negligence, and your verdict must be for the defendant.”

\* \* \*

The instructions . . . very fairly present the only controverted issue in this case. It was the plain duty of the defendant to provide suitable, safe, and convenient means for the ingress and egress of its passengers into and out of its trains. It had wholly failed to comply with this obligation. . . . Carriers of passengers should anticipate that both old and young women, feeble and delicate people, as well as the strong and robust, will seek passage on their cars, and provide suitable platforms or steps for that purpose.

\* \* \*

As to the criticism of the court's instructions because it defined negligence to mean the lack of such care and caution as reasonable and prudent "men" would exercise under like circumstances, instead of "women," it is only necessary to say the defendant's own instruction cured this defect, if any; but the jury would have been utterly unfit to try any case if they did not understand that "men," in this instruction, was generic, and embraced "women."

The judgment is affirmed.

SHERWOOD and BURGESS, JJ., concur.

**TUCKER v. HENNIKER.**  
41 N.H. 317 (1860)

CASE, for damages resulting to the plaintiff from alleged defects in a public highway in Henniker.

On trial, it appeared that on the afternoon of July 28, 1858, Dr. Jonas Ball hired a horse and carriage at Hillsborough Bridge, to go to the village of Henniker, where he arrived about sunset, taking the plaintiff and his daughter with him. Dr. Ball stopped at the hotel in Henniker; while the plaintiff and his daughter started with the horse and carriage to go to the plaintiff's mother's, about half a mile distant; and on the way thither, the plaintiff driving the horse at the time, the accident occurred.

\* \* \*

The defendants . . . contended that the unskillfulness or want of care of the plaintiff in the management of the horse contributed to the accident; and upon this point the court instructed the jury, that if the plaintiff were guilty of any fault in the management of the horse, any want of ordinary care, skill and prudence in driving or controlling the horse, which contributed to the accident, without which the accident would not have occurred, notwithstanding the defect in the highway, she could not recover; because she was bound to exercise ordinary care, skill and prudence in managing the horse, such care, skill and prudence as ordinary persons like herself were accustomed to exercise in managing their horses. To the instructions . . . the defendants excepted.

FOWLER, J.:

\* \* \*

The instructions . . . although generally correct, contain a single expression in the explanation of what constitutes ordinary care and skill, which, in the opinion of the court, might have misled the jury as to the proper standard by which to determine it. The plaintiff was bound only to the exercise of ordinary care, skill and prudence in the management of her horse; such care, skill and prudence as persons or people in general were accustomed to exercise in managing their horses. Common or ordinary diligence is defined by Story as "that degree of diligence which men in general exert in respect to their own concerns;" "which men of common prudence generally exercise about their own affairs in the age and country in which they live." Story on Bailments, sec. 11. In a country where women are accustomed, as among us, to drive horses and carriages, there can be no doubt that the degree of care, skill and prudence required of a woman in managing her horse would be precisely that degree of care, skill and prudence which persons of common prudence, or mankind in general, usually exercise, or are accustomed to exert, in the management of the horses driven by them. Now the language of the charge in the court below might be construed as making the average care, skill and prudence of women in managing horses, instead of the average care, skill and prudence of mankind generally, including all those accustomed to manage horses, whether men or women, boys or girls, the standard by which to determine whether or not the plaintiff had been guilty of any unskillfulness or want of care in the

management of her horse at the time of the accident. As it may be doubtful whether this average would be higher or lower than that of mankind in general, and as it is not the precise standard prescribed by the law, and the jury may possibly have been misled by it, the instructions must be held to have been erroneous on this point.

\* \* \*

With these views, the verdict rendered for the plaintiff must be set aside, and a new trial be granted.

**ASBURY et ux. v. CHARLOTTE ELECTRIC RAILWAY, LIGHT & POWER CO.**  
125 N.C. 568, 34 S.E. 654 (1899)

Action by Josiah Asbury and wife against the Charlotte Electric Railway, Light & Power Company. From a judgment in favor of plaintiffs, defendants appeals. Affirmed.

MONTGOMERY, J.

