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Torts-Negligence-"Stop, Look and Listen Rule"

Torts—Negligence—"Stop, look and listen rule." The decedent was fatally injured when struck by defendant railroad company's locomotive. The deceased was undertaking to cross defendant's right of way at a street intersection, having first looked and listened. He walked to a point in the street near a moving freight train on the main track, stepping without looking to the south into the middle of defendant's parallel side track. While waiting at this point for the freight train to pass the crossing, defendant negligently ran a locomotive northward along the side track and over the plaintiff's decedent. Held, in the matter of application of the "look and listen" rule, the proper and precise inquiry is not whether the person, injured at a railroad crossing, could have discovered his peril and avoided his injury by looking and listening, but whether he could have discovered his peril and avoided his injury by looking and listening when a reasonably careful and prudent man would have looked and listened.[1]

Though the court here makes note of the fact that its doctrine will apply only to instances "where inert and detached cars stand on either side of a crossing," the decision is reasoned in the light of and in reference to the ordinary grade crossing cases. It seems to disapprove of the blind application of the "look and listen" rule even in ordinary crossing cases, saying "To invoke it, there must be evidence of circumstances showing that a failure to see and hear was caused by a failure to use those senses under conditions where seeing or hearing, or both, were available to give notice in time to avoid injury." While the court holds this out as a limitation upon the doctrine, in fact it is simply the ever present element of causation. There must be a causal relation between the plaintiff's failure to use due care and the casualty.[2] Evidence in the instant case showed that looking or listening would have been available immediately before stepping on the side track, so that the case was not decided upon a basis of absence of proximate cause but upon absence of negligence in plaintiff's decedent. Appellant urged that "there is a clear inference of contributory negligence, based on the theory that he was bound to see and hear what by look and listening he would have seen or heard." The difficulty with appellant's position here, the court points out, was that he was asking the court to assume that appellee was bound to look or listen at a particular place, in a particular direction, at almost a particular instant of time, irrespective of other relations or conditions, citing Cleveland R. Co. v. Lynn[3] to sustain it on the proposition that "It cannot be said, as a matter of law, that under all circumstances or conditions, looking or listening at a particular time, in a particular direction, or from a particular place is required." The court in the principal case points out that ordinary care requires one who is about to go upon a railroad track to look and listen, but it does not follow that failure to look and listen at the precise time at which looking or listening would reveal the danger constitutes contributory negligence. From this, then, there remains only the presumption that a reasonable man would look and listen at some time, by way of recognizing any "look and listen" rule. In a dictum the court in the principal case goes even further in emasculating the "look and listen" rule. In the words of the court, "We deem it sufficient to say that we adhere to what we regard as the correct

1 Pennsylvania R. Co. v. Hemmer (1934), 2 Ind. Adv. Rep. 1068 (Ind. Sup. Ct.).

2 "For the plaintiff's conduct to be a legal cause of the harm, it must appear, of course, that it was a cause in fact, that is, a sine qua non, and that there was no intervening force which superseded it so as to make the plaintiff's conduct relatively unimportant in the causal sequence. In other words, the principles which determine whether a defendant's conduct was a legal cause of the harm are identical with those which establish such relationship between the plaintiff's conduct and the harm complained of." Harper, Law of Torts, No. 134 and cases cited.

3 (1911) 177 Ind. 311, 95 N. E. 577, 98 N. E. 67.

rule, which requires the traveler to use ordinary care consistent with the dangers incident to the crossing and its obstructions and peculiar hazards." For authority in its position the court relies principally on Stoy v. Louisville[4] and Cleveland R. Co. v. Lynn,[5] both of which support the proposition that it cannot be said as a matter of law that a person crossing a railroad track at a crossing is required to look or listen at a particular time, in a particular direction, or from a particular place. Both of these cases, however, pay lip service to the "look and listen" doctrine.[6]

