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RECENT CASE NOTES

CONTRIBUTORY NEGLIGENCE—STOP, LOOK, AND LISTEN RULE IN FEDERAL AND INDIANA COURTS.—This was an action for damages for a death resulting from an accident at a railway crossing between Deceased's automobile and one of Defendant's trains, alleged to have been caused by negligence on the part of Defendant's servants. Defendant was switching cars on two tracks used for that purpose which crossed the street in Michigan City on which Deceased was driving his automobile. A switchman in Defendant's employ was standing at the crossing to flag anyone using the street; there is no evidence that he saw the automobile or that Deceased saw the approach of the railroad cars; there was evidence that Deceased was depending on the switchman to warn him of danger. The case was tried before a jury; question was raised as to Deceased's contributory negligence; the jury found for the Plaintiff. Appeal from decision of the court in overruling a motion for a new trial made on grounds that the verdict was not sustained by sufficient evidence, and that it was contrary to law. *Held*, that considering all the circumstances, including limited view, presence of switchman, and lack of evidence as to what Deceased really saw, the question of Defendant's negligence and Deceased's contributory negligence were properly for the jury, and their finding will not be disturbed.[1]

Since the case of *Goodman v. Baltimore & Ohio R. Co.*[2] was decided by the United States Supreme Court, a question has often been raised as to what, as a matter of law, constitutes contributory negligence on the part of an automobile driver in approaching a railway crossing that is familiar to him. Is it failure to come to a complete stop? Is it failure to look? Is it failure to listen? Is it a combination of any of these factors? Or is it, in every case, a question for the jury, no definite requirement as to specific acts being laid down?

An examination of the cases reveals that there are three distinct rules followed by the courts of different jurisdictions. First, a strict rule followed by the Federal courts, Pennsylvania, California, and a few other states, making failure to stop, look, and listen, and if necessary get out of the car to look, at railway crossings where the view is obstructed, contributory negligence *per se*. Under this rule, the track and any warning signals are themselves notice to the ordinary prudent man of the danger existing, thereby eliminating the requirement of familiarity with the crossing to make the rule effective.[3] Second, a somewhat more liberal rule making failure to look and listen contributory negligence *per se*.[4] Indiana has been cited as supporting this rule, and many of the Indiana

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[1] New York, C. & St. L. R. Co. v. Citizens Bank, Supreme Court of Indiana, Dec. 13, 1932, 183 N. E. 552.

[2] 275 U. S. 66, 48 S. C. 24 (1927).

[3] See 16 Calif. L. R. 238 (1928); 28 Columbia L. Rev., 250 (1928); 18 Calif. Law Review, 203 (1930).

[4] 16 Calif. L. R. 238 (1928); 8 North Carolina L. Rev., 293 (1930).

cases support this statement.[5] Third, the prevailing rule that the question whether or not the driver exercised such care as an ordinary prudent person would under the circumstances is a question for the jury in all cases.[6]

Indiana has consistently refused to subscribe to the rule that failure to get out of the car, or even to stop, look, and listen before crossing railroad tracks is contributory negligence *per se*.[7] But several Indiana cases have stated expressly that failure to look and listen is negligence *per se*.[8] A few cases have held that on the particular facts, the driver was guilty of contributory negligence as a matter of law for failing to stop,[9] but each of these cases depended upon its own facts and refused to lay down stopping as a uniform standard of conduct. Thus, what is reasonable care is not always a question for the jury. In *Terre Haute, I. & E. R. Co. v. Clark*,[10] the court held as a matter of law that plaintiff