This action was brought by the feme plaintiff to recover damages for injuries received by her, and alleged to have been caused by the negligence of the defendant. The particular allegation of the complaint is that the feme plaintiff was a passenger on one of the street cars of the defendant, and while she was in the act of disembarking therefrom the servants and agents of the defendant in charge of said car negligently caused the car to be suddenly started forward, and that the said plaintiff, in consequence thereof, was thrown to the ground and injured. The defendant denied the imputed negligence, and averred that plaintiff was negligent in assuming a dangerous position, and in alighting from the car.

[The plaintiff testified that an obstruction prevented her from getting off directly from the floor of the street car to the step or the running board at its exit. As she was trying to get past the obstruction, she says the car started with a jerk, and toppled her over. All the evidence of other witnesses was that the plaintiff had tripped in exiting the car, perhaps because she stepped on her long skirt, but that the car did not move at any relevant point. The defendant objected to various jury instructions.]

\* \* \*

His honor told the jury in his charge that "due care" meant "such care as an ordinarily prudent man, placed in circumstances like or similar to those in which the person whose conduct is in question was placed, would use."

\* \* \*

Under the head of "due care," the defendant contended, further, that when his honor laid down the rule of "the prudent man," in reference to the conduct of the feme plaintiff at the time of her injury, he committed error. The argument was that the definition of "due care" was misleading "as the care to be exercised by a woman, when she is placed in a dangerous position, would be greater than that required of a man surrounded by the same circumstances; that she is supposed to be less able to take care of herself than is a man, and the danger to her will therefore be greater; that, when this is the case (that is, when the danger is greater), the law requires a greater degree of care to be exercised in avoiding it." [But] [t]here is nothing in [the precedent defendant cites in support of its contention] which even squints toward a holding that a woman is not bound by the rule of "the prudent man," but ordinarily by a stricter rule.

\* \* \*

No error.

**LITTLE ROCK & FT. S. RY. CO. v. TANKERSLY**  
54 Ark, 25, 14 S.W. 1099 (1890)

Plaintiff, a passenger on defendant's train, endeavored to alight therefrom at a station while the cars were in motion, and was injured. She alleges that the train did not stop long enough to permit her to alight before it was again started. Verdict for plaintiff, and defendant appeals.

HEMINGWAY, J.

The injury complained of was sustained by the plaintiff, a passenger on defendant's cars, in attempting to alight at the end of her journey, while the cars were in motion. Two questions were therefore involved in the proper determination of the cause--First. Was the injury attributable to any misconduct of the defendant? Second. Did the plaintiff contribute to it by any negligence on her part?

\* \* \*

2. On the law applicable to the negligence of the plaintiff, the [trial court's jury] charge is subject to objection. [The charge was given at the request of the plaintiff, and erred in implying that, if the defendant stopped the train for an insufficiently long time,] that would excuse a hazardous attempt by plaintiff to alight. That is not the law. The conduct of the plaintiff must be judged from present conditions, and upon them the past delinquency of another sheds no light. If it would seem to a person of ordinary prudence and caution to be safe to step off, considering the train's speed, the situation of the place of alighting, the opportunity to see where the step was made, and the activity of the person making it, and all other circumstances reasonably affecting the safety of the attempt, it could not be deemed negligence in the plaintiff to do it. But the failure of a train to stop, does not justify an attempt to alight that is hazardous, nor is it an element to be considered in determining in any given case whether such attempt was prudent or hazardous. . . .

[Moreover,] [t]he eighth instruction asked by the defendant should have been given. The act of the plaintiff was to be judged by a comparison with the acts of persons of ordinary prudence under similar circumstances. Her age, sex, and physical condition were circumstances necessarily affecting her safety in stepping from a moving train, and should have been considered by the jury, in connection with all other such circumstances in proof, in determining whether she acted prudently or recklessly. A young, active man might prudently alight, when the attempt would be reckless in an old or lame man; and any man might do so prudently, when it would be dangerous for a lady in female attire to attempt it.

For the error indicated, the judgment will be reversed, and the cause remanded for a new trial.