The numerous decisions generally dealing with accidents at railroad crossings are in a state of hopeless confusion.[7] All that can be said for courts over the country is that they haven't further complicated the situation by drawing distinctions between pedestrians, persons driving horse-drawn vehicles and those operating automobiles.[8] Although the general principle is, of course, that one approaching a railroad crossing must exercise such care as an ordinarily prudent person would exercise under the circumstances,[9] the application of this principle has resulted in a great conflict over the question whether one must stop, look and listen. There is a tendency to crystallize the requirements of due care into a rule of law, especially in cases of railroad injuries.[10] Out of the confusion, three distinct rules have emerged under which most of the decisions can be grouped.[11] A decided minority adhere to what is known as the Pennsylvania rule. This was first promulgated by the supreme court of Pennsylvania and imposes an unyielding duty to stop, as well as to look and listen, no matter how clear the crossing or the tracks on either side, declaring a failure to stop, look and listen negligence as a matter of law (per se). Although the Pennsylvania rule seems to have at one time gained recognition in a number of jurisdictions, it has been subsequently whittled away[12] until at present it is applied only by a few jurisdictions and by them only in instances where the view of the crossing is obstructed.[13] The Pennsylvania rule was pushed to the extreme by the Supreme Court of the United States in 1927 in Baltimore & O. R. Co. v. Goodman.[14] The court here apparently meant to lay down a rule which should control all similar cases in the future.[15] In uncompromising terms the duty of an automobile driver approaching a crossing was defined; he must, if necessary, get out of his car to look for the approaching train. Naturally such a rule occasioned

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4 (1903) 160 Ind. 144, 66 N. E. 615.

5 (1911) 177 Ind. 311, 95 N. E. 577, 98 N. E. 67.

6 One other case follows this doctrine as set out in Cleveland R. Co. v. Lynn; namely, Cleveland R. Co. v. Markle (1918), 187 Ind. 553.

7 Elliott, Railroads, 3 ed., Nos. 1677, 1678 (1921); 1 Huddy, On Automobiles, 8 ed., No. 663 et seq. (1927); 1 Babbitt, The Law Applied to Motor Vehicles, No. 4833 (1923); (1919) 1 A. L. R. 203; (1926) 41 A. L. R. 405.

8 (1928) 56 A. L. R. 645.

9 33 Cyc. 999; (1918) 22 R. C. L. 1028, 1030.

10 Beach on Contributory Negligence, 2 Ed., Sec. 23.

11 (1928) 43 Harv. L. Rev. 926; (1928) 56 A. L. R. 647, and note; (1925) 10 Min., L. Rev. 265; (1923) 29 W. Va. L. Rev. 274; (1928) 16 Calif. L. Rev. 238.

12 See (1926) 41 A. L. R. 405, 420, for cases showing a relaxation of the Pennsylvania rule; (1928) 16 Calif. L. Rev. 238.

13 Benner v. Philadelphia R. R. Co. (1918), 262 Pa. 307, 105 Atl. 283, 2 A. L. R. 759; Rice v. Erie R. Co. (1921), 271 Pa. 180, 114 Atl. 640; Flick v. Northampton & B. R. Co. (1922), 274 Pa. 347, 118 Atl. 250; Newman v. Reading Co. (1925), 283 Pa. 416, 129 Atl. 450; Hines v. Cooper (1920), 205 Ala. 70, 88 So. 133; Pennsylvania R. Co. v. Yingling (1925), 248 Md. 169, 129 At. 36; Hardy v. Pere Marquette R. Co. (1920), 208 Mich. 632, 175 N. W. 462; Kimbraugh v. Hines (1920), 180 N. C. 274, 104 S. E. 684; (1928) 4 Wis. L. Rev. 467.

14 (1927) 275 U. S. 66, 72 L. ed. 167, 48 Sup. Ct. 24.

15 "But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the courts." Per Holmes, J.

considerable discussion in the public press[16] as well as in legal periodicals.[17] Probably the greater part of such discussion was in valid criticism of the doctrine.[18] In the state courts, including Indiana, the case caused scarcely a ripple in the sea of decisions, and, although cited a good many times, gave no appreciable impetus to the imposition of such an arbitrarily high standard of care.[19] Recently the Supreme Court of the United States acknowledged the severity of the rule in the Goodman case. (Pokora v. Wabash Railway Co.)[20] In the Pokora case, the plaintiff was injured when his truck was struck by a train on a railroad crossing in a populous city. He had failed to leave his vehicle to reconnoiter, after looking and listening for approaching trains, when his view of the main track was obstructed by cars standing on a switch track. Said the court, "Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life. To get out of a vehicle and reconnoiter is an uncommon precaution, as everyday experience informs us. Besides being uncommon, it is very likely to be futile, and sometimes even dangerous. If the driver leaves his vehicle when he nears a cut or curve, he will learn nothing by getting out about the perils that lurk beyond. By the time he regains his seat and sets his car in motion, the hidden train may be upon him."[21]