[5] *Ohio & Miss. R. Co. v. Hill*, 117 Ind. 56, 18 N. E. 461 (1888); *Mann v. Belt, etc. R. Co.*, 128 Ind. 138, 26 N. E 819 (1890); *Cadwallader v. Louisville N. A. & C. R. Co.*, 128 Ind. 518 (1891); *Louisville & N. R. Co. v. Williams*, 20 Ind. App. 576, 51 N. E. 128 (1898); *Malott v. Hawkins*, 159 Ind. 127, 63 N. E. 308 (1902); *Wabash R. Co. v. Keister*, 163 Ind. 609, 67 N. E. 521 (1903); *Cleveland, C., C. & St. L. R. Co. v. Van Laningham*, 52 Ind. App. 156, 97 N. E. 573 (1912); *Cleveland, C., C. & St. L. R. Co. v. Lynn*, 177 Ind. 311, 95 N. E. 577 (1912); *Pittsburgh, C., C. & St. L. R. Co. v. Dove*, 184 Ind. 447, 111 N. E. 609 (1916); *Central Ind. R. Co. v. Wishard*, 186 Ind. 262, 114 N. E. 970 (1917); *New York, C. & St. L. R. Co. v. Leopold*, 73 Ind. App. 309, 127 N. E. 298 (1920); *New York, C. & St. L. R. Co. v. First Trust & Savings Bank*, 198 Ind. 376, 153 N. E. 761 (1926).

[6] 16 Calif. L. Rev. 238; Note, 46 L. R. A. (N. S.) 702.

[7] *New York, C. & St. L. R. Co. v. First Trust & Savings Bank*, 198 Ind. 376, 153 N. E. 761 (1926); *Cleveland, C., C. & St. L. R. Co. v. Baker*, 190 Ind. 633, 128 N. E. 836 (1921); *Central Ind. R. Co. v. Wishard*, 186 Ind. 262, 114 N. E. 970 (1917); *Pittsburgh, C., C. & St. L. R. Co. v. Dove*, 184 Ind. 447, 111 N. E. 609 (1916); *Pittsburgh, C., C. & St. L. R. Co. v. Terrell*, 177 Ind. 437, 98 N. E. 289 (1912); *Cleveland, C., C. & St. L. R. Co. v. Lynn*, 177 Ind. 311, 95 N. E. 577 (1912); *Terre Haute, I. & E. R. Co. v. Clark*, 73 Ind. 168 (1880).

[8] *New York, C. & St. L. R. Co. v. First Trust & Savings Bank*, 198 Ind. 376, 153 N. E. 761 (1926); *New York, C. & St. L. R. Co. v. Leopold*, 73 Ind. App. 309, 127 N. E. 298 (1920); *Central Ind. R. Co. v. Wishard*, 186 Ind. 262, 114 N. E. 970 (1917); *Pittsburgh, C., C. & St. L. R. Co. v. Dove*, 184 Ind. 447, 111 N. E. 609 (1916); *Cleveland, C., C. & St. L. R. Co. v. Lynn*, 177 Ind. 311, 95 N. E. 577 (1912); *Cleveland, C., C. & St. L. R. Co. v. Van Laningham*, 52 Ind. App. 156, 97 Ind. 573 (1912); *Wabash R. Co. v. Keister*, 163 Ind. 609, 67 N. E. 521 (1903); *Malott v. Hawkins*, 159 Ind. 127, 63 N. E. 308 (1902); *Louisville & N. R. Co. v. Williams*, 20 Ind. App. 576, 51 N. E. 128 (1898); *Cadwallader v. Louisville, N. A. & C. R. Co.*, 128 Ind. 518, 27 N. E. 161 (1891); *Ohio & M. R. Co. v. Hill*, 117 Ind. 56, 18 N. E. 461 (1888); *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185.

[9] *Cleveland, C., C. & St. L. R. Co. v. Baker*, 190 Ind. 633, 128 N. E. 836 (1921) —expressly refused to lay down stopping as a uniform standard of conduct; *Cleveland, C., C. & St. L. R. Co. v. Pace*, 179 Ind. 415, 101 N. E. 479 (1913). When the traveler thus is absolutely required to look and listen, the law does not state at what point, or at what distance from the track the senses must be used, but here, again, each case depends upon its own circumstances, and the question whether or not looking and listening was from a proper place is usually one for the jury. *New York, C., C. & St. L. R. Co. v. Leopold*, 73 Ind. App. 309, 127 N. E. 298 (1920); *Central Ind. R. Co. v. Wishard*, 186 Ind. 262, 114 N. E. 970 (1917); *Pittsburgh, C., C. & St. L. R. Co. v. Dove*, 184 Ind. 447, 111 N. E. 609 (1916); *Ft. Wayne & N. I. T. Co. v. Schoeff*, 56 Ind. App. 540, 105 N. E. 924 (1914); *Cleveland, C., C. & St. L. R. Co. v. Lynn*, 177 Ind. 311, 95 N. E. 577 (1912); *Malott v. Hawkins*, 159 Ind. 127, 63 N. E. 308 (1902).