**HENRY FOX, ADMINISTRATOR v. TOWN OF GLASTENBURY,**  
29 Conn. 204 (1860)

Action . . . brought by the plaintiff, as administrator of [the estate of] Harriet Fox, to recover damages for the loss of her life by reason of the negligence of the defendants in not maintaining a railing along the sides of a causeway, which was a part of a public highway of the town. . . . The jury rendered a verdict for the plaintiff, and the defendants moved for a new trial for a verdict against evidence.

SANFORD, J.:

[U]pon a very careful examination of the evidence before us, we are satisfied that, however negligent the defendants may have been, the unfortunate woman who lost her life, essentially contributed to the production of that result by her own culpable imprudence and indiscretion; so that upon the well established principles of law, promulgated and recognized by this court in many cases, the plaintiff was not entitled to the verdict which he obtained.

[The facts were these:] [H]aving procured a horse and wagon, [the deceased and her companion, Mrs. Clarinda Fox] started to go over the causeway, from the main land to the ferry. There was a freshet in the river, and the water had in consequence risen in the cove so as to cover the causeway, was rising rapidly, and there was a strong wind. . . .

As they approached the causeway, the cove and the condition of the water in it could not have escaped their notice. They saw, and observed, that the causeway was entirely submerged, that a swift and strong current of turbid water was passing over it, that there was no rail or visible object of any kind, above the surface of the water, on the sides of the causeway, by which they could be protected or guided in their course, and the depth of the water it was obviously impossible, before they went into it, with any degree of accuracy, to calculate or determine. East of the bridge, the water rose to the hubs of the fore wheels of their wagon, but they reached the bridge in safety. The bridge was raised about two feet and a half above the level of the causeway. On the bridge they stopped, noticed and remarked upon the height of the water and the rapidity of its current, and felt some degree of alarm, but concluded to proceed. As they drove from the bridge into the water on the west side of it, they began to apprehend the extent of their danger, and became frightened; the horse stopped; they urged him forward with the whip, and becoming more frightened they probably attempted to turn around, and went off the causeway, nearly at a right angle with it, into the deep water on the north side. . . . [W]e think in driving upon the causeway at all, even easterly of the bridge, submerged as they saw it was, and with nothing visible above the surface of the water to indicate its true location, these ladies disregarded the dictates of ordinary prudence and discretion.

. . . . On th[e] bridge they were safe; and if they could not, unaided, have turned around and retraced their steps, they could, and should have remained where they were, until relieved from their unpleasant but not perilous situation. And again, when, after they had entered the water west of the bridge, their horse, true to the instincts of his noble nature, faltered, and stood still, they should have heeded his kindly admonition and there waited for assistance and deliverance, instead of forcing the animal forward to his fate. The boat, by means of which one

of them was rescued, with two boys in it, was sailing close at hand; a wagon, with two men in it, was approaching the causeway from the west; and the residence of Mrs. French, with whom they had just been conversing, was within the reach of their voices. Their outcry would have brought almost immediate relief.

. . . . [T]he attempt of these ladies to pass over this causeway, and especially over the western part of it, was an act of rashness, which, upon the well settled principles of law applicable in cases of this character, bars all claims in their behalf for damages from the town. We think no person of ordinary discretion in their circumstances, and exercising ordinary prudence and discretion, would have made such an attempt.

We are not unmindful of the fact urged upon our attention by the plaintiff's counsel, that these travelers were females. And in that fact, and in the timidity, inexperience, and want of skill which it implies, we can find an explanation of their injudicious and fatal attempt to turn around in the water, but no reason or excuse for the recklessness of their conduct in driving into it. . . . If men of ordinary prudence and discretion would regard the ability of the party inadequate for the purpose, without hazard or danger, the risk should not be assumed. . . .

We think a new trial should be granted.

**DENVER & R.G.R. CO. v. LORENTZEN.**  
79 F. 291 (8th Cir. 1897)

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge.

This is a suit to recover damages for injuries sustained at a railroad crossing by Mrs. Anna Marie Lorentzen, the defendant in error, who was the plaintiff below. Mrs. Lorentzen was riding in a public conveyance, termed a 'hack,' which was in charge of a driver . . . . While crossing the defendant's track, the vehicle in which she was riding was struck and overturned by an outgoing train of the defendant company, as the plaintiff below alleged, because of the neglect of the engineer on the outgoing train to ring the bell or sound the whistle.