By the Pokora case the Supreme Court of the United States favors the second rule, a modification of the Pennsylvania rule, supra, which announces that the duty to stop is not absolute but a failure to look and listen is negligence per se. Many jurisdictions are in accord with this rule, holding that ordinary care requires a traveler, in approaching a railroad crossing, to use his faculties of sight and hearing.[22] The duty to stop is relaxed and is made to depend upon the circumstances to be determined by the jury. Almost any departure from the severity of the Pennsylvania rule would seem desirable. Indiana courts, as indicated above, have, with a few exceptions in the appellate courts,[23] consistently clung to this second rule.[24] "The traveler

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16 N. Y. Times, Nov. 1, 1927, at 1; ibid at 26; N. Y. Times, Feb. 25, 1928, at 8; The Literary Digest, Nov. 19, 1927, at 14; (1927) 83 Railway Age, 872, 909.

17 (1928) 3 Ala. L. J. 136; (1928) 2 Dak. L. Rev. 89; (1928) Ill. L. Rev. 800; (1928) 14 Va. L. Rev. 379; (1928) 37 Yale L. J. 532. (These favored the rule.) See citations in footnote (18).

18 (1928) 76 U. of Pa. L. Rev. 321; (1928) 26 Mich. L. Rev. 582; (1928) 43 Harv. L. Rev. 926; (1928) 4 Wis. L. Rev. 467; (1928) 16 Calif. L. Rev. 238; (1928) 56 A. L. R. 645; (1928) B. U. L. Rev. 81; Cf. (1927) 3 Notre Dame Law 106. The absurdity of this rule on application is probably best illustrated by Torgenson v. Missouri K. T. R. R. Co. (1928), 124 Kan. 798, 262 Pac. 564, where it appeared that it was safer to approach the crossing slowly and drive straight across, than to stop and get out. See also Benner v. Philadelphia & R. Ry. Co. (1918), 262 Pa. 307, 105 Atl. 283, 2 A. L. R. 759.

19 (1928) 43 Harv. L. Rev. 926.

20 (1934) 78 S. C. Law. Ed. Advance Opinions, 700.

21 (1934) 78 S. C. Law. Ed. Advance Opinions, 700.

22 Atchison T. & S. F. R. Co. v. McNulty (1922), 285 Fed. 97; Lamley v. B. & O. S. W. R. Co. (1924), 298 Fed. 916; Friesner Fruit Co. v. Chicago G. W. R. Co. (1924), 199 Ia. 1143, 201 N. W. 112; Sullivan v. Boston & M. R. R. Co. (1922), 242 Mass. 188, 136 N. E. 373; Sutter v. Pere Marquette Ry. Co. (1925), 230 Mich. 489, 202 N. W. 967; Capretz v. Chicago G. W. R. Co. (1923), 157 Minn. 29, 195 N. W. 531; Le Febvre v. Central Vt. Ry. Co. (1924), 97 Vt. 342, 123 Atl. 211; Kansas v. C. M. & St. P. R. Co. (1923), 180 Wis. 49, 192 N. W. 383.

23 Cleveland R. Co. v. Penketh (1901), 27 Ind. App. 210, 60 N. E. 1095; Cleveland R. Co. v. Henson (1913), 54 Ind. App. 349, 102 N. E. 399; Cleveland R. Co. v. Lutz (1917), 64 Ind. App. 663, 116 N. E. 429.

24 Bellefontaine R. Co. v. Hunter (1870), 33 Ind. 335, 5 Am. Rep. 201; Indiana, B. & W. R. Co. v. Hammock (1887), 113 Ind. 1, 14 N. E. 737; Cones v. Cincinnati R. Co. (1887), 114 Ind. 328, 16 N. E. 638; Louisville, N. A. R. Co. v. Stommel (1890), 126 Ind. 35, 25 N. E. 863; Mann v. Belt R. & Stock-Yard Co. (1890), 128 Ind. 138, 26 N. E. 819; Shoner v. Pennsylvania R. Co. (1891), 130 Ind. 170, 28 N. E. 616, 29 N. E. 775;

failing to look or listen before crossing a track is negligent as a matter of law, unless he is following a flagman's directions, though the duty to stop is usually a mixed question of law and fact." (Malott v. Hawkins.)[25]