[10] 73 Ind. 168 (1880).

was guilty of contributory negligence in that case for driving a horse-drawn vehicle on the tracks at a trot; in *New York, C. & St. L. R. Co. v. Leopold*,[11] the court so held where decedent did not look and listen, or did not heed what he saw or heard; in *Cleveland, C. C. & St. L. R. Co. v. Baker*,[12] and *Cleveland, C. C. & St. L. R. Co. v. Pace*,[13] for failure to stop; and in *Chicago & E. R. Co. v. Thomas*,[14] for failure to alight and go forward. It usually is a question for the jury, however, and it is a question for the court only when the facts are undisputed and the act done or omitted "is so absolutely inconsistent with the exercise of ordinary care that there could be no room for reasonable minds to differ on the question."[15] The standard of care which must be used is supposed to be the same whether the traveler is on foot, on horseback, in a wagon, a carriage, an automobile, or any other vehicle, according to the statement in one case.[16]

There is no doubt, however, that the case of *Goodman v. B. & O. R. Co.* was intended to and did lay down a rigid and uniform standard of conduct for travelers where they are familiar with the crossing, and where the view is obstructed; but as stated above, the courts hold that the tracks are themselves notice of the danger, and so include in the rule those who are not in fact familiar with the crossing.[17] However, the Federal courts and most others hold that when safety appliances are placed at a crossing, they are an invitation to cross with an implied assurance that no train is approaching which the driver may to some extent rely upon—at least, so far as to relieve him from the duty of stopping. Two Federal cases do not include watchmen or flagmen at the crossing in this exception.[18] Since the Indiana courts do not require stopping as a standard of conduct, however, and since the evidence in the principal case was not such that all reasonable men would agree that deceased did not exercise ordinary care, the court did not deviate from Indiana law in submitting the case to the jury.[19] W. T. H.

CORPORATIONS—POWER TO ISSUE AND REDEEM PREFERRED STOCK.—Hogin, McKinney and Co., an Indiana corporation, had issued 600 shares of preferred stock due serially from 1924 to 1930. Plaintiff held series "F" one hundred shares par value of $100 per share due July 1, 1929. On Nov. 13, 1929 the corporation gave its note to plaintiff for $10,000 to

[11] 73 Ind. App. 309, 127 N. E. 298 (1920).

[12] 190 Ind. 633, 128 N. E. 836 (1921).

[13] 179 Ind. 415, 101 N. E. 479 (1913).

[14] 155 Ind. 634, 58 N. E. 1040 (1900).

[15] *Central Ind. R. Co. v. Wishard*, 186 Ind. 262, 114 N. E. 970 (1917); *Cleveland, C., C. & St. L. R. Co. v. Baker*, 190 Ind. 633, 128 N. E. 836 (1921); *Lake Erie & W. R. Co. v. McFarren*, 188 Ind. 113, 122 N. E. 330 (1919); *Pittsburgh, C., C. & St. L. R. Co. v. Dove*, 184 Ind. 447, 111 N. E. 609 (1916).

[16] *Pittsburgh, C., C. & St. L. R. Co. v. Dove*, 184 Ind. 447, 111 N. E. 609 (1916).

[17] *Teague v. St. Louis, S. W. R. Co.*, 36 Fed. (2nd) 217 (1929)—electric gong; *Canadian Pac. R. Co. v. Slayton*, 29 Fed. (2nd) 687 (1928)—gates; and see cases cited in 2 R. C. L. 1206 and 46 L. R. A. (N. S.) 702.

[18] *B. & O. Railroad Co. v. Shaw* (1929), 34 Fed. (2nd) 410; *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577 (1910).

[19] See 46 L. R. A. (N. S.) 702; 16 Calif. L. R. 238; 18 Calif. L. R. 203; 8 N. Carolina L. R. 293; 21 Columbia L. R. 290; 28 Columbia L. R. 250; 37 Yale L. J. 532; 2 R. C. L. 1206; 3 Elliott on Railroads (2nd Ed.) soc. 1166; 51 C.J. 279.