\* \* \*

In the course of its charge, the trial court used the following language:

'Probably we would not exact the same degree of care and diligence from a woman that we would from a man under the same circumstances. I am inclined to think that, if this plaintiff were a man suing for a recovery, I should be constrained to advise you that he could be no more relieved from the duty of looking out for the train than the driver of the wagon; but this plaintiff being a woman, a person who is not accustomed, or very much accustomed, to such places, and to going in this fashion from one depot to another, I think it is a matter fairly for your consideration whether she used the care and diligence which should be expected of a person in her situation, in going across this road.'

An exception was taken to the aforesaid language, whereupon the court further instructed the jury as follows:

'I do not state that to you, gentlemen, as a matter of law or proposition of law, but simply as a matter for your consideration. I want you to consider whether there is less diligence to be exacted or expected from a woman than would be expected from a man. In fact, I am not considering any of these propositions as matters of law. I am merely explaining them for you to find and pass upon. The facts are with you, gentlemen, and not with the court.'

The exception first taken is insisted upon, notwithstanding the explanatory remarks of the court. We think, however, that the exception is not well founded. Considering all that was said, it appears that the jury was left at liberty to determine, as it had an undoubted right to do, whether, in view of the plaintiff's sex and all the surrounding circumstances, she exercised such care and diligence as should reasonably be expected of her. This was the proper test by which to determine if she was guilty of any contributory fault.

\* \* \*

The judgment of the circuit court is affirmed.

**DENTON v. MISSOURI, K. & T. RY. CO.**  
97 Kan. 498, 155 P. 812 (1916)

BURCH, J.

The action was one for damages for injuries which a woman, riding in an automobile driven by her husband, sustained by being struck by a switch engine on a street crossing in the defendant's yards in the city of Parsons. The plaintiff recovered, and the defendant appeals.

The plaintiff, her husband, F. M. Denton, her son, E. E. Denton, and her son's wife, occupied the automobile. F. M. Denton, sitting on the right-hand side, was driving the car. E. E. Denton occupied the front seat with the driver. The plaintiff and her daughter-in-law occupied the rear seat. [They were driving on a city street across a wide set of 24[!!] railroad tracks.] The plaintiff and her husband had not been on the crossing before. The plaintiff's son was an employe of the defendant, was familiar with the crossing, and said to his father that he would look out for trains. He testified there was danger in stopping an automobile there because cars were likely to be moved at any time. The automobile proceeded as slowly as possible without killing the engine, at a speed of about four or five miles per hour.

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The defendant's principal contentions are that the plaintiff was guilty of negligence as a matter of law, and that judgment should have been rendered for the defendant on the findings of fact.

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The plaintiff was required to take the precautions which a reasonably prudent person, not in the situation of the automobile driver, but in her situation, would have taken. The argument is that she should have stopped the automobile, or should have called her husband's attention to the conditions and requested him to exercise reasonable care. Why should the plaintiff have called her husband's attention to the conditions and exhorted him to use due care? She had confidence in his ability as a driver. The conditions were just as obvious to him as to her. He could see and hear all she could see and hear. He was responsible for the operation of the automobile, not she, and she had no reason to doubt that he was exercising his faculties with diligence. Besides this, there was another observer in the front seat with the driver, who was in fact familiar with the crossing. His safety and his wife's safety were at stake, and there is no evidence of any fact indicating to the plaintiff that her son was not exercising his faculties of observation with diligence. Why ought the plaintiff to have arrogated to herself control over the automobile and commanded it to stop? . . . Her opportunities of observation were not equal to those of her husband. She knew his ability as a driver and trusted him, and, what is more, she had the right to trust him.

In [a previous case in this Court] it was said:

"Common sense would dictate that when a wife goes riding with her children in a rig driven by her husband she rightfully relies on him not to drive so as to imperil those in his charge. The law does not depart from common sense by requiring her, under the circumstances shown here, to impugn her husband's ability to drive and assume the prerogative to dictate

to him the manner of driving."

This doctrine applies to the case of a wife riding in an automobile driven by her husband, unless she should know him to be incompetent or under some disability.

The judgment of the district court is affirmed.

All the Justices concurring.