The third rule, under which the principal case will fall, at least in point of dictum, discards any attempt to specify a particular quantum of care and reverts to the usual test of negligence applied in the ordinary cases, namely, such care as is exercised by a person of ordinary prudence.[26] This rule would seem to make for a more just and more equitable distribution of the burden as between the railroad and the traveler on the highway. "Assuming that rapid and safe transportation over railroads is a present day necessity, it cannot be overlooked that because of the increase in the number of automobiles and improved highways, rapid and safe transportation over these public highways is equally essential. In this connection, Mr. Justice Bradley, in Continental Improvement Co. v. Stead, 95 U. S. 161, said: 'The obligations, rights, and duties of the railroads and the travelers upon intersecting highways are mutual and reciprocal.' "[27] Any stop, look and listen rule or any vestige of it places upon the traveler an undue burden without placing any reciprocal duty or obligation upon the railroad. This may be conducive to carelessness and recklessness on the part of the railroad in the operation of its trains and in the care and construction of the crossings.[28] Certainly the tendency, illustrated by variations of the stop, look and listen doctrine, of resolving mixed questions of law and fact into inflexible rules, seems undesirable,[29] for no matter how sound it may be in theory,[30] in fact it encourages the all too common practice of urging witnesses to swear up to a headnote.[31]

As already noted, as a result of the principal case, if we have anything left of the "look and listen" doctrine, it is only the rather absurd vestige that one must have looked and listened at some time, whether a reasonable man would have done so or not. It may be that a reasonable man would not have looked or listened at all under the circumstances. Is there any reason for clinging to this vestige of what is generally conceded to be a vicious doctrine? It is submitted that the court in the principal case might even more clearly have abandoned the "look and listen" doctrine once and for all, setting out the usual and familiar standard for the appellate courts struggling between the Sylla of the arbitrary "look and listen" doctrine and the Charybdis of

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Thornton v. Cleveland R. Co. (1891), 131 Ind. 492, 31 N. E. 185; D. & W. R. Co. v. Wilson (1892), 134 Ind. 95, 33 N. E. 793; Malott v. Hawkins (1902), 159 Ind. 127, 63 N. E. 308; Grand Trunk Western R. Co. v. Reynolds (1910), 175 Ind. 161, 92 N. E. 733; Pittsburgh R. Co. v. Dove (1915), 184 Ind. 447, 111 N. E. 609; N. Y., Chicago & St. Louis R. R. Co. v. First Trust & Savings Bank (1926), 198 Ind. 376, 153 N. E. 761; Louisville R. Co. v. Kelly (1892), 6 Ind. App. 545, 33 N. E. 1103; Chicago R. Co. v. Reed (1901), 29 Ind. App. 94, 63 N. E. 878; Baltimore & O. S. W. R. Co. v. Rosborough (1906), 40 Ind. App. 14, 80 N. E. 869; Lake Shore and M. S. R. Co. v. Brown (1907), 41 Ind. App. 435, 84 N. E. 25; Toledo R. Co. v. Lander (1911), 48 Ind. App. 56, 95 N. E. 319; Lake Erie & W. R. Co. v. Moore (1912), 51 Ind. App. 110, 97 N. E. 203; Cleveland R. Co. v. Van Laningham (1912), 52 Ind. App. 156, 97 N. E. 573; Chicago R. Co. v. Dann (1912), 53 Ind. App. 382, 101 N. E. 731; Chicago R. Co. v. Sanders (1923), 81 Ind. App. 275, 143 N. E. 789; Pennsylvania R. Co. v. Boyd (1934), 185 N. E. 160.

[25] Malott v. Hawkins (1902), 159 Ind. 127, 63 N. E. 308.

[26] This rule, followed in the overwhelming majority of states, requires only that the traveler when approaching a crossing, exercise that degree of care commensurate with all the circumstances of the situation.

[27] (1928) 4 Wis. L. Rev. 467.

[28] (1928) 4 Wis. L. Rev. 467.

[29] Bohlen, Mixed Questions of Law and Fact, in Bohlen, Studies in the Law of Torts, 601. (Reprinted from 72 U. of Pa. L. Rev. 111 (1924).

[30] Holmes, The Common Law (1881), 122-125.

[31] (1928) 43 Harv. L. Rev. 926.

limitations and refinements of the doctrine. What is perhaps the only dangerous element, in following the usual standard of the care of the reasonable man, namely, the well known fact that juries are inherently prejudiced against railroad companies, may be rendered nugatory by a careful use of the directed verdict.[32]

C. Z. B.

[32] (1921) 21 Columbia L. Rev. 290.

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